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Research in International Law

*Under the Auspices of the Faculty of
Harvard Law School*

Preliminary Draft Conventions to
be considered at the Eighth Meet-
ing of the Advisory Committee,
Kendall House, 1563 Massachusetts
Avenue, Cambridge, Massachusetts,
February 21, 22, 23, 1935

Research in International Law

*Under the Auspices of the Faculty of the
Harvard Law School*

I. Extradition

II. Jurisdiction with Respect to Crime

III. Law of Treaties

DRAFTS OF CONVENTIONS PREPARED FOR THE
CODIFICATION OF INTERNATIONAL LAW



February 1, 1935

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Washington, D. C.

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RESEARCH IN INTERNATIONAL LAW

UNDER THE AUSPICES OF THE FACULTY OF THE
HARVARD LAW SCHOOL

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GENERAL INTRODUCTION

Previous Work of the Research

The Research in International Law was organized under the auspices of the Faculty of the Harvard Law School in 1927 and 1928, for the purpose of preparing a draft of an international convention on each of the subjects which had then been placed on the agenda of the First Conference for the Codification of International Law.

In 1929, the Research published a volume ¹ containing the following draft conventions, with comments:

- (1) Nationality, with Richard W. Flournoy, Jr., of the Department of State, as Reporter;
- (2) Responsibility of States for Injuries to Foreigners, with Edwin M. Borchard, of the Yale Law School, as Reporter, and
- (3) Territorial Waters, with George Grafton Wilson, of Harvard University, as Reporter.

In 1930, the Research published, through the Carnegie Endowment for International Peace, *A Collection of Nationality Laws of Various Countries*, edited by Richard W. Flournoy, Jr., and Manley O. Hudson.

In a second phase of its work, from 1929 to 1932, the Research published a volume ² containing the following draft conventions, with comments:

- (1) Diplomatic Privileges and Immunities, with Jesse S. Reeves, of the University of Michigan, as Reporter;
- (2) Legal Position and Functions of Consuls, with Quincy Wright, of the University of Chicago, as Reporter;
- (3) Competence of Courts in regard to Foreign States, with Philip C. Jessup, of Columbia University, as Reporter; and
- (4) Piracy, with Joseph W. Bingham, of Stanford University, as Reporter.

The 1932 volume also contained *A Collection of Piracy Laws of Various Countries*, edited by Stanley Morrison, of Stanford University.

In 1933, the Research published through the Carnegie Endowment for International Peace, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (in two volumes), edited by A. H. Feller and Manley O. Hudson.

Third Phase of the Work of the Research

In 1932, the Advisory Committee of the Research in International Law decided to continue its work for a third phase, from 1932 to 1935, and to

¹ Republished, with the same pagination, as a special supplement to Volume 23 of the *American Journal of International Law*.

² Republished, with the same pagination, as a supplement to Volume 26 of the *American Journal of International Law*.

deal with three additional subjects. During this period, the membership of the Advisory Committee has been as follows:

CHANDLER P. ANDERSON, Washington, D. C.

Commissioner of the United States, German-American Mixed Claims Commission. *Formerly* Counsellor of the Department of State; United States Arbitrator, British-American Pecuniary Claims Arbitration, United States-Norway Shipping Claims Arbitration.

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Professor of Law, Stanford University.

EDWIN M. BORCHARD, New Haven, Connecticut.

Professor of Law, Yale University; Associate member, *Institut de Droit International*.

CLEMENT L. BOUVÉ, Washington, D. C.

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PHILIP MARSHALL BROWN, Princeton, New Jersey.

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CHARLES K. BURDICK, Ithaca, New York.

Dean of the Cornell Law School.

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Formerly President of the Bar Association of the City of New York.

BENJAMIN N. CARDOZO, Washington, D. C.*

Justice of the Supreme Court of the United States.

JOSEPH P. CHAMBERLAIN, New York City.

Professor of Public Law, Columbia University.

FREDERIC R. COUDERT, New York City.

Member of the New York Bar; Associate member, *Institut de Droit International*.

WILLIAM DENMAN, San Francisco.

Member of the San Francisco Bar. *Formerly* Chairman of United States Shipping Board; President of the Emergency Fleet Corporation.

WILLIAM C. DENNIS, Richmond, Indiana.

President of Earlham College. *Formerly* Agent of the United States in various international arbitrations; legal adviser to the Chinese Government at Peking.

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Professor of Political Science, Bryn Mawr College.

GEORGE A. FINCH, Washington, D. C.

Managing Editor, *American Journal of International Law*; Assistant Director of the Division of International Law, Carnegie Endowment for International Peace. *Formerly* Assistant Legal Adviser to the American Commission to Negotiate Peace at Paris.

RICHARD W. FLOURNOY, Jr., Washington, D. C.

Assistant to the Legal Adviser, Department of State; Professor of International Law, National University.

RAYMOND B. FOSDICK, New York City.

Member of the New York Bar. *Formerly* Under-Secretary-General of the League of Nations.

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LEARNED HAND, New York City.

United States Circuit Judge, second circuit.

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Member of the San Francisco Bar. Lecturer on International Law, School of Jurisprudence, University of California. *Formerly* District Attorney, United States Court for China.

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Hamilton Fish Professor of International Law and Diplomacy, Columbia University; Associate member, *Institut de Droit International*. *Formerly* Solicitor for the Department of State.

PHILIP C. JESSUP, New York City.

Assistant Professor of International Law, Columbia University.

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Member of the New York Bar.

ARTHUR K. KUHN, New York City.

Member of the New York Bar. Associate member, *Institut de Droit International*.

WILLIAM DRAPER LEWIS, Philadelphia, Pennsylvania.

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- JOHN V. A. MACMURRAY, Riga, Latvia.
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United States Minister to China.
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Professor of Political Science, University of Michigan. *Formerly*
President of the American Political Science Association.
- ELIHU ROOT, New York City.
Honorary member, *Institut de Droit International*; member of the
Permanent Court of Arbitration. *Formerly* Secretary of State;
President of the American Society of International Law.
- JAMES BROWN SCOTT, Washington, D. C.
President of the American Society of International Law; Director
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LESTER H. WOOLSEY, Washington, D. C.

Member of the District of Columbia Bar. *Formerly* Solicitor for the Department of State.

QUINCY WRIGHT, Chicago, Illinois.

Professor of International Law, University of Chicago.

The Advisory Committee has had the following meetings since the beginning of the work of the Research:

- (1) January 7, 1928.
- (2) April 28, 1928.
- (3) October 5, 6, 1928.
- (4) February 22, 23, 24, 1929.
- (5) February 20, 21, 22, 1931.
- (6) February 19, 20, 21, 1932.
- (7) February 22, 23, 24, 1934.
- (8) February 21, 22, 23, 1935.

In 1932, the Executive Committee of the Research invited Dean Charles K. Burdick, of the Cornell Law School, to act as Reporter on the *Law of Extradition*; Professor Edwin D. Dickinson, of the School of Jurisprudence of the University of California, to act as Reporter on *Jurisdiction with respect to Crime*; and Professor James W. Garner, of the University of Illinois, to act as Reporter on the *Law of Treaties*.

(1) *Law of Extradition*. In 1925, this subject was studied by the League of Nations Committee of Experts, and a subcommittee consisting of Professor J. L. Brierly and M. Charles de Visscher was appointed to report upon it. Having before it the report of this subcommittee,³ the Committee of Experts reached the conclusion on January 29, 1926, that the difficulties in the way of a general agreement on this subject were too great for their solution to be realizable in the near future, though such solution "appeared very desirable."⁴ In spite of this view taken by the Committee of Experts, the Executive Committee of the Research was of the opinion that the subject should be explored. It is to be noted that two multipartite conventions on extradition have recently been opened to signature, at Montevideo on December 26, 1933, and at Guatemala City on April 12, 1934.

The Reporter on the *Law of Extradition*, Mr. Charles K. Burdick, has been assisted by Mr. V. G. Terentieff, Mr. Lucien Tharaud, and by the following advisers:

³ *League of Nations Document* C.51.M.28.1926.V; 20 *American Journal of International Law* (Special Supplement, 1926), p. 243.

⁴ *Ibid.*

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JESSE S. REEVES
DANIEL C. STANWOOD
GEORGE W. WICKERSHAM
GEORGE GRAFTON WILSON
LESTER H. WOOLSEY

Meetings of the Reporter and advisers on the *Law of Extradition* have been held as follows:

New York: January 20, 21, 22, 1933

Ithaca: June 1, 2, 3, 1933

Ithaca: December 1, 2, 1933

Ithaca: May 13, 14, 1934

New York: November 30, December 1, 2, 1934

(2) *Jurisdiction with respect to Crime*. In 1925, the League of Nations Committee of Experts for the Progressive Codification of International Law studied the subject of "Criminal Competence of States in Regard to Offences Committed Outside Their Territories," and appointed a subcommittee consisting of Professor J. L. Brierly and Professor Charles de Visscher to report upon it. Having before it the report of this subcommittee,⁵ the Committee of Experts reached the conclusion on January 29, 1926, that "international regulation of these questions by way of a general convention, although desirable, would encounter grave political and other obstacles."⁶ In spite of this fact, the Executive Committee of the Research was of the opinion that the subject should be explored.

The Reporter on *Jurisdiction with respect to Crime*, Mr. Edwin D. Dickinson, has been assisted by Mr. William W. Bishop, Jr., as Assistant Reporter, by Mr. Benjamin Akzin, Mr. Lawrence Preuss, and by the following advisers:

JOSEPH W. BINGHAM
EDWIN M. BORCHARD
CHARLES K. BURDICK
JOHN U. CALKINS
WILLIAM DENMAN
A. H. FELLER
FARNHAM P. GRIFFITHS
FRANK E. HINCKLEY
PHILIP C. JESSUP
ALEXANDER M. KIDD
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STEPHEN I. LANGMAID
ALBERT LÉVITT
JAMES P. MCBAIN
DUDLEY O. MCGOVNEY
ORRIN K. MCMURRAY
STANLEY MORRISON
MAX RADIN
JESSE S. REEVES
CHESTER G. VERNIER
AUGUST VOLLMER

⁵ *League of Nations Document C.50.M.27.1926.V*; 20 *American Journal of International Law* (Special Supplement, 1926), p. 253.

⁶ *Ibid.*

Meetings of the Reporter and advisers on *Jurisdiction with respect to Crime* have been held as follows:

Ann Arbor: December 16, 17, 1932

Berkeley: December 21, 22, 23, 1933

Berkeley: December 20, 21, 22, 1934

(3) *The Law of Treaties*. In 1925, the League of Nations Committee of Experts for the Progressive Codification of International Law studied the subject of "Procedure of International Conferences and Procedure for the Conclusion and Drafting of Treaties," and appointed a subcommittee consisting of MM. Mastny and Rundstein to report upon it. With the report of this subcommittee⁷ before it, the Committee of Experts placed the subject on its provisional list and sought the comments of Governments.⁸ On April 2, 1927, the Committee of Experts reached the conclusion that the subject was "sufficiently ripe" for codification,⁹ but it suggested¹⁰ a special procedure for this subject. When its report came before the Council and Assembly of the League of Nations, these bodies were content to have the subject investigated by the Secretariat.¹¹ On February 20, 1928, a convention on "Treaties" was adopted at Havana by the Seventh International Conference of American States,¹² but it has not been ratified by all the States represented at that conference. In view of this situation, the Executive Committee of the Research was of the opinion that the subject should be explored.

The Reporter on the *Law of Treaties*, Mr. J. W. Garner, has been assisted by Mr. Valentine Jobst, as Assistant Reporter, and by the following advisers:

BENJAMIN AKZIN

CHARLES M. BARNES

CLARENCE A. BERDAHL

CLYDE EAGLETON

J. W. FAIRLEE

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GREEN H. HACKWORTH

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HUNTER MILLER

JESSE S. REEVES

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GEORGE G. WILSON

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QUINCY WRIGHT

Meetings of the Reporter and advisers have been held as follows:

New York: November 18, 19, 20, 1932

⁷ *League of Nations Document C.47.M.24.1926.V*; 20 *American Journal of International Law* (Special Supplement, 1926), p. 264.

⁸ *Ibid.* For the comments of Governments, see *id.*, C.196.M.70.1927.V.

⁹ *League of Nations Document C.196.M.70.1927.V.*, p. 7.

¹⁰ *Id.*, C.198.M.72.1927.V; 22 *American Journal of International Law* (Special Supplement, 1928), p. 43.

¹¹ *League of Nations Official Journal*, 1927, p. 754; Records of Eighth Assembly, Plenary, p. 203.

¹² 4 Hudson, *International Legislation* (1931), p. 2378.

Washington: April 24, 25, 1933

Urbana: December 17, 18, 1933

Washington: April 24, 25, 26, 1934

Urbana: September 30, October 1, 1934

Urbana: December 15, 16, 1934

Responsibility for the Drafts

The drafts which are now published as the results of the third phase of the work of the Research, have been made with the object of stating the collective views of a group of Americans specially interested in the development of international law concerning the subjects which may be considered in connection with the codification of international law. The drafts represent the result of the work of American jurists and scholars after thorough consultation, and as such it is hoped that they may merit the attention of persons interested in the codification of international law. The proposals contained in the drafts, and the statements in the comments, are not to be taken to represent the individual views of any of the persons who have taken part in their preparation.

The Research is wholly unofficial, and the drafts must not be taken as in any way representing the views of the Government of the United States.

The Prospect for Codification

The first Conference for the Codification of International Law, which met at The Hague from March 13 to April 13, 1930, achieved a very limited success. On September 1, 1934, none of the instruments opened to signature at the conference had been brought into force, but they had been acted upon as follows:

- (1) *Convention on certain questions relating to Conflict of Nationality Laws.*

Ratifications or accessions deposited at Geneva by Brazil, Great Britain, Canada, Monaco, Norway, Poland and Sweden.

- (2) *Protocol relating to Military Obligations in Certain Cases of Double Nationality.*

Ratifications or accessions deposited at Geneva by United States of America, Brazil, Great Britain, India and Sweden.

- (3) *Protocol relating to a Certain Case of Statelessness.*

Ratifications or accessions deposited at Geneva by Brazil, Great Britain, India and Poland.

- (4) *Special Protocol concerning Statelessness.*

Ratifications or accessions deposited at Geneva by Brazil, Great Britain and India.

The 1930 Hague Conference adopted the following resolution concerning the continuation of the work of codification:¹³

¹³ 26 *American Journal of International Law* (1932), p. 137.

The Conference

Calls the attention of the League of Nations to the necessity of preparing the work of the next conference for the codification of international law a sufficient time in advance to enable the discussion to be carried on with the necessary rapidity and in the light of the information which is essential.

For this purpose the Conference would consider it desirable that the preparatory work should be organised on the following basis:

1. The Committee entrusted with the task of selecting a certain number of subjects suitable for codification by convention might draw up a report indicating briefly and clearly the reasons why it appears possible and desirable to conclude international agreements on the subjects selected. This report should be sent to the Governments for their opinion. The Council of the League of Nations might then draw up the list of the subjects to be studied, having regard to the opinions expressed by the Governments.

2. An appropriate body might be given the task of drawing up, in the light of all the data furnished by legal science, and actual practice, a draft convention upon each question selected for study.

3. The draft conventions should be communicated to the Governments with a request for their observations upon the essential points. The Council would endeavour to obtain replies from as large a number of Governments as possible.

4. The replies so received should be communicated to all the Governments with a request both for their opinion as to the desirability of placing such draft conventions on the agenda of a conference and also for any fresh observations which might be suggested to them by the replies of the other Governments upon the drafts.

5. The Council might then place on the programme of the Conference such subjects as were formally approved by a very large majority of the Powers which would take part therein.

On September 26, 1931, the Twelfth Assembly of the League of Nations adopted the following resolution:¹⁴

The Assembly recalls that the resolution of September 22nd, 1924, emphasised the progressive character of the codification of international law which should be undertaken, and, in view of the recommendations of the First Conference for the Codification of International Law held at The Hague in 1930, it decides to continue the work of codification with the object of drawing up conventions which will place the relations of States on a legal and secure basis without jeopardising the customary international law which should result progressively from the practice of States and the development of international jurisprudence.

To this end, the Assembly decides to establish the following procedure for the future, except in so far as, in particular cases, special resolutions provide to the contrary:

1. Any State or group of States, whether Members of the League or not, may propose to the Assembly a subject or subjects with respect to which codification by international conventions should be undertaken. Such proposals, together with a memorandum containing the necessary explanatory matter, should be sent, before March 1st, to the Secretary-

¹⁴ *Id.*, p. 141.

General, in order that he may communicate them to Governments and insert them in the agenda of the Assembly.

2. Any such proposals will be considered by the Assembly, which will decide whether the subjects proposed appear *prima facie* suitable for codification.

3. If the investigation of a proposed subject is approved by the Assembly and if no existing organ of the League is competent to deal with it, the Assembly will request the Council to set up a committee of experts, which will be asked with the assistance of the Secretary-General of the League of Nations to make the necessary enquiries and to prepare a draft convention on the subject, to be reported to the Council with an explanatory statement.

4. The Council will transmit such report to the Assembly, which will then decide whether the subject is provisionally to be retained as a subject for codification. If this is decided affirmatively, the Assembly will ask the Secretary-General to transmit the said report to the Governments of the Members of the League and non-member States for their comments.

5. The committee of experts, if it considers it desirable to do so, will revise the draft in the light of the comments made by the Governments.

If the committee of experts revises the draft, the revised draft will be submitted to the Governments for their comments and, together with the comments received, will be transmitted to the Assembly, which will then decide finally whether any further action should be taken in the matter and, if so, if the draft should be submitted to a codification conference.

If the committee does not see any reason to revise the draft, it will be transmitted, together with the comments of the Governments, to the Assembly, which will then decide finally whether any further action should be taken and, if so, if the draft should be submitted to a codification conference.

The Assembly recommends:

(1) That, in relation with the further work in connection with the codification of international law, the international and national scientific institutes should collaborate in the work undertaken by the League of Nations;

(2) That the work of codification undertaken by the League of Nations should be carried on in concert with the conferences of the American States.

This resolution has halted, for the time being, the formal efforts of the League of Nations directed toward codification. No government has since made any suggestion calling for the resumption of these efforts.

Meanwhile, however, the Seventh International Conference of American States, meeting at Montevideo, adopted the following resolution on December 26, 1933:¹⁵

The Seventh International Conference of American States:

CONSIDERING: That the codification of international law must be gradual and progressive, it being a vain illusion to think for a long time of the possibility of carrying it out completely;

¹⁵ *Final Act of the Seventh International Conference of American States*, p. 108.

That, without prejudice to the work already accomplished in the International Conferences of American States, the task of gradual and progressive codification must be done by jurists specialized in international law, who should be provided in the decisive meetings with plenipotentiary powers to sign treaties;

That it is indispensable, if it is desired to do practical work with actual results, to seek the conjunction of the juridical viewpoints, theoretical and universal in essence, with the political viewpoints, positive and localistic by nature;

That in this connection the necessity of coordinating this work with the work of codification being done by the League of Nations must be taken into account as far as possible, since international law tends to universalize its rules as the interdependence of the civilized community becomes more and more confirmed and consolidated;

That to this end it is necessary to create a special organization for the preparatory work with the purpose of fixing the basic elements for the gradual and progressive elaboration of international law;

RESOLVES:

1. There is maintained the International Commission of Jurisconsults, created by the Third International American Conference, with the mission of bringing about the gradual and progressive codification of international public law and international private law. This Commission will be composed of jurists named by each government.

2. Each government of the American republics will create respectively a national commission of codification of international law. This Conference considers that these commissions shall be made up of qualified officials or ex-officials from the respective Foreign Offices, and by professors or jurists who are specialists in international law. Each commission shall act through the channel of the respective Foreign Office.

3. There shall be created a Commission of Experts with the duty of organizing with a preparatory character, the work of codification. This Commission shall be composed of seven jurists chosen as follows:

Each of the twenty-one governments shall send to the Pan American Union a list of not to exceed five persons having the same qualifications as the members of the national commissions provided for in Article 2 hereof. The Pan American Union shall transmit all these different lists to the governments.

Once the definite lists are made up, each government shall designate from said lists seven persons, of whom only two shall be nationals, whom they desire to constitute the Commission of Experts, communicating its choice to the Pan American Union.

If, after three months a government has not submitted its list of candidates, then after a month's delay the Pan American Union will proceed to form the final list with the names received to date. The seven persons who obtain the highest number of votes shall constitute the first Commission of Experts. In case of a tie the Governing Board shall decide it by lot. It is understood, however, that the Commission of Experts, however chosen or elected, must always contain at least one person representing each of the two great systems of jurisprudence of this hemisphere.

If the name of no such person is found among the first seven persons

having the highest number of votes, then that person having the highest number of votes of any person listed by the government or governments having the particular system of jurisprudence not represented among those having the seven highest votes, shall be made a member of the commission in the place of that particular person of the seven who had the least number of votes.

4. The persons elected pursuant to the foregoing provisions shall hold office until the end of the first session of the International Commission of Jurisconsults.

The International Commission of Jurisconsults shall at its first meeting determine the organization, functions, duties, and terms of office of the Commission of Experts and of its members. Until such determination is made the Commission shall have such organization, functions, and duties as are hereinafter provided.

This Commission of Experts shall be a subcommittee of the International Commission of Jurisconsults. The members of this subcommittee shall be *ex officio* members of the International Commission of Jurisconsults. When that International Commission is in session, the members of the subcommittee shall be considered as members thereof and of the delegation named by the country of which they are nationals.

5. There shall be created in the Pan American Union a general secretariat charged with the files and correspondence of the codifying bodies. With this in view the Pan American Union will establish a juridical section of a purely administrative character.

6. Both the Commission of Experts as well as the separate local commissions of codification should take into account, in so far as it may be convenient, the suggestions and projects which other institutions may submit for its consideration.

7. The first meeting of the Commission of Experts will take place as soon as possible at the Pan American Union in Washington, where there shall have been organized a juridical section referred to in Article 5.

The subsequent meetings of the Commission of Experts shall be annual and will take place in the various cities of America which the Commission itself shall determine at the proper time.

8. The Commission of Experts will proceed to examine all the problems of private and public international law and will make a list of those matters which it considers susceptible of codification. With respect to each point it will draw up a questionnaire which it will submit to the consideration of all the national commissions of codification.

Each commission will study thoroughly the topics contained in the questionnaire and within a reasonable time will give its views thereon, returning the reply through the respective Foreign Offices to the juridical section of the Pan American Union.

This procedure does not prevent an exchange of ideas on one or more topics between the national commissions themselves, it being on the contrary even desirable that this method be adopted.

9. It shall be the special duty of the juridical section of the Pan American Union to expedite whenever necessary the prompt submission of the views solicited.

Once the replies and observations have been received from the Foreign Offices, the division shall notify the Governing Board of the Pan American Union in order that it may arrange a meeting of the Commis-

sion of Experts which shall be held at the place which may have been decided upon at its previous meeting.

10. The Commission of Experts so convoked shall undertake a thorough study of the replies and observations received and shall proceed to classify them according to topics or concrete points in two categories:

- (1) Those which are susceptible of codification because there is a harmony of opinions which permits the formulation of concrete bases of discussion;
- (2) Those which do not fulfill these conditions.

When the classification is made, the Commission of Experts shall coordinate the various points of view and shall form concrete bases of discussion for the International Commission of Jurisconsults. The antecedents thus prepared by the Commission of Experts and all the documents transmitted by the governments shall serve as a basis for the work of the International Commission of Jurisconsults.

The Commission of Experts, when it may have prepared a reasonable number of projects or declarations such as to justify a meeting of the International Commission of Jurisconsults, will so notify the Governing Board of the Pan American Union in order that the latter may call that Commission together.

11. The next meeting of the International Commission of Jurisconsults will be held in the city of Rio de Janeiro and the following meetings in the places arranged by the Commission itself.

12. The members of the International Commission of Jurisconsults shall have the character of plenipotentiary delegates.

13. The organs of codification shall not, in the work of juridical organization, alter the fundamental principles of positive International Law already established by Convention between the American States.

14. The expenses arising out of the attendance of the delegates or of experts at the meetings provided in the previous articles shall be for the account of the government whose national is concerned.

This resolution represents a decided departure from the methods heretofore followed by the International Conference of American States. On January 1, 1935, only 13 of the 21 Governments had sent in the lists of candidates as provided in sub-paragraph 1 of section 3 of the resolution, and the Pan American Union had not proceeded to form the final list as provided in sub-paragraph 3. Hence, the election of members of the Commission of Experts has been postponed.

MANLEY O. HUDSON

Director

February 1, 1935.

PART I
EXTRADITION

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CONVENTION ON EXTRADITION

PART I. USE OF TERMS

ARTICLE 1. USE OF TERMS

As the terms are used in this Convention :

(a) "Extradition" is the formal surrender of a person by a State to another State for prosecution or punishment for a crime.

(b) A "State" is a member of the community of nations.

(c) A "requesting State" is a State which requests of another State the extradition of a person, or the provisional arrest of a person with a view to extradition, or the delivery of property.

(d) A "requested State" is a State of which the extradition of a person, or the provisional arrest of a person with a view to extradition, or the delivery of property is requested by another State.

(e) A State's "territory" comprises its land and territorial waters and the air above its land and territorial waters.

(f) A "person claimed" is a person whose extradition is requested.

(g) A "requisition" is a formal request for extradition.

(h) An "act" includes a failure to act.

PART II. ACTS

ARTICLE 2. PENALTY ATTACHED TO EXTRADITABLE ACTS

Except as otherwise provided in this Convention, a requested State shall extradite a person claimed, for an act

(a) For which the law of the requesting State, in force when the act was committed, provides a penalty of death or deprivation of liberty for a period of two years or more; and

(b) For which the law, prevailing in that part of the territory of the requested State in which the person claimed is apprehended, provides a penalty of death or deprivation of liberty for a period of two years or more, which would have been applicable if the act had been there committed.

ARTICLE 3. PLACE OF COMMISSION OF EXTRADITABLE ACTS

(a) A requested State may decline to extradite a person claimed for an act committed wholly or in part within its territory.

(b) A requested State may decline to extradite a person claimed for an act committed wholly outside the territory of the requesting State, unless in that part of the territory of the requested State in which the person claimed is apprehended, its law would have made the act punishable under similar circumstances, though the act had been committed wholly outside the territory of the requested State.

(c) For the purposes of this article vessels and aircraft in the public service of a State, and the private vessels and aircraft, which have its national character, are assimilated to a State's territory; but while a private vessel is within the territorial waters of another State, or while a private aircraft is on or over the land or territorial waters of another State, acts done upon such vessel or aircraft are also done within the territory of the other State.

ARTICLE 4. LAPSE OF TIME

A requested State may decline to extradite a person claimed if under the law of the requesting State such person has become immune from prosecution or punishment by reason of the lapse of time, or if under the law prevailing in that part of the territory of the requested State in which the person is apprehended such person would have become immune from prosecution or punishment by reason of the lapse of time, if the act had been committed within the territory of the requested State.

ARTICLE 5. POLITICAL OFFENSES

(a) A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a political offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a political offense.

(b) As it is used in this Convention, the term "political offense" includes treason, sedition and espionage, whether committed by one or more persons; it includes any offense connected with the activities of an organized group directed against the security or governmental system of the requesting State; and it does not exclude other offenses having a political objective.

ARTICLE 6. MILITARY OFFENSES

(a) A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a military offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a military offense.

(b) As the term is used in this Convention, a military offense is an offense which is punishable only as a violation of a military law or regulation, and which would not be punishable as a violation of a civil law or regulation if the military law or regulation did not apply.

PART III. PERSONS

ARTICLE 7. NATIONALS OF REQUESTED STATE

A requested State shall not decline to extradite a person claimed because such person is a national of the requested State.

ARTICLE 8. CONFLICTING REQUISITIONS

(a) When a requested State receives from two or more States requisitions for the same person for the same act, the requested State shall, in extraditing

the person claimed, give preference to that requesting State in whose territory the act was committed. If the act was committed in the territory of more than one requesting State or in the territory of a non-requesting State, the requested State shall extradite the person claimed to the requesting State whose requisition is first received.

(b) When a requested State receives from two or more States requisitions for the same person for different acts, the requested State shall in extraditing the person claimed decide to which State it will extradite, taking account of the seriousness of each act, the place where each act was committed, the nationality of the person claimed, the times when the requisitions were received, and engagements which may be made for reëxtradition by one requesting State to another.

(c) For the purposes of this article vessels and aircraft in the public service of a State, and the private vessels and aircraft, which have its national character, are assimilated to a State's territory; but while a private vessel is within the territorial waters of another State, or while a private aircraft is on or over the land or territorial waters of another State, acts done upon such vessel or aircraft are also done within the territory of that other State.

ARTICLE 9. NON BIS IN IDEM

(a) A requested State may decline to extradite a person claimed if such person has been prosecuted by the requesting State for the same act or acts for which his extradition is sought and has been acquitted; or if he has been convicted in such prosecution unless the extradition is sought in order that the person claimed may serve an unexpired term of the sentence imposed as the result of such conviction.

(b) A requested State may decline to extradite a person claimed if such person has been prosecuted by the requested State or by a third State for the same act or acts for which extradition is sought and has been acquitted or convicted.

ARTICLE 10. PENDING PROSECUTION FOR THE SAME ACTS

A requested State may decline to extradite a person claimed if he is being prosecuted for the act or acts for which extradition is sought, or if he has been apprehended with a view to such prosecution, either at the time of receipt of a request for provisional arrest, or (in the absence of such request) at the time of receipt of a requisition.

ARTICLE 11. POSTPONED OR CONDITIONAL EXTRADITION

- (1) A requested State may postpone the extradition of a person claimed,
 - (a) In order that the person claimed may be prosecuted and/or punished by the requested State for an act other than that for which extradition is sought; or

[(b) In order that a pending civil proceeding to which the person claimed is a party in the requested State may be concluded; or]

(c) In order that the person claimed may testify as a witness in a criminal [or civil] proceeding pending in the requested State.

But proceedings based upon a requisition shall only be postponed in favor of the proceedings under municipal law above referred to so far as is reasonably necessary.

(2) As an alternative to such a postponement of extradition the requested State may extradite the person claimed upon condition that such person be returned to the requested State, as soon as the prosecution in the requesting State is terminated, for one or more of the purposes enumerated in paragraph (1) of this article.

PART IV. EXTRADITION PROCEDURE

ARTICLE 12. THE REQUISITION AND SUPPORTING DOCUMENTS

(1) A requisition shall be in writing and shall be communicated by a diplomatic or consular officer of the requesting State to the constituted authority of the requested State.

(2) The requisition shall contain:

- (a) A description of the person claimed for the purpose of identification;
- (b) A statement that a warrant of arrest or other document of equivalent import in the prosecution of the person claimed has been issued;
- (c) A statement of the act or acts for which it is intended to prosecute or punish the person claimed, together with a statement of the punishment or correctional measures which may be imposed for such act or acts by the law of the requesting State, or of the sentence for such act or acts which has been imposed by the requesting State and which remains unfulfilled.

(3) The requisition shall be supported by:

- (a) The original or an authenticated copy of the warrant of arrest or other document of equivalent import in the prosecution of the person claimed, or the original or an authenticated copy of the judgment of conviction against the person claimed, and of any sentence imposed in execution of such judgment;
- (b) An authenticated copy or statement of the law of the requesting State under which it is intended to prosecute or to punish the person claimed.

(4) The requisition may be accompanied or followed by a request for the delivery of property.

ARTICLE 13. SUPPLEMENTARY DOCUMENTS

(a) After communicating its requisition to the constituted authority of the requested State, and before a final decision on the requisition has been

made, a requesting State may present supplementary documents in support of or in amplification of such requisition.

(b) Before or after apprehension of the person claimed, the requested State may invite the requesting State to present supplementary documents in support of or in amplification of its requisition.

ARTICLE 14. APPREHENSION AND DETENTION OF PERSON CLAIMED

Upon the receipt of a requisition, the requested State shall endeavor to apprehend and detain the person claimed, unless it clearly appears, on the face of the requisition and any supporting documents submitted, that the person whose extradition is sought may not be extradited under this Convention.

ARTICLE 15. REQUEST FOR PROVISIONAL ARREST

(a) A State may ask for the provisional apprehension and detention of a person, if it indicates at the same time its intention promptly to request the extradition of that person.

(b) A request for provisional apprehension and detention, based upon instructions and information obtained from his government by any means of communication, may be made by a diplomatic or consular officer or other authorized agent of the one State, to the government of the other State, or directly to an official of the other State who is competent to order such apprehension and detention.

(c) The request for provisional apprehension and detention shall contain the name and a description for the purpose of identification of the person whose apprehension and detention are sought, a statement of the act or acts for which it is intended to prosecute or punish such person, and the punishment or correctional measures which may be or which have been imposed for such act or acts by the law of the requesting State, and a statement of the existence of a warrant or other document constituting the first step in the prosecution of such person, or of a judgment of conviction against such person; it may also be accompanied by a further request for the provisional seizure and detention of property.

ARTICLE 16. PROVISIONAL ARREST

A State which has received a request for the provisional apprehension and detention of a person, made in conformity with the provisions of Article 15, shall endeavor to apprehend such person, and if such person is apprehended it shall detain him until the receipt of a requisition, provided that a requisition is received within a reasonable time; it shall also endeavor to seize and detain the property to which the request may have referred, and which appears to fall within the categories specified in Article 24 of this Convention.

ARTICLE 17. HEARING

(1) After the receipt of a requisition and after the detention of the person claimed and before reaching a final determination as to the extradition of the person claimed, a requested State shall hold a judicial hearing.

(2) At this hearing, a judicial authority of the requested State shall determine, upon an examination of the requisition and the documents, submitted in accordance with Articles 12 and 13 of this Convention,

(a) Whether the requisition and documents submitted meet the requirements of paragraphs (2) and (3) of Article 12 [, and no further evidence of guilt of the person claimed shall be required];

(b) Whether the law of the requesting State conforms to the condition set by paragraph (a) of Article 2 of this Convention, with respect to the penalty for the act or acts for which extradition is sought.

(3) At this hearing, a judicial authority of the requested State shall determine, upon an examination of the requisition, the documents submitted by the requesting State, and the evidence offered by the requesting State, or by the requested State, or by the person detained any issues presented as to

(a) The identity of the person detained with the person claimed;

(b) The place of commission of the alleged act or acts, for the purpose of applying Article 3 of this Convention;

(c) Whether the extradition of the person claimed is sought for a political or military offense, or for the purpose of prosecuting or punishing the person claimed for a political or military offense (see Articles 5 and 6);

(d) Whether the person claimed has become immune through lapse of time by the laws of the requesting State, or would have become immune through lapse of time by the law of the requested State if the act had been committed there (see Article 4);

(e) Whether the person claimed has been prosecuted for the same act or acts for which extradition is sought, and has been acquitted or convicted; and, in case of such conviction in the requesting State, whether he has served the sentence imposed (see Article 9).

(4) At this hearing, a judicial authority of the requested State shall determine the law of the requested State applicable to any issue which is presented.

(5) At this hearing, if one or more of the reservations in Schedule A have been signed by the requested State, a judicial authority of the requested State shall determine, upon an examination of the requisition, the documents submitted by the requesting State, and the evidence offered by the requesting State, or by the requested State, or by the person detained, any of the following issues which may be presented:

(a) In case Reservation Number Two has been signed by the requested State, whether the extradition of the person claimed is sought for a

fiscal offense, or for the purpose of prosecuting or punishing the person claimed for a fiscal offense;

- (b) In case Reservation Number Three or Reservation Number Four has been signed by the requested State, whether the person claimed is a national of the requested State;
- (c) In case Reservation Number Five has been signed by the requested State, whether the requesting State has made out a *prima facie* case of guilt, as defined in that reservation;
- (d) In case Reservation Number Six has been signed by the requested State, whether the person claimed is a national of the requested State, and whether the requesting State has made out a *prima facie* case of guilt, as defined in that reservation.

ARTICLE 18. EFFECT OF JUDICIAL DETERMINATION

(a) As a result of a final determination by a judicial authority of the requested State of the matters set out in Article 17 of this Convention in the manner there prescribed, it shall declare either that the requested State is authorized, or that it is not authorized [by this Convention], to extradite the person claimed, and to deliver the property asked for.

(b) Such declaration that the requested State is not authorized [by this Convention] to extradite the person claimed shall be conclusive and the person claimed shall be set at liberty, and property seized shall be returned.

(c) Upon such declaration that the requested State is authorized [by this Convention] to extradite the person claimed, the requested State shall extradite that person and deliver the property seized, or shall hold such person and property for executive action, as the law of the requested State may provide.

ARTICLE 19. LANGUAGE TO BE USED AND TRANSLATIONS

Insofar as the requisition and other documents referred to in Articles 12 and 13 of this Convention and written evidence to be offered in the extradition proceedings are not in an official language of the requested State, the requesting State shall communicate to the requested State translations of the same into an official language of the requested State.

ARTICLE 20. ARRANGEMENT FOR EXTRADITION

(a) A requested State shall promptly communicate to the requesting State its final decision upon the requisition.

(b) After its final decision to extradite a person claimed, the requested State shall effect the extradition of such person at a time and place to be agreed upon and without unreasonable delay, and shall permit and facilitate the transportation of such person from its territory.

(c) If the requesting State does not accept custody of the person claimed and remove him from the territory of the requested State within a reasonable time after opportunity therefor has been afforded by the requested

State, the requested State may set such person at liberty, and may refuse to take him into custody again for the same act or acts.

ARTICLE 21. REIMBURSEMENT OF REQUESTED STATE

A requesting State shall reimburse the requested State for special expenses occasioned by the extradition proceedings up to the time of the surrender of the person claimed to an agent of the requesting State.

ARTICLE 22. TRANSIT THROUGH TERRITORY OF THIRD STATE

If a State desires to transport the extradited person through the territory of another State or on a vessel having the national character of another State for the purpose of bring him to its own territory, it shall notify such other State and the latter shall permit and facilitate such transportation. The State to which a person has been extradited shall reimburse the State through whose territory or on whose vessel such person is transported for any expenses incurred by the latter in connection with such transportation.

PART V. LIMITATIONS UPON THE REQUESTING STATE

ARTICLE 23. TRIAL, PUNISHMENT AND SURRENDER OF EXTRADITED PERSON

(1) A State to which a person has been extradited shall not, without the consent of the State which extradited such person:

- (a) Prosecute or punish such person for any act committed prior to his extradition, other than that for which he was extradited;
- (b) Surrender such person to another State for prosecution or punishment;
- (c) Prosecute such person before a court specially constituted for the trial, or to which special powers are granted for the trial.

(2) Paragraph (1), sub-paragraphs (a) and (b) of this article shall not apply, if the person who was extradited voluntarily remains within the territory of the State to which he was extradited for a period of 30 days, or voluntarily returns thereto.

PART VI. PROPERTY

ARTICLE 24. DELIVERY AND RETURN OF PROPERTY REQUESTED

(1) When a person claimed is extradited, a requested State shall deliver to the requesting State the following categories of property, if requested, and if such delivery will not work an injustice to any other person and will not interfere with the administration of justice by the requested State:

- (a) Property which appears to have been acquired by the person claimed or by an accomplice of such person by means of the act for which the extradition is made;
- (b) Property which may serve as evidence in the prosecution of the person extradited.

(2) The requested State may make delivery of such property subject to the condition that it be returned to the requested State:

- (a) When, the property having been delivered in accordance with paragraph (1) (a) of this article, the person claimed is not put on trial, or is acquitted, or such property is proved not to have been acquired by means of the act for which extradition is made;
- (b) When, the property having been delivered in accordance with paragraph (1) (b) of this article, it is no longer required for the purpose for which delivered.

PART VII. GENERAL PROVISIONS

ARTICLE 25. RESERVATIONS IN SCHEDULE A AND DECLARATION IN SCHEDULE B

A State may make one or more of the reservations set forth in Schedule A, and no others, and/or the declaration set forth in Schedule B, at the time of its signature, or ratification of this Convention and any reservation or declaration so made shall be effective between the State making it and all other parties to this Convention in their relations *inter se*.

ARTICLE 26. DECLARATION AS TO APPLICATION OF CONVENTION TO CERTAIN TERRITORIES

(a) At the time of its signature or ratification of this Convention, a State may declare that, in accepting the present Convention, it does not assume any obligation in respect of all or any of its colonies, protectorates and overseas territories, or territories under its suzerainty or mandate, and that the present Convention shall not apply to any territories named in such declaration.

(b) A State, which has made such declaration, may thereafter notify the Secretary General of the League of Nations that it desires that the Convention shall apply to all or any of its territories, which have been made the subject of a declaration under the preceding paragraph, and the Convention shall thereafter apply to all territories named in such notice.

ARTICLE 27. OTHER EXTRADITION AGREEMENTS

Nothing in this Convention shall affect the provisions of any agreement in force between any of the parties concerning extradition for acts for which extradition is not required by this Convention; nor shall this Convention preclude any of the parties from entering into such an agreement.

ARTICLE 28. SETTLEMENT OF DISPUTES

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application

of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

SCHEDULE A

RESERVATION NUMBER ONE. CAPITAL PUNISHMENT

A requested State may make the extradition of any person conditional upon the receipt of satisfactory assurance that, in case of conviction, neither the death penalty, nor any cruel or unusual punishment will be imposed upon him by the requesting State.

RESERVATION NUMBER TWO. FISCAL OFFENSES

A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a fiscal offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a fiscal offense. For the purposes of this reservation a fiscal offense is an offense in connection with the customs or revenue law of a State, and it does not involve misuse of public funds.

RESERVATION NUMBER THREE. NON-EXTRADITION OF NATIONALS WITH DUTY OF PROSECUTION

A requested State may decline to extradite a person claimed on the ground that he is a national of the requested State, and was such national at the time when the act in question is alleged to have been done, if the act for which extradition is sought is punishable in the courts of the requested State; however, in any case in which this right to decline extradition is exercised, the requested State shall have a duty to prosecute the person claimed for the act for which his extradition is sought [and, in such case, the requesting State shall furnish, so far as practicable, to the requested State, all articles, documents, evidence and information which may be useful in expediting the trial].

RESERVATION NUMBER FOUR. NON-EXTRADITION OF
NATIONALS WITHOUT DUTY OF PROSECUTION

A requested State may decline to extradite a person claimed on the ground that he is a national of the requested State, and was such national at the time when the act in question is alleged to have been done.

RESERVATION NUMBER FIVE. *PRIMA FACIE* CASE .

A requested State may require that the requesting State make out a *prima facie* case of guilt on the part of the person claimed such as would be sufficient, in case the person claimed were accused of having committed the alleged act or acts within the territory of the requested State, to justify a magistrate of that State in ordering that he be held for trial.

RESERVATION NUMBER SIX. *PRIMA FACIE* CASE IN
EXTRADITION OF NATIONALS

A requested State may require that the requesting State make out a *prima facie* case of guilt on the part of the person claimed, if he is a national of the requested State, such as would be sufficient, in case the person claimed were accused of having committed the alleged act or acts within the territory of the requested State, to justify a magistrate of that State in ordering that he be held for trial.

SCHEDULE B

DECLARATION AS TO POLITICAL AND MILITARY OFFENSES

At the time of its signature or ratification of this Convention, a State may declare that it will not extradite a person claimed if the extradition is sought for an act which constitutes a political or military offense, or if it appears to the requested State that extradition is sought in order that the person claimed may be prosecuted or punished for a political or military offense, and that it will not give consent to such prosecution or punishment of a person who has been extradited.

EXTRADITION

INTRODUCTORY COMMENT

NEED FOR DEVELOPMENT OF EXTRADITION

NEED FOR COÖPERATION IN SUPPRESSION OF CRIME

The suppression of crime is recognized today as a problem of international dimensions and one requiring international coöperation. States are desirous of punishing those who have broken their laws. They want therefore to get back those law-breakers who have escaped to other countries. The State, whose assistance in such recovery is requested, should view the request with favor, if for no other reason, because it may soon be in the position of requesting similar assistance. The government of a State may also bear in mind that, in this day of travel and of international commerce, the victim of a crime committed in another country may well be a national of its own. There is another most important point of view, which cannot escape the attention of the authorities of the State where an accused person has taken refuge, and that is that a country, in the interest of its own inhabitants, cannot afford to become an asylum for the ordinary alien criminal. In fine, the most effective deterrent to crime is the prompt apprehension and punishment of criminals, wherever they may be found. For the accomplishment of these purposes States cannot act alone; they must adopt some effective concert of action.

OPINIONS

I should have thought that it [extradition even in the absence of reciprocity] was very desirable, taking the lowest point of view, to get rid of the foreign criminals, if the foreign country desires to have them. (H. T. Holland, Legal Adviser to the Colonial Office, *Report from Select Committee [of the House of Commons] on Extradition, (1868)*, par. 1018, p. 51.)

Il y a, d'abord, l'intérêt général attaché à la conservation de l'ordre, à l'observation de la justice et à la répression du crime, intérêt qui existe, quoique à un degré moindre, dans le pays de refuge aussi bien que dans celui où l'infraction a été commise. Les nations ne vivent plus dans l'isolement, comme aux siècles précédents. . . . Il est d'un intérêt général que l'impunité ne soit pas acquise au coupable, et que la loi triomphe partout: le désordre et le crime sont contagieux.

L'extradition n'est pas seulement un moyen de répression; elle produit encore un effet de prévention. Les délits sont commis, pour le plus grand nombre, avec cette pensée que nourrit le coupable, d'échapper à la punition en dissimulant sa faute. . . . Chaque nation est donc intéressée directement, pour empêcher ces calculs dangereux et prévenir les crimes, à repousser les coupables qui viennent se mettre sous la protection de sa souveraineté. . . .

Enfin, chaque Etat est intéressé, à un troisième point de vue, à accorder les extraditions qui lui sont demandées: c'est la condition nécessaire de la ré-

ciprocité qu'il attend des autres Puissances. (Billot, *Traité de l'Extradition* (1874), §3, p. 11.)

C'est une opinion presque universellement admise à notre époque que la remise réciproque des malfaiteurs est une chose conforme à l'intérêt des divers Etats. De cette façon, en effet, on arrive à faire produire au jugement ses effets dans le lieu où a été commis le délit. . . .

. . . on devrait la considérer non pas comme établie à l'avantage de tel ou tel Etat, ou motivée exclusivement par des considérations d'utilité réciproque ou par la lettre morte des conventions dérivant des traités, mais bien comme la plus large application du principe de la justice pénale. (Fiore, *Traité de Droit Penal International et de l'Extradition* (1880), traduit par Antoine, §301, p. 453 and §311, p. 462.)

Aber nicht bloss das Interesse an der möglichsten Erhaltung des Rechtszustandes im Inlande, welcher durch den Aufenthalt eines noch nicht bestraften Verbrechers gefährdet oder gestört wird auch das Interesse an der Erhaltung des Rechtszustandes ausserhalb seiner Grenzen verpflichtet den Zufluchtsstaat, seine Strafberechtigung gegenüber dem auswärtigen Verbrecher, als die einzige, welche für die Dauer des Aufenthaltes desselben im Inlande realisiert werden kann, entweder durch Bestrafung des auswärtigen Verbrechers im Inlande oder durch dessen Auslieferung an einen auswärtigen Staat auszuüben. Dieses Interesse eines Staates an der Erhaltung des Rechtszustandes und an der Verhütung und Verhinderung künftiger Verbrechen im Auslande ist aber ein zweifaches. Einmal ist es ein allen civilisierten Staaten gemeinsames Interesse an der Erhaltung, Vertiefung und Verbreitung des bisher erworbenen Culturzustandes, wie auch eine Pflicht der Humanität: mitzuwirken, dass die Uebel und Leiden, von welchen die Menschen betroffen werden—Uebel, welche nicht bloss in Naturereignissen im engeren Sinne, sondern ebenso auch in menschlichen Handlungen ihre Ursache haben—hintangehalten werden. Nun gehört aber das Bewusstsein, dass ein Verbrecher, auch nachdem er die Grenzen des Staates, in welchem er seine That verübt, überschritten habe, vor Verfolgung und Bestrafung nicht sicher sei, zum mindesten insofern zu den Bedingungen der Abhaltung von verbrecherischen Entschlüssen und Thaten für die Zukunft, als er das Auftauchen der entgegengesetzten Vorstellung verhindert, welche geeignet ist, für viele Verbrecher die psychische Wirksamkeit der Strafdrohung völlig zu vernichten. Deshalb aber ist jeder Staat berufen, in seinem eignen und im allgemeinen Interesse, die Verbreitung dieses Bewusstseins zu fördern. . . . Zum andern hat aber jeder Staat an der Verhütung künftiger Verbrechen im Auslande auch ein specifisches Interesse, gegründet auf die in dem vielverschlungenen modernen Verkehre von Tag zu Tag häufiger werdende Gefahr, dass ein in dem einen Staate begangenes Verbrechen schon durch seine nächsten oder doch durch fernere Wirkungen Angehörige eines andern Staates in ihren Rechten verletze, eine Gefahr, welche u. a. Heinze mit dramatischer Lebhaftigkeit ausgemalt hat. (Lammasch, *Auslieferungspflicht und Asylrecht* (1887), p. 34.)

C'est à la fois de livrer aux juges compétents au individu coupable ou présumé tel, d'assurer l'exercice de la justice répressive et d'acquérir un droit à la réciprocité de la part de l'Etat requérant. Nous avons établi, en effet, que les Etats trouvent dans l'extradition un avantage général à s'unir dans une assurance mutuelle contre les malfaiteurs en les livrant à la justice du pays dont ils ont violé la loi et un avantage particulier dans l'intimidation

qui résulte pour leurs sujets d'une mesure qui les menacerait eux-mêmes s'ils voulaient se soustraire par la fuite à la réparation de leurs crimes. A ce double intérêt les publicistes ajoutent l'avantage spécial que se procurent les nations de s'assurer une exacte réciprocité dans l'échange qu'elles se proposent de faire de leurs criminels. (Bernard, *Traité Théorique et Pratique de l'Extradition* (1890), Vol. 2, p. 31.)

The motive of such surrender is the "common interest of civilized communities." It is of a twofold character corresponding to the dual nature of government, first as the guardian of the domestic interests of the governed, then as their agent charged with the maintenance of good relations with their neighbors; each government desiring (1) to protect its own citizens from the menace to which their tranquillity is exposed by the immigration of dangerous persons, (2) to promote friendly relations with their neighbors by refusing to allow the criminal flying from the justice of the country where his crime was committed to seek an asylum within its borders. (Biron and Chalmers, *The Law and Practice of Extradition* (1903), p. 1.)

The motives for extradition.

The commissioners were of opinion that the extradition of fugitive criminals is founded on the following twofold motive:

1. That it is the common interest of mankind that offenses against person and property, offenses which militate the general well-being of society, should be repressed by punishment, as the means of deterring others from committing, as well as of deterring the criminal from repeating the offense, as also of disabling the offender, either permanently or temporarily, from further crime.

2. That it is to the interest of the State into whose territory the criminal has come that he shall not remain at large therein, inasmuch as from his past conduct it may reasonably be anticipated that, if opportunity offers, he will again be guilty of crime. No State can desire that its territory should become a place of refuge for the malefactors of other countries. It is obviously its interest to get rid of them.

On the first of these grounds we may reasonably claim from all civilized nations that they shall unite with us in a system which is for the common benefit of all; in other words that they shall concede to us reciprocity in the matter of extradition. But, looking to the second and narrower ground, it seems to us that, even if any State should fail to concede full reciprocity, there is no principle which should make this country unwilling to surrender, and so get rid of, the fugitive subjects of other States who have been guilty of crime, and whose surrender is asked for. (Piggott, *Extradition* (1910), p. 16, quoting from the Report of the Royal Commission, May, 1878.)

Toute nation du reste, même sans réciprocité, est intéressée à livrer les criminels, qui ont trouvé un refuge sur son territoire, car cette mesure est bien plus efficace qu'une simple expulsion. . . . De plus l'Etat de refuge est intéressé tout spécialement encore à contribuer à la répression des crimes, mêmes commis en dehors de ses limites, en raison des dangers auxquels ces crimes peuvent à l'étranger exposer ses nationaux, hypothèse très préoccupante, en présence de l'extension croissante des rapports commerciaux et des relations internationales. (Saint-Aubin, *L'Extradition et le Droit Extraditionnel* (1913), p. 39.)

Sometimes it is said that crimes, or at least the more serious crimes, are not merely an infraction of a command which a particular society chooses to

give; they sap the foundations of social life, they are an outrage upon humanity at large, and all human beings therefore ought to contribute to repress them. More often it is said that all nations have a common interest in the repression of crime, that its commission is encouraged when a criminal enjoys immunity so soon as he leaves the territory of his country, and that in order to secure reciprocity states must give up criminals at the demand of their neighbors. (Hall, *A Treatise on International Law* (8th ed. by Higgins, 1924), p. 68.)

EFFECT OF DEVELOPMENT OF TRANSPORTATION AND COMMUNICATION

The discovery in 1814 that cars could be propelled by the adhesion of a smooth wheel to a smooth rail marks the beginning of modern steam railway transportation. In that year George Stephenson's first engine, the *Blucher*, drew a train of eight loaded wagons, weighing 30 tons, at a speed of 4 miles per hour. The *Encyclopædia Britannica* of 1824, in speaking of this form of transportation, says: "This application of steam has not yet arrived at such perfection as to have brought it into general use." Yet the steam locomotive and the railways were making rapid progress, and on the 10th of October, 1825, the Stockton and Darlington Railway began to run a daily coach. By 1847 there were in England 5,000 miles of railroad. In America the first locomotive was built at New York in 1830 and put to work the same year on the South Carolina Railroad. On the Continent, Belgium and Germany were the leaders in early railroad construction. After 1850 the amalgamation of the numerous small and disconnected lines was effected by the organization of large corporations and by the participation of the various governments. It was possible for the large systems to undertake the construction of difficult and expensive roads over hills and mountain ranges; endeavors far beyond the financial power of the small companies. While the early short and isolated lines were of hardly more value than highways and canals, the new long lines constituted a real revolution in land transportation.¹ The Alps were first crossed by rail in 1847 with the completion of the Semmering line from Vienna to Trieste. The North American continent was spanned by rail in the year 1869 with the meeting of the Central Pacific, built eastward from San Francisco, and the Union Pacific from the east. The main line of the Trans-Siberian Railroad across the northern part of Asia was completed in 1902. In South America the transcontinental line from Buenos Aires over the Andes to Valparaiso was finally finished in 1920. The rate of railroad construction in the world in general is shown by the fact

¹ The French Ministry of Public Works published in 1873 the following figures which show the great increase in the speed of transportation resulting from the use of the railroad and the steam locomotive:

Average speed of stage-coach including stops:	1814	4.3 kilometres per hour.			
	1830	6.5	"	"	"
	1848	9.5	"	"	"
Average speed of railroad trains including stops, since	1856	35 to 72	"	"	"

The trip from Paris to Geneva, which in 1848 required 60 hours by stage-coach, could, in 1883, be accomplished by train in from 11 hours and 30 minutes to 17 hours and 40 minutes, depending on the circumstances.

that although in 1850 there were only about 20,000 miles of railroad, this was increased by 1860 to about 66,000, and by 1870 had reached a total of 132,000 miles.¹

In the year 1815 the first steamship began to ply between Liverpool and Glasgow. The Atlantic crossing of the *Savannah* in 1819 is often cited as the first passage under steam from the United States to England, but actually she steamed only 80 hours out of the 29 days required for the crossing. The *Curaçao*, the first steamship to be put on a regular transoceanic run, began in 1827 to carry the Dutch mail to the West Indies. The masters of the sailing packets made strenuous efforts to shorten the time of their crossings, and there are on record numerous passages under sail which took but fourteen or fifteen days. The competition between sail and steam was an important cause of the rapid development of the steamship. Three British companies were organized in the middle of the fourth decade to promote ocean travel by steam. Their life was short, but they paved the way for Mr. Samuel Cunard, who first established a regular service between England and the North American continent, with the aid of a government subsidy and contract to carry the mail. The rapid spread in the use of the steamship is shown by the springing up of numerous companies in the 'thirties and 'forties, whose ships steamed to all parts of the world, notably the P. & O., which soon extended its service to India; the Austrian Lloyd Steam Navigation Co., calling at Constantinople and the ports of the Levant; the Royal Mail Steam Packet Co., trading with the British West Indies, and the Pacific Steam Navigation Co., started in 1840, the pioneer line to the west coast of South America.² The 'fifties brought the screw propeller to replace the wooden paddle wheel, and the next decade saw the introduction of the compound engine. With the turn of the century came the turbine engine with its greater economy of fuel consumption and increased speed. In September, 1907, the *Lusitania* on her maiden run crossed the Atlantic in five days.³

Morse built and exhibited in 1835 the first practical recording telegraph, and in 1844 a private company was organized to erect a telegraph line between New York and Baltimore and Washington. By 1851, fifty companies using Morse telegraph patents were in operation in the United States, and by 1861 Morse patents were in operation in Europe.⁴ The first permanent transatlantic cable was laid in 1866 (though in 1858 one had been put

¹ See: Hadley, *Railroad Transportation, Its History and Its Laws* (1896); Picard, *Traité des Chemins de Fer* (1887); Raper, *Railway Transportation* (1912); Ross, "Railways," in *Encyclopædia Britannica* (11th ed., 1911), Vol. XXII, p. 819 *et seq.*

² In 1839 the steamship people in their efforts to inform the public as to the superiority of their vessels, published among others the following figures:

Average Atlantic crossing—sail	34.1¼ d	Wwd	22.1	d	Ewd
steam	17	"	"	15.4¼	"

³ See: Abbott, *American Merchant Ships and Sailors* (1902); Benedict, "Steamship Lines," in *Encyclopædia Britannica* (11th ed., 1911), Vol. XXX, p. 850 *et seq.*; Bowen, *A Century of Atlantic Travel, 1830-1930* (1930); Day, *A History of Commerce* (1922).

⁴ 21 *Encyclopædia Britannica* (14th ed., 1929), p. 882.

into operation for three months), and in addition an abortive attempt in 1865 was redeemed. Thus in 1866 there were two cables operating. In 1929, there were 21 cables across the Atlantic between North America and Europe, 3,500 cables in the world, and 300,000 miles of cable in the world.¹ In 1902, the British Pacific Cable between Australia and British Columbia, 7,800 nautical miles, was completed. In 1903, the first American cable was laid in the Pacific with a length of 7,846 nautical miles, by the Commercial Cable Co., between San Francisco and the Philippines. This cable touches at Hawaii, Midway Island and Guam. Later it was extended from Manila to Shanghai and to Japan by way of Bonin Islands.²

The telephone was invented in 1876 at Boston by Alexander Graham Bell. The table in the note below shows how great has been the development of its use.³ Transatlantic telephone service was first opened to the public early in 1927, through coöperation of the American Telegraph and Telephone Company, and the British Post Office. The services have so developed that North America, Europe and Africa are now joined by transatlantic service.⁴ In 1896, Marconi was able to send a radio message one and three-quarter miles, and in 1903, the first transoceanic radiogram was published in the London Times.⁵

The necessity for concerted action against crime has become increasingly apparent as the improvement in transportation and in communication, outlined above, has taken place. The present possibilities of rapid transportation make it easy to seek asylum elsewhere, while such means of transportation, coupled with our modern systems of communication, play into the hands of criminals operating back and forth across State boundaries. It will shortly appear, as the history of the subject is briefly traced, that the period of the development of the steamship, the railroad and the telegraph was the period also of the great development of arrangements for mutual aid in the apprehension and punishment of persons accused of crime.

¹ 15 *Encyclopædia Britannica* (14th ed., 1929); p. 891.

² 22 *New International Encyclopedia* (1916), p. 61.

³ Year	Number of telephones in U. S.	Telephones per 100 Population
1877	2600	0.005
1880	4700	0.09
1885	155,000	0.27
1890	227,000	0.36
1895	339,500	0.48
1900	1,335,900	1.76
1905	4,126,900	4.85
1910	7,635,400	8.19
1915	10,523,500	10.39
1920	13,329,400	12.43
1925	16,935,900	14.76
1927	18,523,000	15.79
1928	19,341,000	16.32
1932	19,690,187	15.8

(15 *Encyclopædia Britannica* (14th ed., 1929), p. 895; *World's Almanac* (1934), p. 533.)

⁴ 15 *Encyclopædia Britannica* (14th ed., 1929), p. 900.

⁵ 2 *Air Law Review* (1931), pp. 107, 108; 18 *Encyclopædia Britannica* (14th ed., 1929), pp. 885, 886.

OPINIONS

In modern times the importance of the subject [extradition] has vastly increased. The improved facilities of communication which modern invention has afforded, and the consequent ease with which malefactors can escape from the jurisdiction of the countries whose laws they have violated, have rendered it essential to the order of society that flight should not secure immunity from punishment. (Moore, *Extradition* (1891), §3, pp. 5 and 6.)

In recent times, since facility of travel has given criminals more opportunities of escaping from the scene of their crime, and it has consequently become important to obtain their extradition, delivery for specified crime, and under specified conditions, has been provided for internationally by express agreements. (Hall, *A Treatise on International Law* (8th ed. by Higgins, 1924), p. 68.)

When, however, in the nineteenth century, with the appearance of railways and transatlantic steamships, transit began to develop immensely, criminals used the opportunity to flee to distant foreign countries. It was then, and in consequence of this, that the conviction was forced upon the States of civilized humanity that it was in their common interest to surrender ordinary criminals to each other. (Oppenheim, *International Law* (4th ed. by McNair, 1928), Vol. I, §328, p. 566.)

With the rise of the modern state system, however, and the development of means of travel and communication coöperation in the suppression of crime became a matter of international concern. (Dickinson, "Extradition" in *Encyclopædia of the Social Sciences* (1931).)

EXTRADITION THE MOST EFFECTIVE MEANS OF COÖPERATION

Expulsion of alien criminals by States of refuge hardly deserves to be described as international coöperation in the suppression of crime, since it only rids the expelling States of undesirables, without bringing to an end the criminal activity of those expelled, or assuring an orderly trial and punishment of the criminals in question. On the other hand, a unified world system of criminal law, enforced by all States and enforceable in all courts, is an idle dream in our day. The two alternatives which remain are, first, punishment of criminals where found, according to the criminal law of the forum; and, second, extradition of those accused of crime for trial in the States where the punishable acts are claimed to have been committed, or in the States whose interests have been adversely affected, and according to the laws of those States.

The subject of jurisdiction to punish for crimes does not belong to this study,¹ but States generally do not punish acts committed within the territorial jurisdiction of other States, unless those acts are committed by their own nationals, or at least are directed against their own safety or that of nationals of the punishing States. Except in these cases there is no strong incentive to trial and punishment of crimes committed abroad.

¹ See the full treatment in Draft Convention on Jurisdiction to Punish for Crime, *Harvard Research in International Law* (1935), E. D. Dickinson, Reporter.

Even if the sense of international solidarity could supply this incentive in other cases, it is obvious that the general assumption by States of criminal jurisdiction of all persons within their borders, accused of the commission of crimes in the territory of other States, would be less effective than extradition. The proof of crime can best be adduced at the place of its commission, and the injury to society can best be measured there. Therefore, international coöperation in the suppression and punishment of crime should take the form of perfecting and making general the practice of extradition.

OPINIONS

The arguments for such [extradition] legislation are really arguments of principle; namely, that it is very desirable that crime should not go unpunished; that the country where the crime has been committed is chiefly interested in the suppression of that crime, and the discovery of it; and further that it is very desirable that the trial should be had where the evidence is most easily obtainable. (H. T. Holland, Legal Adviser to the Colonial Office, *Report from Select Committee [of the House of Commons] on Extradition* (1868), par. 1012, p. 51.)

Le droit de répression des Etats sur leurs sujets est naturellement limité à l'étendue de leur territoire juridictionnel, en dehors duquel leurs lois perdent toute action. Il suit de là que les infractions à ces lois ayant un caractère purement local, ne peuvent être poursuivies que dans le pays où elles ont été commises, et que si les prévenues se réfugient sur le territoire d'un autre Etat, l'infraction demeure impunie, à moins que l'Etat offensé n'obtienne l'extradition des coupables. (Calvo, *Le Droit International* (1870), t. I, §374, p. 470.)

It has been proposed by some that the operation of the criminal law be made cosmopolitan. Pinheiro-Ferreira strongly argues that the state in whose territories the fugitive seeks asylum should not deliver him up, but should punish him.¹ The answer to this proposition is conclusive. In the first place, it would involve the assimilation of the penal laws of all countries, without respect to their social conditions.² If this were not done, we should be reduced to one of two alternatives, neither of which would be desirable. The punishing state would either be required to administer, in respect to the offence proved, the penalty of the country within whose limits the crime was committed; or else, in affixing its own penalty, would subject the offender to a dual penal liability. The first alternative, which has been adopted in several codes, violates the principle that one state will not enforce the penal laws and judgments of another state.³ The second alternative would involve a great hardship to the criminal. The answer from motives of convenience is equally forcible. It is upon the spot where the crime is committed that it can best be tried and punished. There are the witnesses, and there can the circumstances be most accurately ascertained and considered. The transportation of witnesses to a distant place would not only be attended with great expense, but also might be impracticable. Besides, it

¹ {The following footnotes are to the text of the author quoted:

¹ Cours de droit public, t. ii. §12.

² "The conception of an abstract law, generally applicable in all places, can only be an ideal towards which we can tend, without flattering ourselves that we shall ever completely attain it." M. Brocher, *Inst. de droit int.*, 1879-80, t. i. p. 53.

³ Foelix, *Droit int, privé*. t. ii. tit. ix. ch. 4.]

is at the place where the offence was committed that the greatest interest is felt in its detection and punishment, and the moral effect of retribution most necessary and useful.¹ And it is there tried according to the law which was of paramount obligation at the time of its commission.²

Another measure which has been suggested as a substitute for extradition is expulsion. But the inefficiency of this remedy is obvious. While it rids the country of refuge of undesirable inhabitants, it affords little satisfaction to the laws which they have violated.³ It may well be employed in cases not affording ground for extradition, as in that of political offenders who by their acts violate the neutrality of the state of refuge, or whose presence is inconvenient.⁴ . . . But expulsion in the main conserves only the interests of the state to which the criminal flees.⁵ It does not meet the ends of justice. In extradition alone is found a complete remedy for the evils in which it has its justification. (Moore, *Extradition* (1891), §§3 and 4, pp. 7-9. See also the excellent statement in Moore's *Report* of the same year.)

The extradition of a fugitive from justice signifies that the State within whose domain he is found, believes it to be preferable that he should be prosecuted by the country where the offense was committed than remain unpunished or even be prosecuted under the laws of the place of asylum. . . . Such preference on the part of the State of asylum always indicates that it regards with respect the administration of justice of the country demanding the fugitive, and also that it itself denounces as illegal and punishable the commission within its own domain of acts such as are laid at the door of the fugitive. (Hyde, *International Law* (1922), §310, p. 567.)

It became evident that states must either find a way to administer the penal law of other states, develop a cosmopolitan system of criminal jurisprudence or provide for the surrender of fugitives. The first alternative presented the gravest practical difficulties; the second was obviously utopian; the third was developed extensively through the conclusion of bilateral treaties. (Dickinson, "Extradition" in *Encyclopedia of the Social Sciences* (1931).)

So strictly is the independence and sovereignty of states interpreted that not even the repression of the most outrageous crimes will warrant the exercise by one state of the slightest act of jurisdictional authority within the territory of another state. Under these circumstances a mutual interest in the maintenance of law and order and the administration of justice has led nations to coöperate with one another by surrendering fugitive criminals to the state in which the crime was committed. (Fenwick, *International Law* (1934), p. 237.)

[The following footnotes are to the text of the author quoted:]

¹ Lewis, *Foreign Jurisdiction and the Extradition of Criminals*, p. 29 et seq.

² The superiority of the territorial competence over every other is now universally accepted. See Report on Extraterritorial Crime and the Cutting Case, by the writer of this work. Washington, Government Printing Office, 1887.

³ In 1889 the government of General Légitime at Port-au-Prince, Hayti, published a decree (*Le Moniteur*, May 2, 1889) stating that it had been decided to expel from the territory of the republic all foreigners condemned in their own country to afflictive and infamous punishments. The Minister for Foreign Affairs was directed to obtain information from the ministers, chargés d'affaires, and consuls of the various powers represented in Hayti, to the end that the decision might be given effect.

In Gachard's *Analectes historiques*, vol. i, p. 380, there is an interesting circular letter of the Duke of Alva to the tribunals of justice and governors of provinces of the Netherlands, touching the measures to be taken against vagabonds, fugitives, and other bad fellows: November 27, 1571.

⁴ Bluntschli, *Le Droit int. cod.*, §394; 2d ed., Paris, 1874. Lewis, *Foreign Jurisdiction and the Extradition of Criminals*, pp. 68-72. 2 Rev. de droit int. (1870), p. 191, article by Dr. Christian Neumann. Heffter, Bergson's ed., §63. Decree of Minister of Interior, *Le Moniteur*, Port-au-Prince, May 2, 1889. Taney, Ch. Jus., in *Holmes v. Jennison*, 14 Pet. 540, 568.

⁵ Bomhoy & Gilbrin, *Traité pratique de l'extradition*, p. 8.]

THE PAST DEVELOPMENT OF EXTRADITION

EXTRADITION BEFORE AND DURING THE NINETEENTH CENTURY

Though Grotius¹ took the view that extradition is a duty imposed by international law, and was supported by Vattel² and Kent³, the general opinion and practice of nations is quite the contrary, and the right of States to grant asylum is thoroughly established today.⁴ All periods of history, however, afford examples of surrender of refugees as a matter of courtesy or of subservience on the part of one sovereign towards another, and extradition in the absence of treaty is practiced today by some States, though usually under regulation of municipal statutes.^{5a} On the other hand we find a few examples of early treaties for such surrender, such as one between France and Savoy in 1376, and between France and Austria and Spain in 1612.⁵ France took the lead in the development of extradition in the 18th century by entering into arrangements with all her immediate neighbors except England: the Low Countries in 1746, Wurtemberg in 1759, Spain in 1765, Switzerland in 1777, and Portugal in 1783.⁶ France maintained her leadership in this field during two thirds of the 19th century, and in 1868 it appeared that she had 53 treaties of extradition, while England had only 3 and the United States 13.⁷ She also developed early a well regulated set of rules for the conduct of extradition proceedings, embodied in a *Circulaire du Ministre de Justice du 5 Septembre 1841 relatant les Principes de la Matière de l'Extradition*,⁸ though she was to wait until 1927 for a comprehensive statute on the subject.

Though the United States and England provided in the Jay Treaty for the surrender of those charged with murder or forgery, this treaty was never an effective instrument of extradition and expired in 1807.

The Treaty of Amiens of 1802, between France, Spain, Holland and Great

¹ Grotius, *De Jure Belli ac Pacis* (The Classics of International Law, 1925), Vol. II, Bk. II, ch. 21, p. 527.

² Vattel, *The Law of Nations* (1760), Vol. I, Bk. II, §76, p. 145.

³ Kent, *Commentaries on American Law* (1896), Vol. I, pp. 47-50.

⁴ Wheaton, *Elements of International Law* (6th Eng. ed., 1929), p. 212; Bluntschli, *Le droit international codifié* (Fr. ed. 1870) §§. 395, p. 218; Oppenheim, *International Law* (4th ed., 1928), Vol. I, p. 565; Hyde, *International Law* (1922), §310, pp. 566-568; Moore, *Extradition* (1891), §§9-14, pp. 13-19; Clarke, *Extradition* (4th ed., 1903), p. 3, note b. It is generally agreed in the United States that there is no power to extradite without authority by treaty or statute. Moore, *op. cit.*, §§16-27, pp. 21-35.

^{5a} Moore, *Extradition* (1891), I, §§70 and 71, pp. 79 to 82, and §§452 to 515, pp. 697 to 816; Hyde, *International Law* (1922), I, §312, p. 569; Biron & Chalmers, *Extradition* (1903), p. 14. See the national statutes in Appendix VI.

⁵ Billot, *Traité de l'Extradition* (1874), pp. 35 to 37; Bonafos, *D'Extradition* (1866), pp. 7-15; Aupècle, *L'Extradition et la Loi du 10 Mars 1927* (1927), pp. 11 ff; Clarke, *Extradition* (4th ed., 1903), pp. 16-26. Cf. Phillipson, *International Law and Custom of Ancient Greece and Rome*, (1911), Vol. I, p. 358 *et seq.*

⁶ Billot, *op. cit.*, pp. 37 to 46; Aupècle, *op. cit.*, p. 10; Moore, *op. cit.*, §7, pp. 10 and 11; Moore, *Principles of American Diplomacy* (1918), pp. 424, 425.

⁷ Report from Select Committee [of the House of Commons] on *Extradition* (1868), p. viii and par. 432, p. 24.

⁸ *Loc. cit.*, pp. 146-148; Billot, *op. cit.*, p. 415.

Britain, is important historically because it contained an article providing for extradition between the parties of persons accused of murder, forgery and fraudulent bankruptcy,¹ and particularly because one of the contracting parties was Great Britain, whose government up to this time had refused to join in the movement on the Continent for extradition, which was led by France. Unfortunately the resumption of war prevented the coming into effect of the extradition provisions of the treaty.² The Webster-Ashburton Treaty of 1842 marked the beginning of the activity of the United States and Great Britain in this field. There was, however, a rapid spread of extradition treaties during the next forty years, stimulated by the development of means of transportation and communication, which, as pointed out above, accentuated the necessity of concerted action in the suppression of crime, though extensive participation by Great Britain did not occur until after 1870.³

MOVEMENTS OF POPULATION AND "RIGHT OF ASYLUM"

The doctrine of "right of asylum" and the changing views with regard to it have played an important part in the practices with regard to immigration and with regard to extradition (as well as raising problems where fugitives seek protection in foreign legations or on foreign vessels) and has been the subject of much debate.^{4a} Widespread migration to the Western Hemisphere was stimulated in the 19th century by improvement in transportation, by the desire of the American Republics, both north and south, to increase their wealth by increasing their populations, and by encouragement given to emigration by the States of Europe.⁵

It was natural that unrestricted immigration should carry with it a large

¹"Art. 20. Il est convenu que les parties contractantes sur les réquisitions par elles faites respectivement ou par leur ministres et officiers dûment autorisés à cet effet, seront tenus de livrer en justice les personnes accusées de meurtre, de falsification ou banqueroute frauduleuse commis dans le juridiction de la partie requérante, pourvu que cela ne soit fait que lorsque évidence du crime sera si bien constatée que les lois du lieu où l'on décevra la personne ainsi accusée, auraient autorisé sa détention et sa traduction devant la justice au cas que le crime y eût été commis. Les frais de la prise de corps et de la traduction en justice seront à la charge de ceux qui feront la réquisition; bien entendu que cet article ne regarde en aucune manière les crimes de meurtre, falsification et banqueroute frauduleuse commis antérieurement à la conclusion du traité." (English translation in Appendix III, No. 1.) See Bernard, *Traité Théorique et Pratique de l'Extradition* (1890), Vol. I, pp. 415, 416.

² Clarke, *Extradition* (4th ed., 1903), p. 127.

³The United States had no extradition treaty before 1842 (except for a provision in the Jay Treaty from 1794 to 1807), but in 1868 it had 13 such treaties. *Report from the Select Committee [of the House of Commons] on Extradition* (1868), par. 432, p. 24; and by 1880 it had entered into 25, Moore, *Extradition* (1891), pp. 1060-1162, where the texts are set out. France concluded 12 extradition treaties between 1736 and 1838, while she entered into 41 such treaties between 1844 and 1860, *Report from Select Committee, ibid.*, p. 149, where a table of the treaties is given. Great Britain had extradition treaties with the United States (1842), France (1843), Denmark (1862), before 1870, but during the next decade she entered into eleven such treaties. Clarke, *op. cit.*, Appendix.

^{4a} See the full discussion in Bernard, *L'Extradition* (1890) vol. I.

⁵ During the brief period when immigration took on, at least in appearance, one of the characteristics of dispersion—that of being beneficial to all concerned,—an optimistic philosophy was developed, and many traditions and dogmas set up, parading under the guise of "liberality," humanitarianism, brotherhood, equality, and international good will,

movement of criminal elements, and that this movement should be stimulated by countries from which criminals emigrated. As early as the end of the 18th century complaint was made of the dumping of criminals upon our shores. Benjamin Franklin is said to have wondered what Europe would have thought if America, to rid itself of rattlesnakes, should have brought them all to France or England.¹ However, the feeling in favor of granting asylum to aliens generally was very widespread and was tenaciously held for many years.²

Though in 1856 a United States committee of inquiry reported that the exaggerated current of immigration had filled the cities of the country with immigrant paupers and criminals, that it constituted a danger to peace and the public morals and that immediate legislation was necessary³, it was not until 1875 that an Immigration Act was passed excluding alien convicts, other than those convicted of political offenses.⁴ President McKinley was assassinated in October, 1901, by Czolcosz, an alien anarchist. The re-

but in reality resting on the assured advantage of the receiving state. (Fairechild, *Immigration* (1925), p. 475.)

In 1812, when the political liberty of the Argentine was still menaced, that country published a decree assuring protection to all foreigners who came with the intention of establishing themselves at La Plata. On the fourth of September of the same year the president Rivadavia addressed his famous appeal to the immigrants of the whole world. In it he said that the young government offered its protection to people of all nations and to their families who desired to settle on the territory of the Republic and that it guaranteed them the exercise of all the rights of man in society with the single condition that they not disturb the public order and respect the laws of the country. (Varlez, *Les Migrations Internationales et leur Réglementation* (1929), p. 38.)

¹ Martitz, *Internationale Rechtschiffe in Strafsachen* (1888), p. 12 n.

² "It is holden and so it hath been resolved that divided kingdoms under several kings, in league one with another, are sanctuaries for servants or subjects flying for safety from one kingdom to another; and upon demand made by them, are not, by the laws and liberties of kingdoms, to be delivered." Coke's *Institutes* (1817), Vol. III, p. 180.

"It has been the glory of this country to afford asylum to the persecuted foreigner. That is a glory which I hope ever will belong to this country. That asylum, however, remember, amounts to this, that foreigners are at liberty to come to this country and to leave it at their own will and pleasure, and that they cannot be disturbed by the Government of this country as long as they obey our laws; and they are under the same laws as native-born subjects, and if they violate those laws they are liable to be prosecuted and punished in the same manner as native-born subjects." *Regina v. Bernard*, 8 State Trials, N. S., 887, 1055, 1061 (1858).

The protests of Jefferson and Madison against the Alien and Sedition Laws, in so far as they applied to aliens, were based on the supposition that there was a lack of constitutional power in Congress to enact laws restricting alien friends, and in the Presidential Message of Jefferson, of 1801, which marked the death of the Alien and Sedition Laws, we have the expression of early American sentiment with regard to asylum: "Shall we refuse the unhappy fugitives from distress that hospitality which the savages of the wilderness extended to our forefathers arriving in this land? Shall oppressed humanity find no asylum on this globe?" Kohler, "The Right of Asylum with Particular Reference to Aliens" (1917), 51 *American Law Review*, pp. 381, 382.

As late as 1884 the Democratic platform, upon which Cleveland was elected speaks of "the liberal principles embodied by Jefferson in the Declaration of Independence and sanctioned in the Constitution, which makes ours a land of liberty and the asylum of the oppressed of every nation," which "have ever been cardinal principles of the Democratic faith." (*Ibid.*)

³ Varlez, *Les Migrations Internationales et leur Réglementation* (1929), p. 54.

⁴ 18 United States Statutes at Large, p. 477. In 1882, provision was made for the return of alien convicts to the countries of their origin, and polygamists, prostitutes, diseased persons and the insane were added to those to be excluded, 22 United States Statutes at Large, p. 214.

sultant public feeling was sufficiently strong to further limit the asylum afforded to aliens in the United States by the exclusion of anarchists.¹ However, when a literacy test for immigrants was proposed in 1915, President Wilson vetoed the measure as "a radical departure from the traditional and long-established policy of the country."² Nevertheless, a similar bill was passed over the President's veto two years later.³ This new restriction was soon followed by the adoption of a quota system for immigrants.⁴ Thus we see that any privilege of asylum which may be enjoyed by aliens in the United States has been progressively restricted under the country's immigration laws, and is very different from what it was sixty years ago.

The interests of labor were very influential in bringing about this change of policy as to immigration, but the argument was often presented, by those desiring restrictive legislation, that immigration increased crime.⁵ The

¹ 32 U. S. Stats. at L., p. 1214 (1903). Speaking of the change of policy on immigration after 1875, it has been said:

"For many decades Americans have hesitated to lay an embargo upon this inspiring westward movement. It was our proudest boast—our highest ideal—that America was to be the haven of the world's oppressed. So long as we had free lands in the West, so long as each new immigrant added inevitably to the wealth of his neighbors, this ideal was rooted in the economic conditions. But in the course of time we deeded away the continent which was to have been the home of the oppressed, and, year by year, we found it more and more impossible to deflect the broader stream of immigration from the congested districts of our cities. To-day the ideal is in conflict with our economical and political conditions. Failing its economic root, the ideal has degenerated into a tradition. . . ." Weyl, *The New Democracy* (1912), p. 346.

² *Congressional Record*, 63rd Congress, 3rd Session, Vol. 52, Pt. 3, pp. 2481-2482.

³ 39 U. S. Stats. at L., p. 874 (1917).

⁴ 42 U. S. Stats. at L., p. 5 (1921).

⁵ On this point there is the report of the Immigration Commission made in 1908 after a careful study of the matter of crime among the immigrants, containing the following statement:

In response to the questions, "Is the volume of crime in the United States augmented by the presence among us of the immigrant and his offspring?" and "If immigration increases crime, what races are responsible for such increase?" the Commission says that no satisfactory answer has ever been made, or can ever be made, without much more complete data than have ever been collected or are available.

See also No. 10 of the Publications of the National Commission on Law Observance and enforcement (Wickersham Commission), entitled "Report on Crime and the Foreign Born" (1931).

In England, on the other hand, the reports of commissions of inquiry as to criminality and poverty among immigrants led directly to the passage of the Alien Act of 1905. (Monnier, *Les Indesirables* (1907), p. 65 *et seq.*) This bill excluded persons who were diseased or criminal, or likely to become public charges, but exempted those who could prove that they sought admission to avoid prosecution or punishment on religious or political grounds. (5 Ed. 7, ch. 13) The debates preceding the passage of this bill brought forth full discussion of the doctrine of "right of asylum" in England, which evidenced the hazy concepts on this subject of many of the members of the House of Commons:

Maj. EVANS GORDON: "Now what is this so-called right of asylum? As far as I understand it, it amounts to this, that this country has consistently refused to surrender persons who, having committed a political and non-extraditable offense abroad have sought a refuge here. But the right of asylum may be interpreted in a far wider sense. It may be said, that we are bound by some unwritten law to admit any one who states that he is persecuted in his own country. If that contention be accepted, then, there is an end to any restrictive legislation." *Parliamentary Debates*, 4th series, Vol. CXLV (1905), p. 711.

Mr. AKERS-DOUGLAS: "I was about to point out that there is no such thing as a 'right' of asylum, but the practice which has existed of welcoming foreigners who were flying from political or religious prosecution in their own lands." *Ibid.*, p. 751.

earlier attitude towards the granting of asylum to aliens certainly had its effect in retarding the development of extradition. It is known that in 1805 Russia refused an extradition treaty with Austria so as not to lose the immigration of Austrian peasants she was enjoying at that time.¹ After the French Revolution, the French Assembly demanded that no surrender be made for political offenses,² and since 1833 the French practice has been consistent on this point.³ France was the first to free herself from the confusion inherent in the loose use of the term "right of asylum," which led to the acceptance and protection of all kinds of aliens, including those accused of common crimes. Therefore it was France, as we have seen, which took the lead in the negotiation of extradition treaties at the end of the 18th century and during the first half of the 19th. In the United States and Great Britain the broader and less well defined idea of right of asylum, which so long prevented legislation in the United States and restricting immigration, unquestionably played an important part in delaying the participation of those States in the more orderly and effective control of crime by participation in treaties for extradition. Moore says: "The extradition article in the Webster-Ashburton treaty between the United States and Great Britain of August 9, 1842, awoke violent opposition in the United States, and on January 30, 1844, Mr. Benton offered in the Senate a resolution for its immediate termination;"⁴ and "even where treaties of extradition existed, the prejudice against surrender was formerly so great as often effectually to obstruct their execution. The treaty between France and Great Britain of February 13, 1843, was never executed, although it was little more than a rescript of Article 20 of the Treaty of Amiens, between France, Spain, Holland and Great Britain, signed March 2, 1802."⁵ In 1868 the following statements were made to a British Parliamentary Committee considering extradition by a representative of the Foreign Office: "It was of no use signing a treaty if Parliament was to throw out the Bill enabling it to be

Mr. A. J. BALFOUR: "What was understood by the right of asylum in the old days was this. We supposed ourselves, and with considerable reason, to be the best governed country in Europe. We were aware that there were a great number of countries where tyranny prevailed and where it produced, as a natural consequence, conspiracies and in many cases armed rebellion; and we prided ourselves upon giving an asylum to the protagonists in a cause which we regarded as, with some exceptions, the cause of freedom." *Ibid.*, p. 799.

¹ Lammaseh, *Auslieferungsrecht u. Asyl.* (1887), p. 6 n.

² Aupèele, *L'Extradition et le Loi du 10 Mars 1927* (1927), p. 16.

³ Billot, *Traité de l'Extradition* (1874), pp. 109-112; M. Treitt evidence in *Report from Select Committee [of the House of Commons] on Extradition* (1868), pars. 1294-1298, pp. 67 and 68; *Circulaire du Ministre de la Justice du 5 Sept. 1841*, *loc. cit.*, p. 146, and Billot, *op. cit.*, p. 415.

⁴ Moore, *Extradition* (1891), §8, p. 12, citing Senate Documents, 28th Congress, 1st Session, Vol. III, p. [125] 1843-44. It should be remembered, however, that Jefferson, though a strong believer in the right of asylum as it affected immigration, nevertheless believed in extradition of criminals and wrote an interesting opinion for Washington in 1791-2, refusing to follow British precedents and advising the negotiation of extradition treaties. Kohler, "Right of Asylum with Particular Reference to Aliens," 51 *American Law Review* (1917), p. 405.

⁵ Moore, *op. cit.*, §8, p. 12.

brought into operation.”¹ “. . . we have considered it of late perfectly useless to go to Parliament for an Act because there was so much jealousy upon the subject.”² But, with regard to extradition, as with regard to immigration, the doctrine of asylum has finally lost its wider meaning of earlier days, and is no longer applied to those accused or convicted of common crimes, but generally only to those who have committed political or military offenses.³

EXTRADITION STATUTES

Municipal laws supplementing extradition treaties had their inception in Belgium in 1833.⁴ In the United States, treaties which are self-executing in form become part of the law,⁵ but it has been found convenient to enact legislation to implement extradition treaties.⁶ In Great Britain, treaties are not law, and extradition treaties require Parliamentary legislation to make them effective. At first this was accomplished by passing a statute to give effect to each treaty, but in 1870 a general extradition act was passed which, by an Order in Council, is made to apply to each treaty as it is entered into.⁷ In France, extradition treaties were given effect without legislation until 1927.⁸ Now statutes are often drafted to operate in the absence of treaties,⁹ though this is not true of the United States or Great Britain.

Statutory provisions have proved important in this study, and the Research in International Law is greatly indebted to the State Department of the United States for its generous assistance in the collection of the national extradition laws, a number of which appear in the Appendix to the Convention.

¹ *Report from Select Committee [of the House of Commons] on Extradition* (1868), par. 161, p. 9.

² *Ibid.*, par. 160, p. 9.

³ Moore, *op. cit.*, §§205-207, pp. 303-307; Oppenheim, *International Law* (4th ed., 1928), §331, p. 571. See Comment to Articles 5, 6 and 25, Reservation No. 1, of this Convention.

⁴ *Loi sur les Extraditions*, 1^{er} Octobre, 1833, *Bulletin Officiel*, No. 77. See Martitz, *Internationale Rechtschilfe* (1897), II, pp. 747 to 818 for history of such laws.

⁵ United States Constitution, Art. VI.

⁶ See Appendix VI, No. 15.

⁷ Clarke, *Extradition* (4th ed., 1903), ch. V, pp. 121-207; Piggott, *Extradition* (1910), pp. 29-42. Appendix VI, No. 8.

⁸ Travers, *L'Entr'aide Répressive Internationale et la Loi Française du 10 Mars 1927* (1928), §13, p. 14. See the *Circulaire du Ministre de la Justice du 5 Sept. 1841*, *loc. cit.*, pp. 146-148, and in Billot, *Traité de l'Extradition*, p. 415, which took the place of statutory direction to French officials. For present French Statute see Appendix VI, No. 6.

⁹ Canadian Extradition Law of 1927, Appendix VI, No. 4. Moore, *Extradition* (1891), §449, pp. 692-694; French law of 1927, see Appendix VI, No. 6, Travers, *op. cit.*; German law of 1929 (see Appendix VI, No. 7).

Mr. Hammond, representing the Foreign Office, urged in 1868 that Parliament pass an extradition law “leaving it open to other States to agree to give up criminals to us, and to take the benefit of our law, and our definition of crime so far as they went, in order to obtain criminals from us,” and do away with extradition treaties. *Report from Select Committee*, *ibid.*, par. 185, p. 10. For many years it appears to have been an early practice with regard to the British Colonies for extradition to be arranged between them and other countries by local legislation, without treaty or act of Parliament. *Ibid.*, pars. 822-992, pp. 42-50.

A GENERAL EXTRADITION CONVENTION

PAST EFFORTS

For many years efforts have been made by scholars and jurists to supplement national laws and bipartite treaties by general acceptance of a uniform code of international law on extradition, or by multipartite conventions to be adhered to by all States, or by territorial groups of States. The Treaty of Amiens¹ in 1802 must be considered the mother of all multipartite conventions on extradition, though the renewal of war prevented its extradition article being put into operation. One of the earliest attempts to draft a general regulation of extradition was that of David Dudley Field in 1878. In his *Outlines of an International Code* he briefly covered the question of extradition.² This was followed in 1880 by the famous Resolutions of Oxford,³ adopted by the *Institut de Droit International*. At Geneva in 1890,⁴ and at Paris in 1894,⁵ these resolutions were slightly amended. A multipartite convention on international penal law, which also dealt with extradition, was concluded between Brazil, Chili, Bolivia, Paraguay and Peru in 1889,⁶ and an extradition treaty between the United States and eleven other American States was signed in 1902, but was not ratified.⁷ An Extradition Convention between Costa Rica, Guatemala, Honduras, Nicaragua and Salvador was adopted as part of the program of the Central American Peace Conference of 1907.⁸ In 1912, an International Commission of Jurists drafted a Project for an American Extradition Convention at Rio de Janeiro.⁹ A second extradition convention was signed by the Central American States in 1923 and went into effect the next year.¹⁰ In 1926 a multipartite convention in the field was proposed for deliberation by the International Law Association (French branch).¹¹ In 1927 a commission drafted for the consideration of the Sixth International Conference of American States, a Project of a General Convention of Private International Law, Book 3 of which—Penal International Law—included a title dealing with extradition,¹² which, with only slight alterations, was adopted by the conference in 1928, and is known as the Bustamante Code.¹³ Also in 1928 the

¹ See Appendix III, No. 1.

² (2d ed., 1876), §§210–246, pp. 90–127. See Appendix IV, No. 1.

³ 8 *Annuaire de l'Institut de droit International* (1885–86), p. 129 *et seq.*; Appendix IV, No. 2.

⁴ 11 *Ibid.* (1889–92), p. 172 *et seq.*

⁵ 13 *Ibid.* (1894–95), p. 333 *et seq.*

⁶ See Appendix III, No. 2.

⁷ Scott, *The International Conference of American States* (1931), pp. 83–88; Appendix III, No. 2.

⁸ *American Journal of International Law, Supplement*, Vol. 2 (1908), pp. 243–251.

⁹ Appendix IV, No. 3.

¹⁰ 2 Hudson *International Legislation*, pp. 955–960; *Conference on Central American Affairs* (Washington, 1923), p. 354; 3 *Revista de Derecho Internacional* (1923), p. 131. This has been replaced by a new convention of 1934 (see Appendix III, No. 7).

¹¹ International Law Association, *Rapport sur la réunion de Vienne de 1926*, p. 441.

¹² *American Journal of International Law, Special Supplement*, Vol. 22 (1928), p. 314.

¹³ 4 Hudson, *International Legislation*, pp. 2330–2335. See Appendix III, No. 5.

International Law Association approved a Draft Convention dealing with Extradition.¹ In 1931 a subcommission of the International Penal and Prison Commission prepared a Model Draft of an Extradition Treaty.² The Seventh International Conference of American States, held at Montevideo in 1933, approved a Convention on Extradition.³ In 1934 the Central American States revised their Extradition Convention of 1923.⁴ Notwithstanding this persistent movement towards a more general regulation of extradition than is possible through bipartite treaties and national legislation, it appears that only four multipartite extradition conventions are in force at the present time, namely, the treaty of 1889 between Argentine, Paraguay, Uruguay, Bolivia and Peru,⁵ the treaty of 1911 between Ecuador, Peru, Colombia, Bolivia and Venezuela,⁶ the Central American Convention of 1934,⁷ and the Bustamante Code of 1928.⁸ The Convention of Montevideo⁹ was ratified by the United States, June 29, 1934, but no other ratification has as yet been deposited. This situation is evidence not only of the difficulties which face any multipartite convention, because of the various national interests and points of view to be reconciled, but of certain special difficulties which are inherent in the subject of extradition.

REPORT OF COMMITTEE OF EXPERTS

The Committee of Experts for the Progressive Codification of International Law, created as the result of the action of the Assembly of the League of Nations of September 22, 1924, appointed a subcommittee consisting of Mr. Brierly, as *Rapporteur*, and M. De Visscher, to consider and report on the subject of extradition. On January 29, 1926, the Committee of Experts adopted the following report:¹⁰

After a close study of the report drawn up by Mr. Brierly and the observations thereon submitted by M. De Visscher, the Committee considered that certain questions connected with extradition were susceptible of being dealt with by way of a general international convention. These questions are the following:

1. The question whether and in what conditions a third State ought to allow a person who is being extradited to be transported across its territory.
2. The question which of two States both seeking extradition of the same person from a third State ought to have priority over the other.
3. The questions which arise as to the extent of the restrictions on the right of trying an extradited person for an offence other than that

¹ *Report of the 35th Conference* (1928), pp. 324-329; 14 *Transactions of the Grotius Society* (1929), pp. 108-112. See Appendix IV, No. 5.

² *Recueil de Documents en Matière Pénale et Penitentiaire*, Vol. I, p. 478 et seq. See Appendix IV, No. 6.

³ See Appendix III, No. 6.

⁴ *Ibid.*, No. 7.

⁵ *Ibid.*, No. 2.

⁶ *Ibid.*, No. 4.

⁷ *Ibid.*, No. 7.

⁸ *Ibid.*, No. 5. As to ratification see Editor's Note in 4 Hudson, *International Legislation*, p. 2279.

⁹ *Ibid.*, No. 6; also United States Statutes at Large,

¹⁰ *League of Nations Document*, C. 51. M. 28. 1926. V; *American Journal of International Law, Special Supplement*, Vol. 20 (1926), pp. 243-251.

for which he was extradited and on a State's right to extradite to a third State a person who has been delivered to it by way of extradition.

4. The question as to the right of adjourning extradition when the person in question has been charged or convicted, in the country where he is, for another crime.

5. The question of confirming the generally recognized rule by which the expenses of extradition should be entirely borne by the claimant State.

The discussion in the Committee of the other questions mentioned in the report led it to the conclusion that, although their solution by international agreement appeared very desirable, the difficulties in the way were too great for such solution to be realizable in the near future.

In these circumstances, and in view of the predominant importance of the last-mentioned questions, the Committee, while taking into full account the reasons which in the opinion of many important authorities tell in favour of a general international regulation of extradition, has refrained from including in its provisional list even the questions which in themselves were found susceptible of being treated in a convention.

On the other hand, the Committee decided to communicate to the Governments Mr. Briery's report and the attached observations of M. De Visscher in order to enable them to profit by the light thrown on the matter in these documents and to form a clearer view of the position.

It is of course true that divergent systems of criminal administration, and different points of view on such questions as the extradition of nationals, the evidence of guilt required to support extradition, and the relative positions of the executive and judicial organs of government in extradition proceedings, create difficulties which must be carefully considered in connection with the drafting of a multipartite convention in this field.

A convention in this field might deal only with those points in extradition proceedings considered ripe by the Committee of Experts. Something, to be sure, but not very much would be accomplished in this way. Multiple requisitions are discussed by writers and very often covered by existing treaty and statute provisions, but they seldom turn up in practice. As suggested by the Experts, the rule is now generally recognized that the requesting State defrays the expenses of extradition; and transit across the territory of a third State occasions no substantial difficulty today. "The questions which arise as to the extent of the restrictions on the right of trying an extradited person for an offense other than that for which he was extradited and on a State's right to extradite to a third State a person who has been delivered to it by way of extradition," are of real importance, but there is now substantial uniformity of practice against allowing such further trial or extradition, at least without the consent of the requested State. One also finds general support for the view that a State which has obtained personal jurisdiction of a person, and has convicted or started to try him for an offense under its laws, has a claim on him which should be considered superior to that of another State which by extradition proceedings is seeking to gain personal jurisdiction of him. A convention which confined itself to the

subjects suggested by the Experts, while it might be more readily adopted than one which ranged over to more fundamental problems of extradition, would be fragmentary, and would not advance us far towards the most desirable goal of a uniform law of extradition.¹

POSSIBILITY OF DRAFTING FOR LIMITED GROUP OF STATES

In drafting a comprehensive convention on extradition, it would be possible to attempt only the framing of one for a named group of States which are already bound together by an extensive network of bipartite treaties on this subject. Such are those, referred to above, which have been drafted for varying numbers of American States. Another possibility would be to plan for limited acceptance by any signatory power, *vis-à-vis* a group of States which should be named. However, such limited acceptances would cause ill-feeling; and a convention drawn for a limited group of States, or drawn in a form to encourage limited acceptances *vis-à-vis* certain States, would at once militate against the effort against organized crime.

THIS DRAFT IS FOR GENERAL ACCEPTANCE WITH POSSIBLE RESERVATIONS

A third possibility, which has formed the basis of the present drafting, is to provide for possible reservations (Article 24), which may be made at the time of signing or ratification with regard to points on which there is sharp divergence of views at the present time, such as extradition of nationals, the *prima facie* case as a prerequisite to extradition, non-extradition for fiscal offenses, and non-imposition of the death penalty. On these points it is believed that the better rule, from the point of view of the community of nations as a whole, has been incorporated in the main body of the Convention, but it is understood that some States may not, at the present time, be prepared, in one case or another, to accept such rule. For such States the reservations should make it possible to sign the Convention, and so allow them to participate in a universal convention on extradition. It is possible that such reservations, though made at the time of signature or accession, may later be withdrawn.

EFFECT OF THIS CONVENTION ON OTHER TREATIES

A State which signed and ratified an extradition convention, in the form proposed in this draft, would not by that act sweep away such provisions of its existing bipartite treaties with other parties to the Convention as cover situations not covered by provisions in the Convention, nor would signature and ratification of a general convention prevent a State from entering into

¹ "What is required nowadays, and what will certainly be realized in the near future, is a universal treaty of extradition—one single treaty to which all the civilized States become parties." (Oppenheim, *International Law* (McNair, 4th ed., 1928), §328, p. 567.)

"Le Congrès considère comme hautement désirable, pour assurer une répression efficace de la criminalité, l'unification internationale des règles sur l'extradition." (Resolution adopted by International Congress of Comparative Law, The Hague, 1932.)

future bipartite arrangements to meet special situations. (*See* Article 27 of this Convention.) However, general acceptance of a single extradition convention would very largely obviate the necessity for separate treaties on extradition, thus greatly simplifying the international relationships in this field.

JURISDICTION TO PUNISH FOR CRIME AND JUDICIAL ASSISTANCE NOT HERE
DEALT WITH

This Convention of course does not embody rules as to jurisdiction to punish for crime, as that subject is being dealt with in a separate draft convention. Also the Convention has not been drafted to cover the field of judicial assistance,¹ it being felt that this field deserves a separate convention. However, this Convention does include provisions for the surrender of property with a person claimed—provisions which are usual in connection with extradition and which are convenient.

¹ See, for typical provisions, Appendix V, Nos. 3, 5, 6 and 8.

EXTRADITION

PART I. USE OF TERMS

ARTICLE 1. USE OF TERMS

As the terms are used in this Convention:

COMMENT

There is no attempt in the following paragraphs of this article to define the terms there set out. It is considered desirable, however, to state at the outset the sense in which certain terms will be used throughout this Convention.

As the term is used in this Convention:

(a) "Extradition" is the formal surrender of a person by a State to another State for prosecution or punishment for a crime.

COMMENT

The word "extradition" is relatively new. It seems to have appeared first in an official document in a French decree of February 19, 1791, and to have been used for the first time in a treaty by France in 1828. Before that date either the expression *restituer* or *remettre* had been used.¹ In the Treaty of Amiens of 1802,² the contracting parties were declared bound to deliver up to justice the persons accused. However, the word extradition having once been introduced, came rapidly into general use. It is often employed in a broad sense to cover the whole process of the application for delivery of a person, and all action resulting from such application, but its precise meaning is accepted as directed to the act of surrender.

OPINIONS

L'extradition est l'acte par lequel un État livre un individu, accusé ou reconnu coupable d'une infraction commise hors de son territoire, à un autre État qui le réclame et qui est compétent pour le juger et le punir.

. . . Dans la langue du droit international moderne, le mot "extradition" reçoit souvent un sens plus large: il désigne le contrat même, qui a pour objet la remise de l'individu réclaté. C'est dans cette acception que l'expression est prise, lorsqu'on parle de la "théorie de l'extradition", du "droit d'extradition". (Billot, *Traité de l'Extradition* (1874), pp. 1 and 2.)

. . . extradition may be defined as the delivery by a state of a person accused or convicted of a crime, to another state within whose territorial jurisdiction, actual or constructive, it was committed, and which asks for his

¹ Billot, *Traité de l'Extradition* (1874), p. 34.

² Appendix III, No. 1.

surrender with a view to execute justice.¹ (Moore, *Extradition* (1891), §1, p. 4, with citations.)

The surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him demands the surrender. (Hyde, *International Law* (1922), p. 566, quoting C. J. Fuller in *Terlinden v. Ames*, 184 United States Reports, 270.)

Extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of, a crime, by the State on whose territory the alleged criminal happens for the time to be. (Oppenheim, *International Law* (4th ed. by McNair, 1928), p. 565.)

The extradition article (Art. 20) of the Treaty of Amiens of 1802² applied only to accused persons. This limitation was followed in the treaties between the United States and Great Britain of 1842,³ between the United States and France of 1843,⁴ and between France and Great Britain of 1843.⁵ France began the inclusion of convicted persons in 1844 in her treaty with Baden,⁶ as did Great Britain in 1873 in her treaty with Denmark,⁷ followed by the Extradition Statute of 1870,⁸ and the United States in 1868 in her treaty with Italy.⁹ Such inclusion is now general.

As the term is used in this Convention:

(b) A "State" is a member of the community of nations.

COMMENT

The statement in this paragraph is the same as that used in the Draft Conventions on Diplomatic Privileges and Immunities (Art. I, par. (a)) and on Competence of Courts in Regard to Foreign States (Art. I, par. (a)), published by the Research in International Law, though in the text of each of those Conventions the statement is somewhat amplified to meet the special situations there involved.

There seems no advantage in attempting here a definition of the classes of entities which are recognized as being members of the community of nations. Only entities generally recognized as having that status will become parties to such a convention as is envisaged by this draft, or will fall within the meaning of the term "State" as it is here used. No effort has been made to distinguish between the State and its government, as the act of a government is the act of the State for all purposes of this Convention.

¹ But Moore says a little later: "Thus the act of extradition assumes the form of a contract; the two States being the parties, the delivery of the criminal the subject matter, and the repression of crime, undertaken by the demanding State, the consideration." (Moore *Extradition* (1891), §2, p. 4.)

² Appendix III, No. 1.

³ Malloy, *Treaties, Conventions, etc.*, Vol. I, p. 655.

⁴ *Ibid.*, p. 527.

⁵ Martens, *Nouveau Recueil Général de Traité*s (1847), T. 5, p. 20.

⁶ *Ibid.* (1850), T. 7, p. 125.

⁷ *Ibid.* (1876), 2d series, T. 1, p. 297.

⁸ See Appendix VI, No. 8.

⁹ Moore, *Extradition* (1891), p. 1104.

As the terms are used in this Convention:

(c) A "requesting State" is a State which requests of another State the extradition of a person, or the provisional arrest of a person with a view to extradition, or the delivery of property.

(d) A "requested State" is a State of which the extradition of a person, or the provisional arrest of a person with a view to extradition, or the delivery of property, is requested by another State.

COMMENT

It must be admitted that in English the terms most used up to the present time are "demanding" State¹ and State "of refuge."² Nevertheless, requesting State and requested State seem preferable. It is a "requisition" which is sent when extradition is desired; requested and requesting have the advantage of uniformity of word stem as between themselves and also with relation to requisition. The idea of requesting extradition is more consonant with the actual attitude taken by the State desiring a person for trial than is the idea of demanding extradition. The person claimed may not have taken refuge in the territory of the State to which a requisition is addressed, but such a State may always be described correctly as a requested State. Requesting State and requested State, when translated into French become *l'état requérant* and *l'état requis*, terms which are most commonly used by French authors and in treaties and statutes couched in French.³

As this Convention has been framed to cover delivery of property under certain circumstances (Article 25), it is believed that the description of a requesting State should include a State which seeks to have articles of property delivered, and that the description of a requested State should include a State from which the delivery of property is sought.

As the term is used in this Convention:

(e) A State's "territory" comprises its land and territorial waters, and the air above its land and territorial waters.

¹ Field's *International Code*, Appendix IV, No. 1; Moore, *Extradition* (1891); Hyde, *International Law* (1922); Pan American Convention of 1902, Appendix III, No. 3; Rio de Janeiro Draft of 1912, Appendix IV, No. 3; Montevideo Convention of 1933, Appendix III, No. 6. Other terms used are State "making application" (United States-British Treaty of 1932, Appendix V, No. 1; Draft of International Penal and Prison Commission of 1931, Appendix IV, No. 6); State "seeking extradition" (Central American Convention of 1934, Appendix III, No. 7).

² Moore, *Extradition* (1891); Hyde, *International Law* (1922); Pan American Convention of 1902, Appendix III, No. 3; Rio de Janeiro Draft of 1912, Appendix IV, No. 3; Central American Convention of 1934, Appendix III, No. 7.

³ E.g., Billot, *Traité de l'Extradition*; Resolutions of Oxford, Appendix IV, No. 2; International Congress of Comparative Law of 1932; Treaty Between France and Poland of 1925, 95 *L.N.T.S.*, 217; French Extradition Law of 1927, Appendix VI, No. 6; Swiss Federal Extradition Law of 1892, Appendix VI, No. 13.

The Montevideo Convention of 1933, Appendix III, No. 6, occasionally speaks of a "requesting State," though more frequently using the term demanding State. The Bustamante Code (1928), Appendix III, No. 5, several times uses "requesting State" and "requested State," though it is not consistent in such use.

COMMENT

It is a self-evident proposition that the land over which a State is sovereign is its territory.

The sovereign right of a State over a marginal strip of sea, known as its territorial waters, is now accepted, and it is therefore correct and convenient, for the purposes of this Convention, to include the territorial waters of a State under the term "territory."¹

Notwithstanding proposals advanced for complete freedom of the air comparable to freedom of the sea, or for a recognition of sovereignty in the air, limited to a height to which control may be exercised by anti-aircraft guns, similar to a marginal strip of territorial waters on the seacoast, considerations of national safety have led to general recognition of complete sovereignty in air superjacent to territorial land and water.² Therefore such air is here included within a State's "territory."

This section of the Convention by its terms obviously includes in a State's territory the territory within its colonial possessions—*i.e.*, all territory which belongs to it in the sense that it there wields sovereign power. For instance, in the case of the United States, its territory includes both Alaska and the Philippine Islands, though for certain constitutional purposes one is held to be "incorporated" and the other "unincorporated" territory.³ However,

¹ Draft of Convention on Territorial Waters, Research in International Law (1929), pp. 288-295.

² McNair, *The Law of the Air* (1932), pp. 87, 94; M. O. Hudson, "Aviation and International Law", 24 *American Journal of International Law* (1930), pp. 228, 238; Hazeltine, *Law of the Air* (1911), pp. 40-46; Wilson, *International Law* (2d ed., 1927), p. 116; Clunet, "*Le Surval et l'Atterissage en Territoire Étranger dans l'État Actuel du Droit Aérien Positif*", 48 *Journal du Droit International* (1921), p. 846.

The Convention for Regulation of Aerial Navigation, 1919, 11 *L.N.T.S.*, 173, Art. 1, provides: "The High Contracting Parties recognize that every power has complete and exclusive sovereignty over the air space above its territory."

The American Uniform State Law for Aeronautics (adopted in 20 States of the United States), Art. 7, declares: "All crimes, torts and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State."

The United States Air Commerce Act of 1926, 44 Stats. 572, provides: Sec. 6(a) "The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the air space over the lands and waters of the United States, including the Canal Zone."

³ In the treaty between Italy and Venezuela of 1930, Art. 22 (Appendix I, No. 67), reference is made to "all territory under the sovereignty" of the parties.

The treaty between France and Latvia of 1924, Art. 1 (Appendix I, No. 29), speaks of crimes committed "in the home territory, or in the territory of the colonies and possessions, or within the area of the consular jurisdiction of either party."

In the treaty between France and San Marino of 1926, Art. 1 (Appendix I, No. 43), territory of France is defined as "France herself, her colonies and possessions and territory coming under the jurisdiction of her consular officers."

The following clause, used in several United States treaties, is common: "The stipulations of this treaty shall be applicable to all territory wherever situated, belonging to or in the occupancy or under the control of either of the High Contracting Parties during such occupancy or control." See United States-Siam, Art. 11, Appendix I, No. 7; United States-Venezuela, Art. 11, Appendix I, No. 13; United States-Latvia, Art. 11, Appendix I, No. 14; United States-Finland, Art. 11, Appendix I, No. 23; United States-Lithuania, Art. 1, Appendix I, No. 26; United States-Czechoslovakia, Art. 11, Appendix I, No. 31; United States-Poland, Art. 14, Appendix I, No. 57; United States-Austria, Art. 11, Appendix I, No. 71, and Appendix V, No. 2. And see United States-Germany, Art. 1, Appendix I, No. 70.

it is to be noted that by Article 27 a State may make a declaration excepting any colonies or overseas possessions from the scope of this Convention.

Mandatories are not sovereign in mandated territory¹ and treaties made by mandatories do not automatically extend to mandated areas.² However, the mandatory has control of the foreign relations of mandated territory³ and therefore can make treaties for it, subject only to control by the Council of the League of Nations;⁴ and it is the ordinary practice of Mandatories to provide for the application to mandated territories of treaties of a general character.⁵ The need for extradition treaties on behalf of mandated territories seems to have been particularly in the minds of those setting up the Mandates,⁶ and it appears "that extradition treaties of a Mandatory are now regularly extended to mandated territories."⁷ If a mandatory should sign the present Convention, and should fail to make a declaration, in accordance with the terms of Article 26, excluding mandated territory from the scope of this Convention, it would seem reasonable to conclude that the Convention had been signed on behalf of the mandated territory.⁸

In so far as mandated territory constitutes a State—*i.e.*, a member of the family of nations, though temporarily under tutelage, as is the case with the A Mandates—the territory within its borders should be viewed as the territory of such State, as the term "State's territory" is used in the present section of this Convention. In the case of B and C Mandates, however, where the mandated territories do not constitute States which are in any sense members of the family of nations, mandated territory should, for the purposes of this Convention, be considered part of the territory of the Mandatory State. This may become important in applying Article 3, as is pointed out in comment upon that article.

As the term is used in this Convention:

(f) A "person claimed" is a person whose extradition is requested.

¹ Wright, *Mandates Under the League of Nations* (1930), pp. 445–447; Bentwich, *The Mandates System* (1930), pp. 20, 105; Margalith, *The International Mandates* (1930), p. 177; Pelichet, *La Personnalité Internationale Distincte des Collectivités sous Mandat* (1932), pp. 81–109.

² Wright, *op. cit.*, p. 449; Bentwich, *op. cit.*, p. 105.

³ See for example the Mandate for Palestine and Transjordan, Art. 12, and Mandate for Syria and the Lebanon, Art. 3. (Wright, *op. cit.*, pp. 602 and 608.)

⁴ Wright, *op. cit.*, p. 450.

⁵ Bentwich, *op. cit.*, p. 105.

⁶ See, for example, Mandate for Palestine and Transjordan, Art. 10, Mandate for Syria and the Lebanon, Art. 7, Decision of the Council of the League of Nations with regard to Treaty between Great Britain and Iraq, Art. III (Wright, *op. cit.*, pp. 602, 609 and 594, respectively).

⁷ Bentwich, *The Mandates System* (1930), p. 105. In treaties made by Great Britain with Latvia (Appendix I, No. 20), Finland (Appendix I, No. 25), Estonia (Appendix I, No. 30), and Albania (Appendix I, No. 47) in Article 19, it is provided that the treaties can be extended by notes "to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by his Britannic Majesty," either for Great Britain or for the self-governing Dominions.

⁸ See *Annual Digest of Public International Law Cases*, 1923–24, p. 275, where it appears that an Italian court held that France as Mandatory for Syria and Lebanon could demand extradition from Italy of a person claimed to have committed an offense in the mandated territory.

COMMENT

This term is not new in English texts, for Field used it in 1876.¹ *L'individu réclamé* has been used quite uniformly for many years by French writers and in treaties and statutes where the official language is French,² and its general use is increasing,³ though drafters and text writers seldom use a single expression consistently, and a wide variety of terms may be found.⁴

The expression "person claimed" seems best for several reasons. It does not, as does the term "accused", appear to exclude a person convicted. Nor does it carry any implication of guilt as do such terms as "offender", "delinquent", and "criminal". It becomes clear that the person sought is none of these, if in the trial following his extradition he is acquitted. The term "fugitive" may be equally misleading, for again, the person wanted may prove to be innocent, or in fact he may not have fled to the requested State. In England the use of the term "fugitive criminal" led to the case of *Rex v. Godfrey* [1923], 1 Kings Bench Reports 24, wherein it was held that a person, alleged to have committed a crime in a foreign country, which country seeks his extradition from England, need not have been physically present in the requesting State at the time of the alleged offense in order that he may qualify as a "fugitive criminal" within the meaning of Section 26 of the Extradition Act of 1870. The expression "person claimed" obviates the need of such interpretation. Finally, it is essentially the same as the standard French term "*l'individu réclamé*".

The term "person claimed" has been used throughout this Convention until such person has actually been handed over to the requesting State, after which he is referred to as a person who has been extradited.

As the term is used in this Convention:

(g) A "requisition" is a formal request for extradition.

¹ Field's *International Code*, Appendix IV, No. 1, where the term "person claimed" is used interchangeably with "person accused" and "an alleged fugitive from justice."

² E.g., Billot, *Traité de l'Extradition* (1874); Resolutions of Oxford (1880), Appendix IV, No. 2; Swiss Federal Extradition Law (1892), Appendix VI, No. 13; French Extradition Law (1927), Appendix VI, No. 6; Treaty between France and Poland (1925), Appendix I, No. 32; Resolutions adopted by the International Congress of Comparative Law (1932).

³ See the following treaties: United States-Great Britain of 1932, Appendix V, No. 1; Draft Convention of International Penal and Prison Commission, Appendix IV, No. 6; Finland-Sweden, Appendix I, No. 17; Great Britain-Finland, Appendix I, No. 25; Great Britain-Latvia, Appendix I, No. 20; United States-Czechoslovakia, Appendix I, No. 31; Finland-Norway, Appendix I, No. 35; Lithuania-Czechoslovakia, Appendix I, No. 83; Central American Convention of 1934, Appendix III, No. 7.

⁴ One finds "*malfaiteur fugitif*" in Billot, *Traité de l'Extradition* (1874); "fugitive" in Moore, *Extradition* (1891), Hyde, *International Law* (1922), Rio de Janeiro Draft of 1912, Appendix IV, No. 3, The Central American Convention of 1934, Appendix III, No. 7, Treaty between United States and Great Britain (1932), Appendix V, No. 1; "fugitive demanded" in Pan American Treaty of 1902, Appendix III, No. 3; "fugitive criminal" in British Extradition Act of 1870, Appendix VI, No. 8; "accused" in Central American Convention of 1923; "accused demanded" in Central American Convention of 1934, Appendix III, No. 7; "accused person" in Montevideo Convention of 1933, Appendix III, No. 6; "person demanded" in Rio de Janeiro Draft of 1912, Appendix IV, No. 3, and the Bustamante Code of 1928, Appendix III, No. 5; "delinquent" and "offender" in Pan American Treaty of 1902, Appendix III, No. 3.

COMMENT

The term "requisition" has been well established in Anglo-American usage for many years,¹ in the sense in which it is used in this Convention.² The term generally used in French, though "*la requête*" is also used,³ is "*la demande*".⁴

As the term is used in this Convention:

(h) An "act" includes a failure to act.

COMMENT

No such provision is found in extradition treaties or statutes. Three recent provisions in fact exclude crimes which are purely negligent.⁵ Nevertheless, it is felt that extradition may properly be sought under a multipartite convention for a failure to act which would make one guilty of involuntary manslaughter, breach of trust, non-support of dependents,⁶ or other offenses carrying such penalty as is provided for in Article 2.

In order to avoid confusion, the word "act" is used in this Convention only for an act for which extradition is sought.

PART II. ACTS

ARTICLE 2. PENALTY ATTACHED TO EXTRADITABLE ACTS

Except as otherwise provided in this Convention, a requested State shall extradite a person claimed, for an act—

COMMENT

France, when she took the lead in the 18th century in making arrangements with her neighbors for extradition, drew the line broadly between

¹ In Webster's *New International Dictionary* (1932), is found the following definition of requisition:

. . . Specif. a (International Law) A formal demand made by one state or government upon another for the surrender of a fugitive from justice.

² British Extradition Act of 1870, §7, Appendix VI, No. 8; Field's *International Code* (1876), Art. 211, Appendix IV, No. 2; Moore, *Extradition* (1891), ch. 9; Biron & Chalmers, *Extradition* (1903), pp. 19, 34 and 36; Piggott, *Extradition* (1910), p. 77; Hyde, *International Law* (1922), §324, p. 586; Treaty between United States and Great Britain of 1932, Art. 9, Appendix V, No. 1. Other terms used in English are "demand", see Pan American Convention of 1902, Appendix III, No. 3, Central American Conventions of 1923 and 1934, Appendix III, No. 7; Bustamante Code of 1928, Appendix III, No. 5; Montevideo Convention of 1933, Appendix III, No. 6; "formal request", see Rio de Janeiro Draft of 1912, Appendix IV, No. 3; "application for surrender of", see Treaty between United States and Venezuela of 1922, Appendix I, No. 13.

³ Billot, *Traité de l'Extradition* (1874), pp. 163, 164.

⁴ *Ibid.*, pp. 137, 139; Travers, *L'Entr'aide Répressive Internationale* (1928), pp. 189, 192, 194; French Extradition Law of 1927, Arts. 9 and 10, Appendix VI, No. 6.

⁵ Hungary-Serbs, Croats, Slovenes, Appendix I, No. 61; Italy-Venezuela, Appendix I, No. 67; Brazil-Italy, Appendix I, No. 87.

⁶ *International Labor Office, Studies and Reports*, Series O (Migration), No. 3, *Migration Laws and Treaties* (1928), Vol. I, p. 329: "There has been . . . in the last few years, a tendency to consider as a misdemeanor neglect to contribute to the support of dependents, and thus to include a negative offense of this kind in the class of extraditable offenses. In some cases the compulsory return of an emigrant who is guilty of having left his dependents without resources can thus be obtained."

"*les grands crimes*," for which extradition could be sought, but which were not always set out, or set out fully by name, and the lesser offenses or "*délits*," which were not extraditable. The early arrangement with the Low Countries seems to have applied generally to "*malfaiteurs réfugiés*." In the Wurttemberg treaty, there is an enumeration of persons to be returned, but this enumeration includes "*malfaiteurs*" generally. The Swiss treaty and that with Spain enumerate extraditable offenses, but it is not clear that these lists are intended to exclude others; and in the treaty with Portugal, it appears from the language that the list of offenses is illustrative only.¹ In the rapidly widening circle of extradition treaties, made by France during the 19th century, we find the enumeration of offenses, now always present, becoming longer and more detailed. In form these lists appear to cover all extraditable offenses as between the contracting parties, but the famous *Circulaire du Ministre de la Justice du 5 Avril 1841*, instructing magistrates on matters concerning extradition, declares (§5): "Les traités contiennent la liste des crimes pour lesquels l'extradition est accordée, mais il faut pas s'arrêter à cette nomenclature, qui est plutôt indicative que limitative."² In another circular issued by the Minister of Justice in 1872, he says that except in the cases of Great Britain, the United States and Belgium, silence in a treaty with regard to certain offenses does not prevent extradition, which may be accorded on the basis of reciprocity; in fact, he adds, extradition may take place in the absence of any treaty, as has been true with Russia and Brazil.³ Still, as treaties containing lists of offenses became the normal basis of dealing between France and other countries, extradition without treaty, or for offenses outside of the treaty lists, would naturally be exceptional, controlled by executive discretion, and based upon courtesy or reciprocity of action.

As is pointed out in the Introductory Comment, Great Britain and the United States came late and slowly into the field of extradition. The first agreement entered into by either for extradition was contained in Article 27 of the Jay Treaty of 1794, which expired by its own terms in 1807. This article applied only to persons accused of murder and forgery. Great Britain signed the Treaty of Amiens in 1802, which in Article 20 provided for extradition for murder, forgery and fraudulent bankruptcy, but this provision was never given effect because of the recurrence of war between the parties to it. The Webster-Ashburton Treaty of 1842, the next excursion of the United States and Great Britain into extradition treaty-making, listed murder, piracy, arson, robbery, forgery and the utterance of forged paper as extraditable offenses. The treaty between the United States and France of 1843 listed as extraditable offenses murder, attempt to commit murder, rape, forgery, arson, and embezzlement by public officers, while in

¹ Billot, *Traité de l'Extradition* (1874), pp. 38 to 46. In his *Résumé* he says (p. 46): "L'extradition n'a lieu que pour les 'grands crimes.' . . . Une énumération des faits passibles d'extradition est contenue dans certains traités; mais cette énumération n'est pas toujours limitative."

² *Ibid.*, p. 420.

³ *Ibid.*, p. 423.

that between Great Britain and France of the same year were listed murder, attempt to commit murder, forgery and fraudulent bankruptcy. However, by 1870 Great Britain expanded extraditable offenses to nineteen categories, some of them including several crimes each (Extradition Act, 1870, First Schedule¹), and by 1889 the United States and Great Britain had by treaty expanded the provisions of the Webster-Ashburton Treaty to cover ten additional classes of offenses. In the latter part of the 19th and the first third of the 20th centuries, the lists of extraditable offenses recognized by the United States and Great Britain have continually expanded, so that the Extradition Treaty between these States, signed in 1932, enumerates 27 classes of extraditable offenses covering a wide range of criminal acts. In Great Britain extradition cannot be granted except as provided for by statute and treaty,² and in the United States it is now the accepted view that extradition should only be granted in fulfillment of a treaty.³

Throughout the world the network of bipartite extradition treaties grew to vast proportions during the 19th century. The expansion of the lists of extraditable offenses in the French, British and United States treaties is illustrative of the tendency in extradition treaties generally. With the multiplication of extradition treaties and the enlargement of lists of extraditable offenses has gone the tendency to hold extradition within the framework of such agreements, though some States have recognized the possibility of extradition outside of treaty, by executive action, upon the basis of reciprocity or courtesy.⁴

The effort to determine the acts for which extradition is available by listing extraditable offenses separately, in each of a vast number of unrelated bipartite treaties, has inherent in it serious shortcomings, which have now become very apparent.

In the first place, as between two States negotiating an extradition treaty, difficulty is found in using definitions of offenses which are satisfactory to both parties, and which are sure to meet with the same interpretation in the courts of both States.⁵ Particularly is this true when the States have widely variant systems of municipal law.⁶ In the second place, as between such two

¹ Appendix VI, No. 8.

² Piggott, *Extradition* (1910), p. 15; Oppenheim, *International Law* (4th ed. by McNair, 1928), § 329, p. 567; Moore, *Extradition* (1891), §§ 28-30, pp. 36-38.

³ Moore, *Extradition* (1891), §§ 16-27, pp. 21-35; Hyde, *International Law* (1922), § 311, p. 568.

⁴ Billot, *Traité de l'Extradition* (1874), p. 120.

⁵ See the situation with regard to piracy as between the United States and Great Britain under the Webster-Ashburton Treaty. Piggott, *Extradition* (1920), pp. 72 and 73.

⁶ Attorney-General Cushing in 1885 said: "All the treaties of extradition between the United States and foreign governments are defective as to the enumeration of crimes, in these respects, namely: . . . 3. Cases occur in each treaty of crimes imperfectly described, with irregularity of imperfection." Moore, *Extradition* (1891), § 95, p. 108. See, also, for illustrations of difficulties as to interpretation of extradition treaties, Moore, *op. cit.*, §§ 97-101, pp. 113-131; *In re Arton* (No. 1) [1895] 1 Q.B. 108, also in Clarke, *Extradition* (4th ed., 1903), pp. 189-193; Piggott, *Extradition* (1910), pp. 215-235.

" . . . doubts and controversies have arisen from the attempt to include under one definition crimes of a character similar, but not identical, in the cases of the contracting

States, an enlargement of the list of extraditable offenses, to meet changing conditions, requires a new treaty, which may involve legislative as well as executive action. There are already forty bipartite extradition treaties which do not attempt to list offenses which are extraditable.¹ The United States is not a party to any one of them.

From an international point of view the introduction of lists of indictable offenses into an ever-increasing number of bipartite treaties tends towards uncertainty and disorder, where effective coöperation is needed. The situation can hardly be other than chaotic when the practice of individual States varies without reason even with regard to the lists of offenses which they introduce into their own treaties.² A study of offenses in a group of recent United States extradition treaties, which is contained in Appendix II (A), is illustrative of this point.

When one approaches the problem of framing an extradition convention which might be adhered to by the States of the world generally, it becomes clear that such a convention could not be successfully drafted upon the basis of listing the offenses which should be extraditable. Here the difficulty of use of terms, troublesome in bipartite treaties, would be accentuated; and the problem of adding to extraditable offenses by periodical revision of the convention would be well-nigh insurmountable. But probably most difficult of all would be agreement by the countries of the world upon a usefully comprehensive list of named offenses. A study of offenses in a group of extradition treaties to which a large number of States are parties, which study is contained in Appendix II (B), is very enlightening in this connection, and shows how chaotic, from an international point of view, is the present situation.

Professor Brierly, in his Report to the Committee of Experts, says:³

On the whole, we consider that, if the States should decide to adopt a general convention on extradition, the most convenient method of deal-

countries. It is better therefore to take from the laws or code of each country the names of the crimes or offenses as to which each should claim the benefit of extradition; as, for instance, in the case of a treaty with France, we should say we will give up to you those which are charged with the offenses specified in such and such articles of your penal code if you shall give up to us those who are charged with the offenses specified in such and such sections of our Consolidated Statutes." Mr. Neate, *Report from the Select Committee [of the House of Commons] on Extradition* (1868), p. ix.

¹ See Appendix I.

² "All the treaties of extradition between the United States and foreign governments are defective as to the enumeration of crimes, in these respects, namely: 1. Crimes are inserted or omitted in a given treaty, without regard to their relative importance. 2. Crimes are inserted in some treaties, and omitted in others, without regard to any rule. . . ." Attorney-General Cushing (1855), quoted in Moore, *loc. cit.* Moore continues (p. 109) by pointing out that these observations were still more applicable in 1891, and suggests that this is due to changing points of view of Secretaries of State, and of the Senate.

"The present condition of affairs is, however, very unsatisfactory, since there are many hundreds of treaties in existence which do not at all agree in their details." Oppenheim, *International Law* (4th ed. by McNair, 1928), §328, p. 567. See also Billot, *Traité de l'Extradition* (1874), pp. 124-133.

³ *Publications of the League of Nations*, v. Legal, 1926, v. 8, p. 3; 20 *American Journal of International Law, Supplement* (1926), p. 245.

ing with this particular matter would be to grant extradition for any act punishable with a certain prescribed severity either in the two States concerned or in the State demanding extradition, and not to attempt a detailed list of crimes.

M. de Visser in his *Observations on Professor Brierly's Report* says:¹

Like Mr. Brierly, I believe that the only way to obtain a certain degree of agreement would be to adopt as a criterion the notion of a minimum penalty. Extradition would only be made obligatory for offenses which are subject to a definite minimum penalty, both in the State requesting and in the State requested to grant extradition. In other cases the extradition would be merely optional.

M. de Visser adds to the statement just above: "This is the system followed in several extradition treaties concluded by France."

Travers and Fauchille also commend the abandonment of lists of offenses. Travers says:²

Il est toutefois impossible de ne pas admettre que la suppression de toute liste constitue un progrès.

D'abord, les limites de l'extradition sont toujours plus étroites quand il y a une énumération que lorsqu'il n'y en a pas.

En second lieu, la différence de terminologie des diverses législations pénales est de nature à entraîner des divergences profondes pour la détermination de la portée d'une liste, quelle qu'elle soit.

La tendance est, enfin, lorsqu'il y a une énumération de la considérer comme limitative. On arrive alors aux résultats les plus regrettables.

As stated above, in forty bipartite treaties the practice of listing extraditable offenses has been abandoned in favor of the description of acts carrying certain penalties for which extradition shall be granted.³

The first multipartite convention which dealt with extradition, namely, the Treaty of Amiens of 1802,⁴ listed three offenses—murder, forgery and fraudulent bankruptcy. The convention of 1889 between Argentina, Bolivia, Uruguay, Paraguay and Peru⁵ contains no list of crimes. Although the Convention of 1902⁶ between the United States and eleven other American States includes a list of crimes, the latter is to be followed according to the provisions of the convention only when the penalty-test cannot be applied. The Rio de Janeiro Draft of 1912,⁷ the Bustamante Code of 1928,⁸ and the Montevideo Convention of 1933,⁹ contain no lists of offenses. The same is true of the Central American Conventions of 1923 and 1934.¹⁰ The Model Draft of an Extradition Treaty drawn in 1931¹¹ for the International Penal and Prison Commission was drawn in the same way. The Draft of the

¹ *Publications of the League of Nations*, v. Legal, 1926, v. 8, p. 5; 20 *American Journal of International Law*, Supplement (1926), p. 250.

² Travers, *L'Ent'aide Répressive Internationale et La Loi Française du 10 Mars 1927* (1928), p. 35. See also: Fauchille, *Traité du Droit International Public* (1922), Vol. I, p. 1009.

³ See Appendix I.

⁶ *Ibid.*, No. 3.

⁹ *Ibid.*, No. 6.

⁴ *Ibid.*, III, No. 1.

⁷ *Ibid.*, IV, No. 3.

¹⁰ *Ibid.*, No. 7.

⁵ *Ibid.*, No. 2.

⁸ *Ibid.*, III, No. 5.

¹¹ *Ibid.*, IV, No. .

International Law Association of 1928 stands alone in relying upon a list of offenses as a basis for international action in the field of extradition.¹ Also such legislation as the French Extradition Law of 1927² and the German Extradition Law of 1929,³ intended to operate in the absence of treaties, provide for extradition for criminal acts of certain seriousness, and not for categories of offenses. It seems certain that a modern multipartite extradition convention can be drafted only in this way.

[Except as otherwise provided in this Convention, a requested State shall extradite a person claimed, for an act]

(a) For which the law of the requesting State, in force when the act was committed, provides a penalty of death or deprivation of liberty for a period of two years or more; and

COMMENT

This paragraph requires, first of all, that the act for which extradition is sought shall be subject, in the requesting State, to a penalty of death or deprivation of liberty for a period of two years or more,—*i.e.*, the test here established for an extraditable act is not the possible minimum penalty, but the possible maximum penalty which may be attached to it. Secondly, it makes no distinction as to the penalty test when the person sought is an accused person and when he is a convicted person. Thirdly, it introduces into the Convention a provision against extradition for punishment under an *ex post facto* law. Fourthly, this paragraph and paragraph (b) together require that an act to be extraditable must be punishable by the laws of both the requesting and requested States.

It is clear, from the very nature of extradition, that the act for which extradition is sought must be punishable in the requesting State, and this is recognized by existing extradition treaties which contain no lists of offenses. Such treaties occasionally name no minimum or maximum penalty.⁴ Most of them, however, require a named minimum penalty by the law of the requesting State. This larger group of treaties breaks up, from the point of view of the requesting State, into two classes: the first comprising those treaties by whose terms the same minimum penalty (usually one year) is required, irrespective of whether the person claimed is an accused or a convicted person;⁵ the second comprising those treaties by whose terms a minimum possible penalty (usually one year) is required when the person claimed is

¹ Appendix IV, No. 5.

² *Ibid.*, VI, No. 6.

³ *Ibid.*, No. 7.

⁴ See Brazil-Paraguay, Appendix I, No. 8; Germany-Czechoslovakia, Appendix I, No. 11; Finland-Sweden, Appendix I, No. 17.

⁵ See Estonia-Latvia, Appendix I, No. 4; Estonia-Lithuania, Appendix I, No. 5; Latvia-Lithuania, Appendix I, No. 6; Estonia-Norway, Appendix I, No. 76. Similar in this respect are the provisions of the Rio de Janeiro Draft of 1912, Appendix IV, No. 3, and the Bustamante Code of 1928, Appendix III, No. 5. Cf. Finland-Norway, Appendix I, No. 35, where a different standard of punishment is set for a demand by Finland from that for a demand by Norway.

accused of a crime, while, in case a person claimed has been convicted, a lower actual penalty (usually six months) will suffice.¹

Extradition statutes are more important when we come to consider the extraditable act from the point of view of the requested State, dealt with in the next paragraph, than they are when we are considering the extraditable act from the point of view of the requesting State. Many of them are passed only to implement treaties containing lists of offenses and do not, therefore, go into the question of penalties which may be involved.² Of those statutes which have been passed to control or implement extradition treaties, or which, by their terms, are to operate in the absence of treaties, part only deal with the *quantum* of punishment in the requested State. Five state no more than what is otherwise implicit, namely, that the crime must be a crime under the penal law of the requesting State.³ Mexico requires a minimum penalty of one year of imprisonment by the law of the requesting State.⁴ Cuba adopts the same minimum penalty, but requires it in both requesting and requested States.⁵ Ecuador and Peru require such minimum penalty of two years of imprisonment.⁶ The French law, important as the culmination of more than a century's agitation for reform in extradition procedure, and for its intelligent approach to modern extradition problems, makes the test of punishability in the requesting State a maximum of two years or more of imprisonment.⁷

Though it appears from the statements just made, with regard to bipartite no-list extradition treaties, that they generally require for an extraditable act that a penalty of not less than a named period of imprisonment shall attach to that act by the law of the requesting State, it has nevertheless seemed wise to frame the present paragraph of this Convention so as to make the test the penalty which *may* be imposed rather than the penalty which *must* be imposed. Thus it has been provided that the extraditable act shall

¹ See Central American Extradition Convention of 1934 (Art. 1) Appendix III, No. 7; Italy-Serbs, Croats and Slovenes, Appendix I, No. 10; Italy-Czechoslovakia, Appendix I, No. 12; Bulgaria-Serbs, Croats and Slovenes, Appendix I, No. 16; Albania-Serbs, Croats and Slovenes, Appendix I, No. 44; Roumania-Czechoslovakia, Appendix I, No. 36; Estonia-Czechoslovakia, Appendix I, No. 37; Latvia-Czechoslovakia, Appendix I, No. 38; Bulgaria-Czechoslovakia, Appendix I, No. 39; Spain-Czechoslovakia, Appendix I, No. 51; Portugal-Czechoslovakia, Appendix I, No. 52; Hungary-Serbs, Croats and Slovenes, Appendix I, No. 61; Bulgaria-Greece, Appendix I, No. 62; Spain-Bulgaria, Appendix I, No. 73; Latvia-Spain, Appendix I, No. 74; Lithuania-Czechoslovakia, Appendix I, No. 83. Cf. Finland-Italy, Appendix I, No. 66, where a different standard is set for a demand by Finland from that for a demand by Italy.

² *E.g.*, United States Code Annotated, Criminal Code and Criminal Procedure, Chap. 20, Appendix VI, No. 15; British Extradition Act, 1870, 33 and 34 Viet., c. 52, Appendix VI, No. 8.

³ Italy, Penal Code, Art. 13, Appendix VI, No. 10; Yugoslavia, Criminal Code, 1929, Art. 494; Estonia, Latvia and Lithuania, which have adopted the Russian Penal Code, 1914, Art. 852 (1).

⁴ Mexican Law of May 17, 1897, Art. 2, III.

⁵ Memorandum prepared by the Legal Division of the Cuban Department of State.

⁶ Ecuador Law of Oct. 8, 1921, Chap. VI, Art. 37, 11; Peruvian Extradition Law, Oct. 23, 1888, Art. 2.

⁷ French Extradition Law, March 10, 1927, Art. 4, Appendix VI, No. 6.

be punishable by "death or deprivation of liberty for a period of two years or more," instead of providing that such act shall be punishable by "death or deprivation of liberty for at least one year" or some other stated term. This decision has been largely dictated by the great increase in the use of the indeterminate sentence in many countries.¹ Under laws embodying this practice, there may be no fixed minimum terms of imprisonment, but with very few exceptions (such as non-support cases) the law states the maximum penalty which can be imposed. So, under the terms of the present paragraph an act is extraditable if imprisonment for two years or more *may* be imposed, even though the court *may* impose a lesser punishment or make the sentence indeterminate.

It is of course difficult to determine what measure of imprisonment to set as a test of the extraditability of an act. Undoubtedly the test of minimum penalty has been employed in bipartite treaties so that extradition shall not be used for petty offenses, and the test in this Convention should be such as to accomplish the same end. Since, in the United States, the test of whether a crime is a felony or a misdemeanor is frequently whether the criminal shall be subject to imprisonment for more than one year or not,² it has seemed best to make the test of extraditability the possible imprisonment of the person claimed for two years or more. It is submitted that, under an enlightened system of criminal law, those who commit petty offenses should not be visited with two years of deprivation of liberty. It seems best, on the other hand, not to make the test a higher one—to err, if at all, on the side of moderation in fixing the penalty test—believing that States will themselves exercise moderation in employing extradition, and ordinarily will not go to the expense and trouble of extradition proceedings except in cases of reasonably serious offenses.

It appears from the analysis of certain treaty provisions above that a number of treaties embody a different test involving shorter imprisonment when claim is made for a convicted person from that which is applied when a person claimed is wanted for trial. For instance, under some such treaties a minimum punishment of a year's imprisonment may be required when a person is wanted for trial, but another person who has been convicted may be extradited though his sentence was only for six months. Under such treaty provisions, minor offenders who have been convicted will be extradited, but persons will only be returned for trial who are charged with relatively serious offenses.

The wording of the present paragraph only requires that an act to be extraditable *may* be punishable by imprisonment for two years or more, whether the person claimed is a person accused or a person convicted. It follows that, when a person accused of crime is extradited, he *may* after

¹ See the Model Draft of an Extradition Treaty, of the International Penal and Prison Commission of 1931, Art. I, Appendix IV, No. 6.

² New York Penal Law §1937; Clark and Marshall, *Law of Crimes* (3rd ed., 1927), §3, pp. 7-11; Bishop, *Criminal Law* (9th ed., 1923), Vol. I, §§614-622, pp. 446-452.

prosecution be subjected in fact to less than two years' imprisonment; and that a person previously convicted of crime *may* be subjected to extradition, though he has received a sentence of imprisonment of less than two years. It seems reasonable and convenient to apply the same test to accused and convicted persons in the form in which the test is here established.

The term "deprivation of liberty" has been used in the present article, rather than imprisonment, since modern penology is producing many forms of restrictions upon freedom of action which do not constitute imprisonment, but which are none the less visited upon those who have committed serious offenses.

The present paragraph provides that the law of the requesting State, which imposes a penalty making an act extraditable, shall have been in force when the act was committed. This excepts from extradition under the present Convention those desired for trial under *ex post facto* laws. Extradition treaties and extradition laws up to the present time have not embodied this proposition. It is, however, one very widely accepted as a principle of justice, and it is not thought that its proposed incorporation in a general extradition Convention should arouse any opposition.

It is not necessary, however, that this Convention shall be in force when the act is done for which extradition is sought. If the act was punishable by the law of the requesting State when it was committed, there is no reason why other States should not thereafter agree to aid, through extradition, in bringing the accused person to trial in the requesting State. It is not thought necessary to deal expressly with this point in this Convention, as the conclusion here arrived at has been uniformly reached in the interpretation and application of treaties.¹

[Except as otherwise provided in the Convention, a requested State shall extradite a person claimed, for an act

(a) For which the law of the requesting State, in force when the act was committed, provides a penalty of death or deprivation of liberty for a period of two years or more; and]

(b) For which the law, prevailing in that part of the territory of the requested State in which the person claimed is apprehended, provides a penalty of death or deprivation of liberty for a period of two years or more, which would have been applicable if the act had been there committed.

¹ *Re de Giocomo* (Circuit Court, Southern District of New York, 1874), 12 Blatchford's Reports 391; *Re J. S. Barbour* (Argentine Supreme Court, 4a serie, 1894), 8 Fallos, p. 11; *Re Insull* (Greece, 1932), 31 *Michigan Law Review*, p. 544; Resolutions of Oxford (1880), Art. 17, Appendix IV, No. 2; Travers, *Le Droit Pénal International* (1921), T. IV, pp. 726 to 733; Bernard, *Traité de l'Extradition* (2d ed., 1910), p. 340; Moore, *Extradition* (1891), I, § 371, p. 568; Moore, *Digest of International Law* (1906), IV, p. 269; Hyde, *International Law* (1922), Vol. II, p. 50; Mereier, *L'Extradition*, Académie de Droit International, 3 *Recueil de Cours* (1930), p. 180; Puente, "Principles of International Extradition in Latin America," 28 *Michigan Law Review* (1930), p. 665.

COMMENT

This paragraph requires first, that the act, which is the basis of requisition, shall be such as to meet the same test of punishability in the requested State as in the requesting State; and second, that a law making such act so punishable must be in force in that part of the requested State in which the person claimed is apprehended.

In the Resolutions of Oxford adopted by the *Institut de Droit International* in 1880, it was declared¹ that: "As a rule it should be required that the acts to which extradition applies be punishable by the law of both countries, except in cases where by reason of particular institutions or of the geographical situation of the country of refuge the actual circumstances constituting the offense cannot exist."² Modern writers on international law have generally stated the principle of double criminality as accepted and as basic.³ Even Travers, who thinks the requirement "excessive," grants that it is generally recognized.⁴ This is consistent with the view, to some extent elaborated in the Introductory Comment, that extradition has developed not only to help the requesting State to enforce its criminal law, but also to protect the requested State from criminals seeking asylum within its borders—*i.e.*, criminals by the legal standards of the requested State.

Under treaties in which extraditable crimes are listed, the Canadian and British courts have held that, though acts may constitute a named crime under its definition in the requesting State, extradition will not be granted if those acts do not also constitute the named crime under its definition in the requested State.⁵ The same has been declared by the German *Reichsge-*

¹ Appendix IV, No. 2.

² Such exception has been repeated in the Model Draft of an Extradition Treaty, International Penal and Prison Commission (1931), Art. 3, Appendix IV, No. 6, and by the Conference on Comparative Law, 1932, Resolution II. Such exception would cover a case of an offense connected with maritime affairs, the requested State having no maritime jurisdiction. It is not felt that such situations are sufficiently important or frequent to be provided for in a multipartite convention, but that, as need arises, they can be met by bipartite arrangements.

³ 1 Phillmore, *International Law* (1854), p. 413 (2d ed., p. 443, 3rd ed., p. 521); Pomeroy, *International Law* (1886), pp. 237, 238; Moore, *Extradition* (1891), Vol. I, §96, pp. 112–113; Diena, *Etude sur l'Extradition* (1905), p. 18; Piggott, *Extradition* (1910), p. 228; Oppenheim, *International Law* (4th ed. by McNair, 1928), §331, p. 570; St. Aubin, *l'Extradition et le Droit Extraditionnel* (1931), pp. 681, 682.

⁴ Travers, *Droit Pénal International* (1920), Vol. IV, p. 655 ff.

⁵ *Matter of John Anderson* (1860), 20 Upper Canada Queens Bench Rep., 124 (1861), 11 Upper Canada Common Pleas, 9, where killing by a slave in making his escape in Missouri was murder, but by the Canadian law was excusable, being committed in self-defense; *In re Windsor* (1865), 10 Cox. Criminal Cases, 118, 12 Law Times (New Series), 307, where the act, made forgery in the third degree by the law of New York State, was not forgery by the law of England. In this case the court also suggested that an act to be extraditable at the request of the United States, would have to be a crime by the general law of the United States, and not by that of a State alone, but this was not the basis of decision, and no such doctrine has in fact been acted upon in Extradition cases. On the contrary, in *Re O'Conner* [1928], 1 Western Weekly Reports, 65, the Canadian court held that it was the United States which had to make application in case of a crime against the California law, and that it would look to the California law and the law of Canada to see if the offense came under the

richt,¹ and by the courts of other European and of Latin American countries.² The Supreme Court of the United States had seemed by its declarations to put itself clearly in accord with this view.³ However, in *Factor v. Laubenheimer et al*,⁴ under its reading of the United States and British Extradition treaty of 1842 (supplemented by the conventions of 1889, 1900, 1905, 1922, and 1925), that court decided that, for the acts there under consideration, the United States should extradite, even though those acts were not an offense by the law of the United States or of the State of Illinois, where the person claimed was apprehended; they constituted an offense under British law and that offense was included within the terms of the treaty. The court seems to have held broadly that, since double criminality was expressly provided as to certain categories of offenses under the treaty,⁵ that instrument should be interpreted as dispensing with double criminality with regard to offenses where there was no such express provision, though it pointed out that the acts in question were criminal by the laws of several of our States. It is, of course, possible for States to frame an extradition treaty which should require that an act to be extraditable shall be criminal only in the requesting State, but the intention to do so, in order to be acted upon, should very clearly appear, in view of the fact that extradition is looked upon as a practice for the protection of the requested as well as of the requesting State, and in view of the almost unanimous acceptance throughout the world of the principle of double criminality. The decision of the United States Supreme Court gives too much importance to the express provisions for double criminality in certain categories under the treaty, and too little importance to the general principle of double criminality which that court had previously recognized. The decision is also made ambiguous by the stress laid by the court upon its assertion that the offense in question was criminal in many of our States, though not in the State where Factor was apprehended.⁶

treaty. Other Canadian cases applying the principle of double criminality are *Re Latimer* (1906), 10 Canadian Criminal Cases, 244; *Re William Stagg* (1912), 20 Canadian Criminal Cases, 306; *Ex parte Thomas* (1917), 38 Dominion Law Reports, 716; *Re Clark* [1929] 3 Dominion Law Reports, 737; *Re Brooks* (1930), 66 Ontario 158.

¹ *Fontes Juris Gentium*, A, 2, Vol. I, pp. 91, 423.

² Travers, *Droit Pénal International* (1921), Vol. IV, §§ 2152-2153 II, pp. 658-664. See the case of *Popenjoy*, wanted for perjury in New York, the acts charged not constituting perjury in Austria. *New York Times*, Oct. 1, 1934.

³ *Wright v. Henkel* (1903), 190 United States Reports, 40 (where the provision of the treaty involved expressly provided for double criminality); *Pettit v. Walshe* (1904), 194 United States Reports, 205; *Collins v. Loisel* (1922), 259 United States Reports, 309. See also *Re Frank* (1901), 107 Fed. 272. The only dissenting suggestion was to be found in *Re Metzger* (1847), 17 Federal Cases 232 (No. 9511).

⁴ (1933), 290 United States Reports, 276.

⁵ In *United States v. Hecht* (1927), 16 Federal Reports (2d series), 955, it was held, under the United States-British Treaty including "offenses if made criminal by the laws of both countries against bankruptcy law," that the fact that the act for which extradition is sought was made criminal in the requested State after it was committed does not prevent extradition.

⁶ See the full discussion and criticism of this case by Manley O. Hudson, "The Factor Case and Double Criminality in Extradition," 28 *American Journal of International Law* (1934), pp. 274 to 306. Cf. Edwin M. Borehard, "The Factor Extradition Case" (1934), 28 *ibid.*, pp. 742 to 746.

All multipartite no-list extradition conventions¹ and drafts of such conventions,² except Travers' *Projet*,³ require that an act to be extraditable must be criminal under the law of the requesting and requested States.⁴ Some of them embody the same penalty test with regard to the laws of both States concerned,⁵ while others establish a definite minimum penalty under the law of the requesting State only. There are provisions in multipartite extradition conventions and drafts establishing a lower minimum penalty when the person claimed has been already convicted.⁶

In most of the existing bipartite no-list treaties the rule is laid down that the same penalty test with regard to the extraditable act must be met by the laws of both the requesting and of the requested States.⁷ In a small group of the bipartite no-list treaties it is merely required that the act be such as to be punishable by the laws of the requested State, while it must be punishable by a minimum of one year's imprisonment under the laws of the requesting State.⁸

Extradition statutes which deal with the subject of penalty divide themselves into those which require generally that the act must be a crime by the laws of both States;⁹ those which say nothing of the penalty in the requesting State, but set up penalty standards under their own laws when extradition is requested of them;¹⁰ those which set a minimum penalty test for the

¹ South American Convention of 1889, Appendix III, No. 2; Convention of Montevideo of 1933, Appendix III, No. 6; Central American Convention of 1934, Appendix III, No. 7.

² Draft Convention of Rio de Janeiro, 1912, Appendix IV, No. 3; Model Draft of International Penal and Prison Commission, Appendix IV, No. 6.

³ Travers' *Projet* (Appendix IV, No. 4) requires criminal punishability of the act under the law of the requesting State only.

⁴ Bustamante Code (Appendix III, No. 5) and Oxford Resolutions (Appendix IV, No. 2) are not mentioned among the "non-list" conventions as, though not containing a list of crimes, they stipulate that such a list shall be included in the bipartite extradition treaties.

⁵ Convention of Montevideo of 1933, Appendix III, No. 6; Draft Convention of Rio de Janeiro of 1912, Appendix III, No. 3; Model Draft of International Penal and Prison Commission, Appendix IV, No. 6.

⁶ South American Convention of 1889, Appendix III, No. 2; Model Draft of International Penal and Prison Commission, Appendix IV, No. 6.

⁷ Estonia-Latvia, Appendix I, No. 4; Estonia-Lithuania, Appendix I, No. 5; Latvia-Lithuania, Appendix I, No. 6; Brazil-Paraguay, Appendix I, No. 8; Germany-Czechoslovakia, Appendix I, No. 11; Finland-Sweden, Appendix I, No. 17; Bulgaria-Rumania, Appendix I, No. 22; Rumania-Czechoslovakia, Appendix I, No. 36; Estonia-Czechoslovakia, Appendix I, No. 37; Czechoslovakia-Latvia, Appendix I, No. 38; Bulgaria-Czechoslovakia, Appendix I, No. 39; Spain-Czechoslovakia, Appendix I, No. 51; Portugal-Czechoslovakia, Appendix I, No. 52; Hungary-Serbs, Croats and Slovenes, Appendix I, No. 61; Bulgaria-Greece, Appendix I, No. 62; Spain-Bulgaria, Appendix I, No. 73; Spain-Latvia, Appendix I, No. 74; Latvia-Sweden, Appendix I, No. 78; Lithuania-Czechoslovakia, Appendix I, No. 83.

⁸ Italy-Serbs, Croats and Slovenes, Appendix I, No. 10; Italy-Czechoslovakia, Appendix I, No. 12; Bulgaria-Serbs, Croats and Slovenes, Appendix I, No. 16; Albania-Serbs, Croats and Slovenes, Appendix I, No. 44.

⁹ German Extradition Law, Dec. 23, 1929, Art. 2, Appendix VI, No. 7; Italy, Penal Code, Art. 13 Appendix VI, No. 10; Latvia, Lithuania and Yugoslavia, which adopted the Russian Penal Code, 1914, Art. 852 (1). Haiti requires that punishment be "corporal" and "ignominious," but it is not clear whether this is by the law of both States, or by the law of Haiti.

¹⁰ Imprisonment: Costa Rica, Penal Code, Chap. II, Art. 230; Finland, Extradition Law, Feb. 11, 1913, Sec. 4; Sweden, Extradition Law, June 4, 1913, Sec. 4, Appendix VI, No. 12. Minimum imprisonment of one year: Panama, Law No. 44, Nov. 22, 1930, Art. 3; Siam, Extradition Act, B.E. 2472, Art. 4. Death or minimum imprisonment of six years, Uruguay, Penal Code, Art. 12.

requesting State, while requiring only criminal punishability under their own laws;¹ the French statute which requires only that the act be criminal by the French law, but requires that it be punishable in the requesting State by a maximum imprisonment of two years or more;² and those which require a named minimum penalty in both States.³

From this review it seems clear that double criminality is so generally accepted as a condition of extradition that the principal should be adopted in this Convention. Treaties embodying lists of offenses depend upon the substantial similarity of penalties for the same offense in the requesting and requested States, and do not lay down an express requirement that the penalties in the two States meet the same standard, but most no-list bi-partite and multipartite treaties and drafts do lay down the same test of punishability in the requesting and requested States. It is thought wise to follow this practice, which seems most likely to appeal to those States which, up to the present, have always written lists of offenses into their treaties. As shown above, the provisions as to penalties in extradition statutes are so various that no general policy (except the general requirement of double criminality) can be drawn from them.

The requirement, written into the present paragraph, that the law of the requested State, imposing the required penalty upon the act in question, must be in force "in that part of the territory of the requested State in which the person claimed is apprehended," is peculiarly applicable to federal States, and to States having colonies and dependencies. This provision is not found in existing treaties, but there is authority for it. The language of the British Extradition Act of 1870 seems to embody this rule where it provides that "the following list of crimes is to be construed according to law existing in England, or in a British Possession (as the case may be) at the date of the alleged crime, whether by the common law or by statute made before or after the passing of this Act."⁴ The rule stated in the present paragraph on the point in question is enunciated by a Canadian court which says: "we must find all the conditions in Canada, or that part of Canada where the fugitive is found or apprehended, to justify his extradition from Canada, and . . . we cannot invoke for that purpose other systems of laws existing in other parts of the Empire."⁵

In *Wright v. Henkel*,⁶ and *Collins v. Loisel*,⁷ the acts charged were crimes in the States of New York and Louisiana respectively in which the persons claimed were apprehended, and the court treated this fact in its discussion as important.

In *Pettit v. Walshe*,⁸ the question was whether, under a warrant issued in

¹ Mexico, Law of May 17, 1887, Art. 2, III.

² Extradition Law, March 10, 1927, Art. 4, Appendix VI, No. 6.

³ Ecuador, Law of Oct. 8, 1921, Chap. VI, Art. 37, II; Peru, Extradition Law, Oct. 23, 1888, Art. 2.

⁴ Appendix VI, No. 8.

⁵ *The King v. Stone* (1911), 17 Canadian Criminal Cases, 377.

⁶ (1903), 190 United States Reports, 40.

⁷ (1922), 259 United States Reports, 309.

⁸ (1904), 194 United States Reports, 205.

extradition proceedings in New York at the request of the British Government, the person claimed, when apprehended in Indiana, had to be brought before a magistrate there, or could be brought back to New York. The court held that the statute required him to be brought before the nearest competent magistrate in Indiana, and fortified itself in this position by referring to the treaty with Great Britain which provides that a person claimed should be delivered up only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had then been committed." The court treated this provision as not only embodying a rule of evidence, known as that of the *prima facie* case, which may be insisted upon by the requested State, but as requiring that the law of that part of the requested State where he is apprehended make the act in question a crime.

The rule which seemed to be assumed in the United States cases just discussed was repudiated by the Supreme Court in *Factor v. Laubenheimer & Haggard*,¹ where in fact, as has been shown above, the court seems to have held that extradition was legal under the treaty with Great Britain though the acts involved constituted a crime only by the law of the requesting State. The court, however, stressed the fact that these acts were criminal by the laws of several of our States, though not by the law of the State of Illinois, in which Factor was apprehended. The provision in the Anglo-American treaty so much relied upon in *Pettit v. Walshe* (*supra*) is treated in *Factor's* case as embodying only a rule of evidence. The change in the wording in the United States-British Extradition Treaty of 1932 seems to make clear that a purely procedural rule is intended, and requires only that the evidence shall be sufficient "according to the laws of the High Contracting Party applied to," saying nothing of the law of the place where the person claimed is apprehended.²

Three positions are possible here: (1) to incorporate in this Convention the rule as here stated, namely that *the law, prevailing in that part of the requested State in which the person claimed is apprehended*, shall provide the designated penalty; (2) to declare by this Convention only that *the law of the requested State* shall provide for such penalty, the position taken by all existing conventions which deal with penalty (except those mentioned in connection with the third alternative below), thus leaving to possibly diverse interpretation, under the municipal laws of various States, the meaning of this clause for

¹ (1933), 290 United States Reports, 276.

² Art. 9: "The extradition shall take place only if the evidence be found sufficient according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offense had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offense of which he has been convicted is one in respect of which extradition could, at the time of such convention, have been granted by the High Contracting Party applied to." Appendix V, No. 1.

each State; (3) to incorporate in this Convention the rule found in extradition treaties between Estonia and Czechoslovakia, Hungary and the Kingdom of the Serbs, Croats and Slovenes, and Latvia and Spain,¹ which requires only that the penalty law be in force in some part of the territories of the contracting parties.² On the whole, it has seemed best to incorporate the British practice, and what seemed to be the view of the Supreme Court of the United States before *Factor's* case.³

ARTICLE 3. PLACE OF COMMISSION OF EXTRADITABLE ACTS

(a) A requested State may decline to extradite a person claimed for an act committed wholly or in part within its territory.

(b) A requested State may decline to extradite a person claimed for an act committed wholly outside the territory of the requesting State, unless, in that part of the territory of the requested State in which the person claimed is apprehended, its law would have made the act punishable under similar circumstances, though the act had been committed wholly outside the territory of the requested State.

COMMENT

Paragraphs (a) and (b) of this article provide for exceptions to the duty, imposed by Article 2 upon the requested State, to extradite under the conditions there specified. The permissive exceptions set out in this Article are based on the place of commission of the offense. Both paragraphs embody principles almost universally accepted by States as manifested in their treaties and in practice.

Paragraph (a) permits the requested State to decline, at its discretion, extradition if the offense, on account of which extradition is sought, has been committed wholly or in part within its territory. This exception to the duty to extradite seems to be inevitable in view of the universal acceptance of territoriality as the primary basis of competence.⁴

In conformity with the principle of territorial competence, the extradition statutes of several nations provide that extradition shall not be granted for offenses committed within their respective territories.⁵ As will be indicated hereafter, the overwhelming majority of treaties confine extradition to offenses committed outside the territory (or jurisdiction) of the requested State.

¹ See Appendix I, Nos. 36, 58 and 71. Sympathy with such position seems to be indicated when the Supreme Court of the United States in *Factor's* case emphasized the fact that the crime in question was made criminal in several of the States, though it was not an offense in Illinois. See discussion earlier in this comment.

² See the view expressed by Edwin M. Borchard, "The Factor Extradition Case," 28 *American Journal of International Law* (1934), pp. 742 to 746.

³ (1933), 290 United States Reports, 276.

⁴ See Draft Convention on Jurisdiction to Punish for Crime (1935), of the Research in International Law.

⁵ See, e.g., the following statutes: Argentina, Art. 3, see. (3), Appendix VI, No. 1; Finland, Art. 3; France, Art. 5, see. (3), Appendix VI, No. 6; Norway, Art. 4, see. (1); Sweden, Art. 3, Appendix VI, No. 12; Switzerland, Art. 12, Appendix VI, No. 13.

Applying the principle of territorial competence, Switzerland on two occasions declined to accede to the request for extradition based on the Franco-Swiss treaty of July 9, 1869, on the ground that the crime (in both instances receiving stolen goods) was committed in Switzerland.¹ In the later case the Swiss Federal Supreme Court stated its point of view justifying the refusal as follows:

La nature même de l'extradition . . . ne permet pas de présumer d'un Etat qu'il ait entendu, en stipulant une convention internationale sur cette matière, abdiquer sa juridiction à l'égard des crimes ou délits commis sur son territoire et punis par ses lois.

It may be noted here that the Model Draft, prepared as late as 1931, by the International Penal and Prison Commission, provides that extradition shall not be granted, *as a rule*, when the offence was committed within the requested State.² Paragraph (a) of this article is, however, in permissive form; the requested State may extradite, if it so chooses, even for an offense committed within its own territory.

The unqualified acceptance of the principle of territorial competence — (viewed now conversely, no longer from the point of view of the requested, but from that of the requesting State) — would logically lead to the conclusion that extradition should only be sought for crimes committed within the territory of the requesting State. Such a strict adherence to the principle is, however, decidedly the exception and not the rule, and has found expression only in very few extradition statutes,³ treaties,⁴ and model drafts.⁵

Whatever may have been the principle upon which the early extradition treaties proceeded, it has now become generally recognized that the principle of territorial competence has to admit of some exceptions in the face of the claims of national laws. The criminal law of many nations reaches beyond the territorial boundaries to punish nationals for crimes committed abroad (jurisdiction based on personal allegiance), or for certain crimes against such States by whomsoever and wherever committed (offenses against the secu-

¹ *In re Meunier* (*Bundesgericht*, Oct. 30, 1880), Clunet, 1882, p. 232; *Veyssière v. l'Ambassade de France* (*Bundesgericht*, April 17, 1896), Clunet, 1897, p. 212.

² Art. 4, Appendix IV, No. 6.

³ See, e.g., the statutes of Peru (1888), Art. 1, and of Panama (1930), Art. 3.

⁴ Liberia-Monaco, Art. 1, Appendix I, No. 48; Persia-Afghanistan, 1928, 104 *L.N.T.S.* 499. The latter is a Protocol to the Treaty of Friendship concluded in 1921, 33 *L.N.T.S.* 285. The earliest multilateral extradition provision, contained in the Treaty of Amiens, provided for the extradition of offenses "commis dans la Jurisdiction de la partie requérante." (Art. 20), Appendix III, No. 1.

⁵ Field's *International Code* provides, in Art. 210, that the offense must have been committed "within the jurisdiction" of the requesting State. Appendix IV, No. 1. Field apparently intended to use "jurisdiction" in a limited sense,—i.e., meaning *territorial* jurisdiction only; not in the broader sense which may include jurisdiction (for example, on the ground of personal allegiance) over crimes committed abroad. This may be implied from the fact that there are no provisions in his code for extradition for offenses committed either in the requested, or in a third, State.

See also the draft adopted in 1928 by the International Law Association, which limits extradition to crimes committed "within the territory" of the requesting State. (Art. 1), Appendix IV, No. 5.

rity of the State, counterfeiting of currency, etc.). Extradition started to deal with crimes committed within the territory of the requesting State, and such extradition finds strong support in the fact that the courts of the country where the act was committed will generally be able to administer justice most effectively.¹ But, as extradition became increasingly recognized as a necessary and useful form of international coöperation in the repression of crime, States were more willing to admit the competence of other States to punish crimes based on grounds other than the place of commission, and they became less reluctant to extradite for such offenses. As long as the requested State's jurisdiction over crimes committed within *its* territory is not interfered with, there is indeed no reason why extradition should not be granted and why the criminal should be permitted to go unpunished merely because the crime was committed outside the territory of the requesting State. It is in the light of these considerations that — as will be indicated hereafter—the overwhelming majority of treaties admit, subject to varying conditions, the possibility of extradition for offenses committed within the territory of a third State.²

The text of paragraph (a) of this article leaves the requested State free to decline extradition whenever the offense has been committed *wholly or in part* within its territory. The reasons underlying this phraseology, at least as far as acts committed *wholly* within the requested State's territory are concerned, are: first, the universal acceptance of the territorial competence principle; second, the assumption that if the offense is sufficiently grave to be extraditable, it is likely to be a sufficiently serious offense in the requested State to assure prosecution there. In fact, extradition could not be requested under Article 2 of this Convention if it were not such an offense. Somewhat different considerations may arise when the act was committed

¹ See the Resolutions of Oxford of 1880, Art. 6: "on doit considérer comme désirable que la juridiction du *forum delicti commissi* soit, autant que possible, appelée à juger." Appendix IV, No. 2.

² See Travers, *L'entr'aide Répressive Internationale* (1928), §119, pp. 116-117:

On peut dire qu'il y a accord, à peu près unanime sur ce point que les juridictions de l'Etat requérant doivent être compétentes d'après les principes du droit international.

Mais cette formule générale admises, les controverses les plus délicates s'élèvent pour la détermination de sa partie pratique.

Quatre phases marquent l'évolution.

La conception la plus étroite, longtemps acceptée, ne considérant l'extradition légitime qu'au profit de l'Etat sur le territoire duquel l'infraction a été commise, est la mise en oeuvre de l'idée erronée qu'une compétence pénale n'est justifiée que si elle est de nature territoriale.

Le second stade est l'admission de la compétence répressive à l'encontre des nationaux et sujets. . . .

La troisième phase de la marche des idées s'analyse dans cette formule vague que la compétence répressive que se reconnaît l'Etat requérant ne doit pas aller à l'encontre des règles du droit public du pays requis, formule qui, en fait, se résume dans cette idée que le droit de juridiction invoqué par l'Etat requérant doit être considéré comme légitimement réclamé, bien que n'étant basé ni sur le lieu de perpétration, ni sur l'allégeance du délinquant ou présumé tel, toutes les fois que l'Etat requis attribue lui-même dans des conditions identiques, droit de juger à ses propres tribunaux. Le progrès est déjà sensible. . . .

Nous estimons que ce stade lui-même devait être dépassé. Un Etat peut très bien admettre qu'un autre pays peut avoir besoin, pour la protection de ses intérêts généraux, d'une compétence répressive tout particulièrement étendue . . .

only *in part* within the requested State's territory. Suppose, for instance, that X, a national of State A, sends poisoned food from that State to a person in State B, who dies therefrom; his extradition is requested by A from B where the act was *in part* committed. In this case the act was committed *in part* in the requested State, and the question may be asked whether that should be a sufficient ground for refusal of extradition. It may be argued that—in the absence of a duty on the requested State to prosecute for offenses committed within its territory—the language of paragraph (a) is too broad, so far as it relates to acts committed *in part* within the requested State, for the following reasons: first, there does not seem to be any criterion whereby it could be tested whether the effective administration of justice is better served by trial at the place where the act was commenced or where it took effect; second, the assumption that the State where the act was done would prosecute is materially weaker when the act was only in part committed within its territory. The argument may be answered, and the apparent broadness of paragraph (a) in this respect may be justified, by pointing out that the principle of non-extradition for acts committed within the territory of the requested State is too strong to be derogated from even for the sake of acts committed there only in part. Moreover, paragraph (a) is in permissive form and does not prevent a State from extraditing, if it be so inclined, for offenses which were committed either wholly or in part within its territory.

It also may be asked whether it would be desirable to place some limitation upon the broad language of paragraph (a) to meet the following situations:

(a) State A's money is counterfeited in State B, which does not punish the counterfeiting of foreign currency;

(b) A national of State A, while sojourning or residing in State B, fails to file an income tax return in A, or files a false return;

(c) A diplomatic representative of State A, accredited to State B, commits a crime there and he is immune from prosecution in the receiving State.

It does not seem that there is any ground for apprehension with respect to any one of the above-stated hypothetical cases.

As to (a), the situation seems to be fully covered by the International Convention on the Suppression of Counterfeiting Currency, signed at Geneva on April 20, 1929, and in force since February 22, 1931.¹

As to (b), it might be argued with some force that some limitation should be placed on the requested State's discretion to decline extradition when acts injurious to another State are committed within its territory, and are not punishable by its laws. The possible disinclination of a State to assist

¹ 112 *L.N.T.S.* 371, Hudson, *International Legislation* (1931), Vol. IV, p. 2692. Art. 5 of this convention provides: "No distinction should be made in the scale of punishment for offenses referred to in Article 3 [enumerating, much in the language used in extradition treaties, various forms of counterfeiting crimes] between acts relating to domestic currency on the one hand and to foreign currency on the other; this provision may not be made subject to any condition of reciprocal treatment by law or by treaty."

another State in the enforcement of its revenue laws has been sufficiently taken account of by including in this Convention Reservation No. 2 of Schedule A. But, as is pointed out in the comment to that reservation, the disinclination to extradite for fiscal offenses is giving way to a sounder spirit of coöperation in this as in other fields. While courts still are, as a rule, reluctant to render assistance in the enforcement of the fiscal laws of foreign States,¹ the tendency in extradition is decidedly toward coöperation in this field. There is indeed no reason why States should not aid each other in the enforcement of their fiscal laws, provided the offense otherwise satisfies the conditions laid down in this Convention and particularly in Article 2. It seems, however, advisable to leave it to the discretion of each State whether it will do so, under the merely permissive form of paragraph (a). In view of the strong feeling against extradition for acts committed within the territory of the requested State, it would not be reasonable to place an express limitation on its discretion to decline extradition for fiscal offenses there committed.

As to (c), the *lacuna* undoubtedly existing in extradition treaties is covered by Article 27 of the Draft Convention on Diplomatic Privileges and Immunities of the Research in International Law.² It should also be noted that the sending State may always waive the immunity of its representative so that he can be tried in the receiving State.³

By the generally accepted principle of international law, every nation has jurisdiction to punish piracy.⁴ While many of the early extradition treaties included piracy in their lists of extraditable offenses, the question arose whether, in the absence of a qualification of "piracy under the law of nations", extradition may be demanded except for piracy under municipal statute.⁵ The issue was raised in several cases of extradition between the United States and Great Britain under the treaty of 1842. In the three cases discussed by Judge Moore, in which England requested extradition from the United States, the offenses charged were piracy by English statutes and the requests were granted.⁶ The Court of Queen's Bench de-

¹ See on this question the enlightening article of Professor A. N. Saek, "(Non-) Enforcement of Foreign Revenue Laws, in International Law and Practice," 81 *University of Pennsylvania Law Review* (1933), p. 559.

² Art. 27 reads: "A receiving state and a sending state shall apply the provisions of an extradition treaty in force between them to a person who is charged with having committed, while a member of a mission of the sending state or a member of the administrative personnel of such a mission, an offense against the law of the sending state, if such person would have been subject to extradition under such treaty, had the offense been committed in the territory of the sending state." See also the comment under this article.

Should such a Convention on Diplomatic Privileges and Immunities not be in force when this Convention is proposed for adoption, the insertion of a provision such as is contained in Art. 27 may be advisable.

³ See Draft Convention on Diplomatic Privileges and Immunities of the Research in International Law, Article 26 and comment.

⁴ See Draft Convention on Piracy of the Research in International Law, Art. 2. See also, Hall, *International Law* (8th ed.), p. 317; Beauchet, *Traité de l'Extradition* (1899), §283, p. 157.

⁵ See Moore, *Extradition* (1891), Vol. I, §110, p. 141.

⁶ *Ibid.*

clined to grant extradition in 1864, holding that the facts charged constituted piracy, if at all, by the law of nations, justiciable by all nations, and thus not coming within the 1842 treaty, which contemplated offenses committed within the exclusive jurisdiction of the requesting State.¹ Thus, the position taken by the two great maritime nations in the middle of the 19th century was that the unqualified inclusion of the term "piracy" meant piracy by municipal law only and not piracy *iure gentium*. The law in England, as laid down *In re Tivnan* was changed by the Extradition Act of 1870, which permitted extradition although the English courts may have concurrent jurisdiction.² The offense is more precisely defined in recent extradition treaties. In view of the rule that every nation has jurisdiction to punish for piracy, there seems no inclination to deny that the option to do so, in the face of a request for extradition, should rest with the State which has the offender in its physical power. It has not seemed necessary to deal with this point in the text of this Convention.

While States are, in general, reluctant to extradite for acts committed within their own territory, the majority of treaties provide for extradition for acts committed outside the territory of the requesting State. Paragraph (b) of this article is intended to apply to such situations.

Paragraph (b) grants to the requested State a qualified right to decline extradition if the offense on account of which extradition is sought has been committed wholly outside the territory of the requesting State. This right of the requested State is subject to the following limitations: first, extradition may not be declined if the law in force in the requested State would enable it to prosecute and punish for the offense, had it been committed wholly outside of its territory; second, extradition may only be declined if the act involved was committed *wholly* outside the territory of the requesting State. In other words, if the act was committed *in part* within the requesting, and in part in a third, State, extradition may not, on that ground, be declined.

Thus, there is a substantial difference between paragraphs (a) and (b). Under paragraph (a), the requested State's discretion is unlimited. Taking full account of the principle of territorial competence, the requested State's freedom to grant or decline extradition is in no way controlled. Paragraph (b), on the other hand, confines the requested State's discretion within certain limits, taking account of the requesting State's claims to punish on grounds other than the territoriality of the crime. In doing so, paragraph (b) serves the interests of the international community in narrowing the possibilities of criminals escaping punishment.

Existing treaty law fully supports the position taken in the first two para-

¹ *In re Tivnan* (1864), 5 Best & Smith 645; 122 English Reports 971. There was a strong dissent by Lord Chief Justice Cockburn. See comment on this case in Moore, *Extradition* (1891), Vol. I, §113, p. 143; Clarke *Extradition* (4th ed., 1903), pp. 142-148.

² Art. 6, Appendix VI, No. 8. See also Piggott, *Extradition* (1910), pp. 71-72.

graphs of this article. The overwhelming majority of treaties provide, in substance, that:

(1) Extradition is, as a rule, limited to offenses committed outside the territory of the requested State;

(2) Extradition may be granted, under specified conditions, for crimes committed within the territory of third States.

Taking account of the varying phraseology used in treaties, they may be classified, for sake of convenience into the following groups:

1) Treaties which provide that extradition shall be granted for offenses committed within the *jurisdiction* of the *requesting* State.¹ It will be noted that Great Britain or the United States is a party to all the bilateral treaties in this group. In view of the importance of the territoriality concept in Anglo-American criminal law, the word "jurisdiction" has been declared (at least as far as the United States and England are concerned) to mean in these treaties *territorial jurisdiction*² (including, of course, territorial waters, public vessels anywhere, merchant vessels on the high seas). As far as the other parties are concerned, it may of course be argued that if their respective criminal laws permit prosecution for crimes committed abroad and their courts are competent to do so, such a crime is committed "within their jurisdiction." In any event, these treaties do not contain express provision for extradition in cases where the offense has been committed in third States.

2) Treaties which provide that extradition shall be granted only for offenses committed outside the territory of the requested State; no express provision for extradition where the offense has been committed in a third State (*i.e.*, outside the requesting State).³

3) Treaties which provide: (1) extradition may only be granted for offenses committed outside the territory of the requested State; (2) if the offense has been committed outside the territory of the requesting State, extradition may be granted *provided* the laws of the requested State permit the prosecution of such offenses when committed outside *its* territory.⁴

¹ The provision is contained in all these treaties in Art. 1 (references are to Appendix I): United States-Siam, No. 7; United States-Venezuela, No. 13; United States-Latvia, No. 14; United States-Estonia, No. 15; Great Britain-Latvia, No. 20; United States-Finland, No. 23; United States-Bulgaria, No. 24; Great Britain-Finland, No. 25; United States-Lithuania, No. 26; Great Britain-Estonia, No. 30; United States-Czechoslovakia, No. 31; Great Britain-Albania, No. 47; United States-Poland, No. 57; United States-Germany, No. 70; United States-Austria, No. 71; also Appendix V, No. 2. The treaty of Amiens of 1802 also provides for extradition for offenses "*commis dans la juridiction de la partie requérante*." (Art. 20), Appendix III, No. 1.

² See Moore, *Extradition* (1891), Vol. I, §103, pp. 134-135, and authorities there cited. Hyde, *International Law* (1922), Vol. I, pp. 567, 591. It is interesting to note in this connection that the United States-German treaty uses the phraseology: "territorial jurisdiction". (Art. 1), Appendix I, No. 70.

³ (References are to Appendix I): Estonia-Latvia, Art. 1, No. 4; Estonia-Lithuania, Art. 1, No. 5; Latvia-Lithuania, Art. 1, No. 6; Bulgaria-Rumania, Art. 1, No. 22; Rumania-Czechoslovakia, Art. 1 (b), No. 36; Estonia-Czechoslovakia, Art. 1, No. 37; Latvia-Czechoslovakia, Art. 1 (b), No. 38; Bulgaria-Czechoslovakia, Art. 1 (b), No. 39; Greece-Czechoslovakia, Art. 1 (b), No. 50; Bulgaria-Greece, Art. 1 (b), No. 62.

⁴ (References are to Appendix I): Hungary-Rumania, Art. 1, No. 27; Finland-Norway, 2, No. 35; Bulgaria-Turkey, Arts. 1, 4 (h), No. 65; Netherlands-Czechoslovakia, Art. 1, ; Austria-Belgium, Art. 1, No. 90.

4) Treaties which provide: (1) extradition shall not be granted for offenses committed within the territory of the requested State; (2) as *supra* in 3).¹

5) Treaties which provide: (1) extradition shall be granted for offenses committed within the territory of the requesting State; (2) as *supra* in 3).²

The view that extradition may be granted for crimes committed outside the requesting State if the laws of the requested State would have permitted prosecution, had the offense been committed outside its territory, which under different formulae, is given effect in the last three groups of treaties, has also been adopted in Argentine³ and French⁴ extradition statutes; in the South American Convention of Caracas (1911),⁵ and in the Draft Convention of Rio de Janeiro (1912).⁶

In this connection, attention may be called to a further limitation to be found in a number of the treaties examined. This limitation is to the effect that no extradition will be granted if, under the laws of the requested State, its courts are competent to punish the offense for which extradition is sought (concurrent jurisdiction),⁷ or if prosecution for such an offense is reserved exclusively to its courts⁸ and cannot be waived.⁹ Such a limi-

¹ (References are to Appendix I): Finland-Sweden, Art. 3, No. 17; Denmark-Finland, Art. 3, No. 18; Switzerland-Uruguay, Arts. 3 (b), 5, No. 19; Finland-Latvia, Arts. 1, 4, No. 21; Estonia-Finland, Art. 4, No. 33; Austria-Norway, Arts. 1, 5, No. 34 (Art. 5 of this treaty provides: "Extradition shall not be granted: (1) If the offense giving rise to the demand for extradition is regarded by the laws of the country to which the demand is submitted as having been committed in that country"); Austria-Estonia, Art. 4, No. 45; Belgium-Czechoslovakia, Art. 4, No. 53; France-Czechoslovakia, Arts. 1, 4, No. 60; also in Appendix V, No. 5; Hungary-Yugoslavia, Art. 3, No. 61; Latvia-Hungary, Art. 4, No. 64 (this treaty puts, in addition to the proviso, a further check on extradition for crimes committed outside the requesting state by providing that "the offense must be punishable under the laws of the place where it was committed"); Germany-Turkey, Art. 6 (1), (3), No. 75; also in Appendix V, No. 3; Estonia-Denmark, Art. 3, No. 77; Latvia-Sweden, Art. 4, No. 78; Latvia-Denmark, Art. 2, No. 79; Estonia-Sweden, Art. 4, No. 80; Poland-Sweden, Art. 2, No. 81; Denmark-Czechoslovakia, Art. 1 (3), (4), No. 89; Austria-Latvia, Arts. 3 (2), 4, No. 92.

² (References are to Appendix I): France-Latvia, Art. 1, No. 29; France-Poland, Art. 1, No. 32; Belgium-Paraguay, Art. 1, No. 40; Belgium-Estonia, Art. 1, No. 41; Belgium-Latvia, Art. 1, No. 42; France-San Marino, Art. 1, No. 43; Albania-Yugoslavia, Art. 4, No. 44; Spain-Czechoslovakia, Art. 1, No. 51; Portugal-Czechoslovakia, Art. 1, No. 52; Latvia-Norway, Art. 2, No. 55; Belgium-Lithuania, Art. 1, No. 56; Belgium-Finland, Art. 1, No. 58; Austria-Finland, Art. 1, No. 59; Colombia-Nicaragua, Arts. 1, 2, No. 63; Finland-Italy, Art. 5, No. 66; Italy-Venezuela, Art. 3, No. 67; Austria-Sweden, Art. 4, No. 72; Bulgaria-Spain, Art. 1, No. 73; Latvia-Spain, Art. 1, No. 74; Lithuania-Czechoslovakia, Art. 1, No. 83; Belgium-Poland, Art. 1, No. 85; also in Appendix V, No. 6; Brazil-Italy, Art. 3, No. 87, also in Appendix V, No. 4.

³ Art. 9, Appendix VI, No. 1.

⁴ Art., 3, par. (3), Appendix VI, No. 6.

⁵ *Ibid.*, III, No. 4.

⁶ *Ibid.*, IV, No. 3.

⁷ (References are to Appendix I): France-Poland, Art. 4 (3), No. 32; Rumania-Czechoslovakia, Art. 1 (c), No. 36; Latvia-Czechoslovakia, Art. 1 (c), No. 38; Bulgaria-Czechoslovakia, Art. 1 (c), No. 39; Albania-Yugoslavia, Art. 4, No. 44; Greece-Czechoslovakia, Art. 1 (c), No. 50; Spain-Czechoslovakia, Art. 1 (c), No. 51; Belgium-Czechoslovakia, Art. 4, No. 53; Bulgaria-Greece, Art. 1 (c), No. 62; Austria-Sweden, Art. 4 (3), No. 72; Bulgaria-Spain, Art. 1 (c), No. 73; Latvia-Spain, Art. 1 (c), No. 74; Poland-Sweden, Art. 4 (b), No. 81; Italy-Brazil, Art. 7, No. 87; also in Appendix V, No. 4; Denmark-Czechoslovakia, Art. 1 (4), No. 89.

⁸ (References are to Appendix I): Portugal-Czechoslovakia, Art. 1 (c), No. 52; Hungary-Yugoslavia, Art. 3 (3), No. 61; Bulgaria-Turkey, Art. 1, No. 65; Lithuania-Czechoslovakia, Art. 1 (c), No. 83.

⁹ (References are to Appendix I): France-Czechoslovakia, Arts. 4 (1), 5, No. 60; also in Appendix V, No. 5; Belgium-Poland, Art. 3 (1), No. 85; also in Appendix V, No. 6.

tation is also contained in the German Extradition Statute of 1929.¹ On the other hand, the British Extradition Act of 1870² and the Canadian Act of 1927³ expressly permit extradition, in case of an applicable treaty, irrespective of "whether there is or is not any criminal jurisdiction in any Court of His Majesty's dominions over the fugitive in respect of the crime."

It is interesting to note in connection with the limitation upon extradition, discussed in the next preceding paragraph, permitting the requested State to decline extradition on the ground of its own courts' competence (concurrent or exclusive), the reservation contained in some treaties which conditions extradition on the competence of the courts of the requesting State to prosecute and punish the offense wherever committed.⁴ This point would seem sufficiently covered by the requirement in Article 11 that an authenticated copy or statement of the law, under which it is intended to prosecute or punish the person claimed, must accompany the requisition.

Any provision permitting the requested State to decline extradition on the ground of its own courts' competence has been purposely omitted from this Convention. The fact that a requested State may claim, by virtue of its municipal law alone, concurrent or even exclusive jurisdiction over acts involved, should not of itself justify recognition in a multipartite convention of a right to decline extradition. The interests of the requested State seem to be amply protected by Article 11, which permits it to decline the request if the offender is being prosecuted for the act on account of which extradition is sought. When the requested State delays or fails to take action, there is no reason why the wheels of justice should be obstructed and the offender should be permitted to go unpunished.⁵

The above survey indicates that the position taken in paragraphs (a) and (b) of this article is amply supported by existing treaty law. It is noteworthy that more or less the same solution has been advocated by M. Ch. de Visser, *co-rapporteur* of the Subcommittee on Extradition, appointed by the League Committee of Experts for the Progressive Codification of International Law. In his Observations on Mr. Brierly's report, M. de Visser stated his views on this point as follows:

According to the generally received theory and practice, a State does not hand over persons justiciable by it. In other words, extradition should be refused when the facts on which the request for extradition is

¹ Art. 4, par. (3), Appendix VI, No. 7.

² Art. 6, Appendix VI, No. 8.

³ Art. 12, Appendix VI, No. 4.

⁴ (References are to Appendix I): Italy-Yugoslavia, Art. 1, No. 10; Italy-Czechoslovakia, Art. 1, No. 12; Colombia-Panama, Arts. 2 (a), 3, No. 54; also in Appendix V, No. 7. Cf. with Art. 351 of the Bustamante Code (1928): "In order to grant extradition, it is necessary that the offense has been committed in the territory of the requesting State, or that its penal laws are applicable to it. . . . Appendix III, No. 5.

⁵ It may also be noted that while the number of treaties incorporating this reservation is fairly large—twenty-one—the parties are recruited from a comparatively small circle of nations. None of the Anglo-Saxon, none of the Far Eastern nations, nor any of the Latin-American countries, with the exception of Brazil (see Italy-Brazil, Art. 7, Appendix I, No. 87; also in Appendix V, No. 4), is a party to a treaty containing this reservation.

based are, on any ground whatever, punishable under the jurisdiction of the State requested to extradite. In this case the refusal to extradite arises from a concurrence of criminal jurisdiction. The principle is not, however, universally accepted. . . .

Leaving on one side the case where the person whose extradition is demanded is a national of the State requested to extradite him, and the latter's criminal jurisdiction over him is accordingly based upon his personal allegiance, might it not be well to try to settle the scope of the principle more precisely, for example: (a) to establish in a general convention the rule that extradition may always legitimately be refused when the acts on which the request is founded were committed in the territory of the State requested to extradite (predominant jurisdiction founded on the principle of territoriality); (b) and on the contrary to stipulate that, when the acts on which the demand for extradition is based were committed in the territory of the State requesting extradition, extradition may not be refused on the mere ground of concurrent jurisdiction, unless the said acts have already, in the State requested to extradite, been made the subject either of a final judgment or of a prosecution already commenced. . . .¹

With respect to the clause in paragraph (2) "the law prevailing in that part of the territory of the requested State in which the person claimed is apprehended," the phraseology conforms to that used in Article 2, paragraph (b). See comment on that paragraph.

(c) For the purposes of this article the vessels and aircraft in the public service of a State, and the private vessels and aircraft, which have its national character, are assimilated to a State's territory; but while a private vessel is within the territorial waters of another State, or while a private aircraft is on or over the land or territorial waters of another State, acts done upon such vessel or aircraft are also done within the territory of the other State.

COMMENT

Paragraph (c) assimilates to the State's territory,² for the purposes of this article only, the vessels and aircraft in the public service of that State, and the private vessels and aircraft which have its national character. The assimilation of vessels, for the purposes of jurisdiction, finds ample support in statute³ and treaty law⁴ and is generally asserted by text-writers. But

¹ 20 *American Journal of International Law*, Sp. Supp., (1926), p. 248, at p. 251.

² As for the meaning generally of the term "territory" in this Convention, see Article 1, par. (3), and comment on that paragraph.

³ See, *e.g.*, the British Extradition Act of 1870, Art. 25, Appendix VI, No. 8: "For the purposes of this Act, . . . every vessel of [a] foreign state shall be deemed to be within the jurisdiction and to be part of such foreign state." *Cf.* the identical provision in the Canadian Extradition Act of 1927, Art. 2 (d), Appendix VI, No. 4.

⁴ See, *e.g.*, the following treaties which provide that extradition shall not be granted if the offense has been committed within the territory of the requested State "*or on board a vessel of its nationality*" (references are to Appendix I): Finland-Sweden, Art. 3, No. 17; Denmark-Finland, Art. 3, No. 18; Estonia-Finland, Art. 4, No. 33; Austria-Estonia, Art. 4, No. 45; Hungary-Yugoslavia, Art. 3, No. 61; Latvia-Denmark, Art. 2, No. 79; Estonia-Sweden, Art. 4, No. 80; Poland-Sweden, Art. 2, No. 81; Austria-Latvia, Art. 3 (2), No. 92.

paragraph (c) makes some distinctions in this respect which have been, until quite recent times, disregarded in extradition treaties, although the distinction itself and the attendant consequences were well understood and generally pointed out in treatises.

Moreover, taking into account the spectacular developments of aviation in recent years, paragraph (c) assimilates aircraft, like vessels, to territory. Until a few years ago, aircrafts were hardly thought of in connection with extradition, and there are very few treaties which contain a provision assimilating an aircraft to the territory of the State.¹ The distinction made by paragraph (c) is between public and private vessels and aircraft; and the consequence attendant upon the distinction is that the complete assimilation to territory is limited, in case of private vessels and aircraft, to those being on and over the high seas. To be specific: when such private vessel is in the territorial waters, or when such a private aircraft is over the territory or the territorial waters, of another State, the concurrent jurisdiction of such other State over an act committed aboard such a vessel or aircraft is recognized. Under the permissive provision of paragraph (1), this State may then decline extradition on the ground that the act was committed wholly or in part within its territory. The distinction drawn between vessels in the public service and private vessels, and the consequences of their position at the time the offense was committed, found expression in the United States-Germany Extradition Treaty of 1930, which provides:

“Territorial jurisdiction” as used in this article means territory, including . . . merchant vessels on and aircraft over the high seas and men-of-war wherever situated.²

In the case of *Wolthusen v. Starl* (Supreme Court of Argentina, March 5, 1926), Argentina extradited the defendant indicted in the United States for larceny committed on board an American merchantman while anchored in Rio de Janeiro, overruling the defence that the United States had no jurisdiction, the offense having been committed in the territorial waters of Brazil.³

¹ See, however, United States-Germany treaty, Art. 1, Appendix I, No. 70; see also the Draft Convention adopted in 1928 by the International Law Association, Art. 18, Appendix IV, No. 5.

² Art. 1, Appendix I, No. 70. See also the Estonia-Denmark treaty of 1930 which provides that extradition shall not be granted for offenses committed within the territory of the requested State or on board of its vessel *when on the high seas*. Art. 3, Appendix I, No. 77. Cf. the draft convention adopted by the International Law Association which defines territory as including ships and aircraft *on the high seas*. Art. 18, Appendix IV, No. 5.

³ 145 *Fallos de la Corte Suprema*, 402, *Annual Digest of International Law Cases*, 1925-26, p. 305. The extradition was requested by virtue of the treaty of 1896 between the United States and Argentina. The court held: “In the relevant clause of the treaty the word “territory” comprised, for the purposes of extradition, crimes committed on the high seas on board merchant or war vessels carrying the Argentine or United States flag, crimes committed on war vessels of both nations, and in the house of a diplomatic agent of either country. This court held previously, in interpreting the extradition treaty with Italy, that if a crime committed in one State affected exclusively the rights and interests of another, the repressive jurisdiction belongs to the latter. In the instant case the crime of larceny committed by an employee of an American merchantman, although committed in Brazilian territorial waters, injured only the rights and interests of the United States.”

With respect to the assimilation of vessels to the territory of the State, and the distinction to be drawn between public and private vessels, the following excerpts indicate the views of text-writers:

Merchant vessels on the high seas and ships of war everywhere are constructively regarded as a part of the territory of the nation to which they belong, and consequently criminal offenses committed upon them are considered as having been committed within the jurisdiction of such nation. (Moore, *Extradition* (1891), I, §104, pp. 135-136; see also §§105-107, and authorities there cited.)

Crimes commis à bord navires.—Il faut, à cet égard, faire plusieurs distinctions, suivant que le crime a été commis dans les eaux territoriales, en haute mer, ou dans un port étranger. Dans le premier cas, c'est-à-dire, si le navire se trouve, lors de la perpétration de l'infraction à son bord, dans les eaux territoriales de la nation dont il porte le pavillon, le délit est réputé commis sur le territoire de cette nation, sans qu'il y ait à distinguer entre les navires de guerre et les navires de commerce, . . . Il en est de même lorsque le délit a été commis en haute mer. . . . Il n'y a pas non plus à distinguer, en ce cas, entre les navires de guerre et les navires de commerce.

Cette distinction s'impose, au contraire, relativement aux infractions commises dans les eaux territoriales d'un Etat étranger. S'il s'agit d'un navire de guerre, il est, en vertu du droit des gens, même dans ses eaux territoriales, affranchi du droit de juridiction qui, normalement, appartient à la souveraineté locale sur son territoire maritime, et cela non seulement pour les délits militaires, mais encore pour les délits de droit commun commis à son bord. . . . Dès lors, la juridiction sur le navire lui-même, sur toutes les personnes et les choses qu'il renferme, appartient au souverain national du bâtiment, et les délits commis à bord de ce dernier peuvent servir de base à une demande d'extradition. . . .

La situation est différente pour les bâtiments de commerce. Si, tant qu'il navigue en haute mer, un bâtiment de ce genre n'est soumis qu'à la juridiction du pays dont il porte le pavillon, lorsqu'il accède dans les eaux territoriales étrangères, il tombe immédiatement sous l'empire de la souveraineté et de la juridiction locales, . . . Donc, . . . un délit commis à bord d'un navire de commerce qui stationne dans un port étranger est commis en territoire étranger et ne peut fonder une demande d'extradition de la part de la nation dont ce navire porte le pavillon. (Beauchet, *Traité de l'Extradition* (1899), §§197-198, pp. 112-113.)

Speaking about the meaning of the word "jurisdiction" in the extradition treaties of the United States, Professor Hyde writes:

The term jurisdiction appears to have been employed to designate any place lawfully subject to the control for purposes of jurisdiction of the demanding State at the time when the act was committed, such as a public vessel, or a merchant vessel on the high seas, . . . (Hyde, *International Law* (1922), I, §328, p. 591.)

The definition of acts committed aboard a private aircraft, while over the territory or the territorial waters of another State, as being committed also

within the territory of such other State, recognizes, by implication, the sovereignty of the State over the airspace above its territory without qualification. As far as the subject-matter of this Convention is concerned, the question here involved is a moot one; for no extradition case growing out of acts committed aboard an aircraft has been found. As far as the general problem of sovereignty over the air above the subjacent State is concerned, three theories have been advanced by writers: (1) complete freedom of the air with territorial limits analogous to freedom of the seas with territorial waters; (2) a limited sovereignty in the subjacent State over the airspace above it to the extent of a stated height, or, as some authorities prefer, to the range of anti-aircraft guns; (3) complete sovereignty in the subjacent State.¹ The latter view, which is adopted, by implication, in this Convention,² is clearly the favored view by reason of considerations of national defense. The International Convention on the Regulation of Aërial Navigation of October 13, 1919,³ the British Navigation Act of 1920,⁴ and the United States Air Commerce Act of 1926,⁵ are all based on the principle of the absolute sovereignty of the subjacent State. Relying on these authorities and stressing the complete absence of judicial precedent, Professor McNair writes:

I submit that . . . the perpetrator of any act (including omission) in any aircraft when in or over Great Britain or Northern Ireland, which would be a crime if committed on the subjacent land or water, may be tried if and when he can be arrested within the jurisdiction.⁶

The same position is taken by Professor Hudson.⁷ The principle of absolute sovereignty of the subjacent State serves as the basis of a number of bilateral treaties relating to aërial navigation, concluded since the end of the war.⁸ It may be noted that the American Uniform State Law for Aëronautics provides:

All crimes, torts and other wrongs committed by or against an aëronaut or passenger while in flight over this state shall be governed by the laws of this state.⁹

¹ For the various views advanced, see the discussions of the *Institut de Droit International* at its Madrid meeting in 1911, 24 *Annuaire de l'Institut*, pp. 279-299, 321; Baldwin, "The Law of the Airship," 4 *American Journal of International Law* (1910), p. 95; Hershey, "The International Law of Aërial Space," 6 *ibid.* (1912), p. 381; Hazeltine, *The Law of the Air* (1911), *passim*; Foulke, *International Law* (1920), §224, p. 287.

² See Art. 1, par. (5) and comment thereto. Cf. also Draft Convention on Piracy of the Research in International Law, Art. 1, see. (2).

³ Art. 1, 11 *L.N.T.S.* 174, Hudson, *International Legislation* (1931), Vol. I, 359.

⁴ 10 and 11 George V, c. 80, Preamble. See also see. 14, par. (1).

⁵ 44 Stat., pt. 2, p. 572, see. 6 (a). With regard to a rather general statutory assumption of criminal jurisdiction of airspace over land and over territorial waters, see Draft Convention on Jurisdiction to Punish for Crime of the Research in International Law, Art. 1, comment.

⁶ McNair, *The Law of the Air* (1932), pp. 87, 94.

⁷ Hudson, "Aviation and International Law", 24 *American Journal of International Law* (1930), pp. 228, 238.

⁸ See, e.g., Convention of May 26, 1923, between Norway and Sweden, Art. 1. 18 *L.N.T.S.* 173.

⁹ This law is adopted in twenty States of the Union. See Russell, *On Crimes* (8th ed. 1923), Vol. I, pp. 29-57.

ARTICLE 4. LAPSE OF TIME

A requested State may decline to extradite a person claimed if under the law of the requesting State such person has become immune from prosecution or punishment by reason of the lapse of time, or if under the law prevailing in that part of the territory of the requested State in which the person is apprehended such person would have become immune from prosecution or punishment by reason of the lapse of time, if the act had been committed within the territory of the requested State.

COMMENT

This article leaves it to the discretion of the requested State to decline extradition, if immunity from prosecution or punishment has been acquired by lapse of time *either* according to the law of the requesting *or* of the requested State. With respect to the clause "the law prevailing in that part of the territory of the requested State in which the person claimed is apprehended," the phraseology conforms to that used in Article 2, paragraph (2). See comment to that paragraph; see also Article 3, paragraph (2).

The question of lapse of time as barring, or, at least, justifying the refusal of extradition is one as to which one finds divergent views. The issue presented by a difference of the statutes of limitation in force in the requesting and requested States, respectively, is whether the requested State should determine acquisition of immunity from prosecution or punishment according to its own law, or according to that of the requesting State, or according to both. There is a noteworthy cleavage concerning this question between the opinion of publicists, on the one hand, and between treaty law and practice on the other. While the majority of text-writers maintain that lapse of time should be determined by the law of the requesting State alone, the majority of treaties examined refers the determination of this question to the law of the requested State. The arguments advanced in support of the opposing theories may be stated briefly as follows:

(1) The *requesting* State's law should alone determine whether or not immunity from prosecution or punishment has been acquired because the offense serving as the basis of the extradition request was committed in violation of that law and is punishable by it. It is to the interest of the requesting State to have a crime committed against *its* laws and disturbing *its* social order prosecuted and punished. The requested State's interests are sufficiently safeguarded by the proviso that no extradition need or should be granted if prosecution or punishment is barred by lapse of time according to the law of the requesting State, under which he is to be tried. The offender should not be permitted to escape punishment merely because the statute of limitation is shorter in the requested State. Moreover, in almost every country the running of the statute of limitation may be interrupted by certain events and it would be difficult to find justification for applying the

requested State's law as to such interruptions with respect to acts or events occurring outside its territory and in no way affecting its interests.

(2) The *requested* State's law should, from the point of view of the requested State, determine whether or not immunity from prosecution or punishment has been acquired, because of the fundamental principle underlying the international law of extradition that extradition may be granted only for acts which are punishable as well by the law of the requested, as by that of the requesting State; and the requested State is primarily interested in examining the request in the light of its own laws, assuming that the requesting State will not make a requisition if prosecution is barred by its laws. Once prosecution or punishment is barred by lapse of time under the law of the requested State, the act is no longer a crime under its laws and one of the essential conditions of extradition is lacking. The requested State cannot be expected to abdicate its right to determine according to its own laws, including the statute of limitation (which is based on considerations of public policy) whether the conditions under which extradition may or should be granted are present.¹

The following excerpts indicate the opinion of text-writers who, in general, take the position that the lapse of time should be determined according to the law of the requesting State:

Another ground of refusal to surrender is the fact that the prosecution of the offence has been barred by lapse of time. In this relation the question arises as to which law is to determine the prescription. The treaty with Spain of 1877 says the law of the demanding government, and this appears to be the true and logical doctrine. . . . the question whether the offence should be prosecuted and punished seems properly to belong to the country whose laws have been violated. To hold otherwise and to give the fugitive the benefit of foreign statutes of limitation, which are necessarily more or less arbitrary, is to defeat the end for which extradition treaties are made, namely, to prevent criminals from securing immunity from punishment by flight. Nevertheless, the opposite principle has generally prevailed, and is found in several of the treaties of the United States, which provide that extradition shall not be granted if prosecution for the particular offence has become barred by limitation, according to the laws of the country to which the requisition is addressed. (Moore, *Extradition* (1891), Vol. I, §373, pp. 569-570.

See also Piggott, *Extradition* (1910), p. 242 ff, *passim*.

La prescription, telle qu'elle est réglée par la législation du pays de refuge, ne saurait donc, à aucun titre, être appliquée à l'individu réclamé: elle n'aurait pas raison d'être.

En droit et en raison, c'est la prescription, telle qu'elle est déterminée par lois du pays réclamant, qui est seule à considérer en matière d'extradition. Là où l'infraction a été commise, là est né le droit

¹ For detailed analyses of the arguments advanced, respectively, in support of the opposing theories, see Beauchet, *Traité de l'Extradition* (1899), §§303-323, pp. 168-180; Billot, *Traité de l'Extradition* (1874), pp. 217-227.

de punir; là seulement le laps de temps peut anéantir ce droit.—La prescription ne peut donc être un obstacle à l'extradition que si elle est acquise au réfugié, d'après la législation du pays requérant. (Billot, *Traité de l'Extradition* (1874), pp. 220–221.)

Ce système [application of the law of the requested State] est généralement repoussé en doctrine, et les auteurs admettent, avec plus de raison, que la loi du pays requérant doit être seule consultée sur cette question de prescription. Cette solution est conforme, d'abord, aux raisons qui servent de base à l'institution de la prescription en matière. . . . On ne peut donc chercher d'autre raison générale et certaine de la prescription criminelle, que celle résultant des modifications que le droit de punir subit, par suite du temps écoulé depuis la perpétration du délit. . . . La société, . . . n'a plus ni nécessité ni intérêt à rechercher et à punir le coupable; le droit de punir s'évanouit avec l'intérêt social à une répression. S'il en est ainsi, on ne peut hésiter à appliquer au cas d'extradition la seule loi du pays requérant, à l'exclusion de celle du pays requis, car ces différentes considérations n'ont aucune force sur le territoire ou l'inculpé à cherché un refuge. . . . A aucun titre, donc, le délai de la prescription ne saurait être déterminé d'après la loi de l'Etat de refuge, et, *a priori*, c'est la loi de l'Etat requérant qui, seule, est appelée à trancher la question. (Beauchet, *Traité de l'Extradition* (1899), §306, pp. 170–171.)

Travers condemns the provision of the French Extradition Law, that extradition shall not be granted if prosecution is barred by lapse of time according to the law of the requested State (*i.e.*, France). After enumerating a number of national extradition acts which take the same position, he writes:

Néanmoins, nous pensons que le législateur français a eu tort d'exiger, de façon absolue, . . . de tenir compte de la législation du pays [requis] pour la prescription. . . . Exiger que la prescription de la peine ou de l'action ne fût pas acquise, dans l'Etat requis, si sa loi était applicable, est encore plus insoutenable. . . . il serait logique, du moment que l'on veut faire état de la prescription dans le pays requis, d'appliquer à la suspension et à l'interruption les règles formulées par la loi de ce pays. Mais comme cette loi n'est pas, en fait, applicable, le gouvernement requérant n'a aucune possibilité matérielle d'accomplir les actes propres d'interruption ou de prescription. (Travers, *L'entraide Répressive Internationale* (1928), §58, pp. 56, at 57–8; see also, Travers, *Le Droit Pénal International* (1922), Vol. IV, §2158, p. 675.)

See also the discussion concerning lapse of time at the 1879 meeting of the *Institut de Droit International*.¹

Contrary to the opinion prevailing among text-writers, the majority of bipartite treaties refer the question to the law of the requested State.² The

¹ *Annuaire*, 1880, p. 220 ff.

² (References are to Appendix I): Greece-Germany, Art. 4 (1), No. 1; Chile-Colombia, Art. 5 (2), No. 2; Estonia-Latvia, Art. 4 (a), No. 4; Estonia-Lithuania, Art. 4 (a), No. 5; Latvia-Lithuania, Art. 4 (a), No. 6; Germany-Czechoslovakia, Art. 4, No. 11; Italy-Czechoslovakia, Art. 7, No. 12; United States-Latvia, Art. 5, No. 14; Finland-Sweden, Art. 4 (2), No. 17; Finland-Denmark, Art. 6 (2), No. 18; Finland-Latvia, Art. 5 (a), No. 21; France-Latvia, Art. 5, No. 29; France-Poland, Art. 4 (7), No. 32; Estonia-Finland, Art. 5 (a), No.

same rule has been incorporated into the South American Convention of 1911.¹ The Draft Convention adopted by the International Law Association in 1928 leaves it to the requested State to refuse extradition, at its discretion, if exemption from prosecution or punishment has been acquired by prescription according to its laws.² A number of the national extradition statutes also provide that the lapse of time as barring extradition must be determined according to the law of the requested State.³

A few treaties exclude the application of the law of the *requested* State by referring the determination of the question of lapse of time either exclusively to the law of the requesting State,⁴ or to the law of the State where the offense was committed (which may be either the requesting or a third State).⁵

Between the two extreme views which refer the question of lapse of time *exclusively* to the law of the requesting, or to that of the requested State, there are a number of treaties and model drafts which take the position adopted in this Convention and provide that extradition shall not or need not be granted if prosecution or punishment is barred by lapse of time according to the law of either the requesting or of the requested State. Taking account of the varying phraseology used, treaties of this type may be classified, for clarity's sake, into the following groups:

(1) Treaties which provide that extradition shall [or need] not be granted if immunity has been acquired through lapse of time under the law of the requested *or* of the requesting State.⁶

33; Austria-Norway, Art. 5 (3), No. 34; Finland-Norway, Art. 5 (3), No. 35; Belgium-Paraguay, Art. 5 (1), No. 40; Belgium-Estonia, Art. 3 (1), No. 41; Belgium-Latvia, Art. 3 (1), No. 42; France-San Marino, Art. 4, No. 43; Albania-Yugoslavia, Art. 6, No. 44; Austria-Estonia, Art. 5 (a), No. 45; Liberia-Monaco, Art. 5, No. 48; Latvia-Norway, Art. 5 (3), No. 55; Belgium-Lithuania, Art. 3 (1), No. 56; Belgium-Finland, Art. 3 (1), No. 58; Austria-Finland, Art. 4 (1), No. 59; Latvia-Hungary, Art. 5 (a), No. 64; Finland-Italy, Art. 6 (3), No. 66; Germany-United States, Art. 6, No. 70; Austria-Sweden, Art. 5 (2), No. 72; Estonia-Norway, Art. 5 (3), No. 76; Denmark-Estonia, Art. 6 (2), No. 77; Latvia-Sweden, Art. 5 (2), No. 78; Latvia-Denmark, Art. 5 (2), No. 79; Poland-Sweden, Art. 4 (a), No. 81; Belgium-Poland, Art. 3 (2), No. 85; also in Appendix V, No. 6; Netherlands-Czechoslovakia, Art. 3 (2), No. 86; Denmark-Czechoslovakia, Art. 3 (d), No. 89; Austria-Belgium, Art. 11 (3), No. 90; Austria-Latvia, Art. 3 (4), No. 92. Some of these treaties use the permissive form; see, *e.g.*, Germany-Czechoslovakia, Art. 5, No. 11.

¹ Art. 5 (b), Appendix III, No. 4.

² Art. 5, Appendix IV, No. 5.

³ See, *e.g.* (references are to Appendix VI): Germany, Art. 4 (2), No. 7; Greece, Art. 4, par. 2 (4), No. 9; Sweden, Art. 9 (2), No. 12; Belgium, Art. 7, No. 2; Switzerland, Art. 6, No. 13; Finland, Art. 7 (2); Peru, Art. 3 (3).

⁴ Bulgaria-Yugoslavia, Art. 8, Appendix I, No. 16; Italy-Brazil, Art. 6 (a), Appendix I, No. 87; also in Appendix V, No. 4. The same rule is found in mandatory form in the South American Convention of Rio de Janeiro of 1889, Art. 19 (4), Appendix III, No. 2; in the Model Draft prepared by the International Penal and Prison Commission, Art. 10, Appendix IV, No. 5. For national extradition statutes adopting this position, see, *e.g.*, Argentina, Art. 3 (5), Appendix VI, No. 1; Panama, Art. 5 (c).

⁵ *E.g.* (references are to Appendix I): United States-Siam, Art. 5, No. 7; United States-Venezuela, Art. 5, No. 13; United States-Finland, Art. 5, No. 23; United States-Bulgaria, Art. 5, No. 24; United States-Lithuania, Art. 5, No. 26.

⁶ (References are to Appendix I): United States-Estonia, Art. 5, No. 15; Switzerland-Uruguay, Art. 3 (d), No. 19; Finland-Great Britain, Art. 5, No. 25; Great Britain-Czechoslovakia, Art. 5, No. 28; Estonia-Great Britain, Art. 5, No. 30; United States-Czechoslovakia, Art. 5, No. 31; Lithuania-Great Britain, Art. 5, No. 46; Belgium-Czechoslovakia, Art. 4 (2), No. 53; Colombia-Panama, Art. 2 (e), No. 54; also in Appendix V, No. 7; Hungary-Yugoslavia, Art. 3, par. 1 (5), No. 61; Germany-Turkey, Art. 6 (4), No. 75; also in Appendix V,

(2) Treaties which provide that extradition shall [or need] not be granted if immunity has been acquired through lapse of time under the law of the requested State *or* the State where the offense was committed (which may be the requesting or a third State).¹

(3) Treaties which provide that extradition shall [or need] not be granted if immunity has been acquired through lapse of time under the law of either the requested or of the requesting State *or of the State in which the offense was committed*.²

It may be pointed out that the treaties in groups (2) and (3)—especially (3)—by referring to the law of the State where the offense was committed, in addition to the laws of the requesting or of the requested State, palpably limit extradition and perhaps unduly complicate extradition proceedings in cases where extradition is requested for acts committed in a third State. In case such proviso is interpreted cumulatively, the statutes of limitation of three States need to be examined.

A statute of limitation is to prevent state accusations, difficult to rebut because of lapse of time. Obviously then, the statute of the State in which the prosecution is desired is primarily applicable. The law of the requested State is given importance in treaties and statutes as the result of a feeling that the person claimed should not be robbed of his asylum, if to do so would subject him to prosecution under circumstances considered unjust in the requested State. There seems to be, however, no reason to refuse extradition to a State, whose jurisdiction of the person and subject-matter is recognized, on the ground that a third State, which *might* also take jurisdiction, because the acts involved were committed in its territory, has a statute which bars prosecution there.³

Two further observations concerning the lapse of time provisions contained in treaties, statutes and model drafts seem to be pertinent:

(1) Some treaties—namely, those to which a State created or substantially transformed after the World War is a party—provide that the acquisition of immunity through lapse of time must have been acquired under “the law in

No. 3. See also to the same effect the following multipartite conventions: Convention of Montevideo, December, 1933, Art. 3 (a), Appendix III, No. 6; Central American Convention of April 12, 1934, Art. 2 (3), Appendix III, No. 7; Bustamante Code, Art. 359, Appendix III, No. 5. The same rule was adopted in the Draft Convention of Rio de Janeiro of 1912, Art. 2 (d), Appendix IV, No. 3; and in the Resolutions of the Comparative Law Congress of 1932, Art. IV (2). See also the French extradition statute, Art. 5 (5), Appendix VI, No. 6.

¹ Hungary-Rumania, Art. 5, Appendix I, No. 27; United States-Poland, Art. 5, Appendix I, No. 57; Estonia-Sweden, Art. 5 (1), Appendix I, No. 80.

² (References are to Appendix I): Bulgaria-Rumania, Art. 4 (e), No. 22; Rumania-Czechoslovakia, Art. 3 (f), No. 36; Estonia-Czechoslovakia, Art. 3 (f), No. 37; Latvia-Czechoslovakia, Art. 3 (f), No. 38; Bulgaria-Czechoslovakia, Art. 3 (f), No. 39; Greece-Czechoslovakia, Art. 3 (f), No. 50; Spain-Czechoslovakia, Art. 3 (f), No. 51; Portugal-Czechoslovakia, Art. 3 (f), No. 52; France-Czechoslovakia, Art. 4 (3), No. 60; also in Appendix V, No. 5; Bulgaria-Greece, Art. 3 (f), No. 62; Bulgaria-Turkey, Art. 4 (e), No. 65; United States-Austria, Art. 5, No. 71; also in Appendix V, No. 2; Bulgaria-Spain, Art. 3 (f), No. 73; Latvia-Spain, Art. 3 (f), No. 74; Lithuania-Czechoslovakia, Art. 3 (f), No. 83.

³ It may be observed that, with the exception of the United States-Austria treaty and Spain's treaties with Bulgaria and Latvia, in all the treaties in this group Czechoslovakia is one of the contracting parties, or they were concluded between States of the Balkan peninsula.

force *in all* parts of the territories” of the requesting and/or the requested State.¹

(2) Many of the treaties and some of the statutes provide at what particular step of the extradition proceeding the immunity through lapse of time must have been acquired in order to bar, or justify the refusal of, extradition, figuring either from the acts alleged, or from the last stage in the commitment or sentence:

(a) Some treaties provide that immunity must have been acquired at the time of surrender.²

(b) Some treaties provide that immunity must have been acquired prior to the time when the requisition reaches the requested State.³

(c) Finally, a number of treaties provide that immunity must have been acquired prior to the arrest or commitment of the fugitive for examination.⁴

In this connection, attention may be called to the Montevideo Convention of December, 1933, according to which no duty to extradite is imposed on the contracting parties if the statute of limitation has run “previous to the arrest of the accused person” (although they are apparently free to extradite under such circumstances if they choose).⁵ It is interesting also to note the provision of the French statute, according to which extradition will not be granted:

When, according to the law of the requesting or requested State, prescription of the action has taken effect *previous to the request for extradition*, or prescription of the punishment has taken effect *previous to the arrest of the person claimed*, . . .⁶

In view of the variety of rules found in treaties and statutes, it is not surprising that judicial practice called upon to apply these rules is far from uniform. The following cases will indicate the position taken by the courts of some countries:

¹ See, *e.g.* (references are to Appendix I): Bulgaria-Rumania, Art. 4 (e), No. 22; Rumania-Czechoslovakia, Art. 3 (f), No. 36; Estonia-Czechoslovakia, Art. 3 (f), No. 37; Latvia-Czechoslovakia, Art. 3 (f), No. 38; Bulgaria-Czechoslovakia, Art. 3 (f), No. 39; Greece-Czechoslovakia, Art. 3 (f), No. 50; Hungary-Yugoslavia, Art. 3, par. I (5), No. 61; Bulgaria-Greece, Art. 3 (f), No. 62; Bulgaria-Spain, Art. 3 (f), No. 73; Belgium-Poland, Art. 3 (2), No. 85, also in Appendix V, No. 6.

² See, *e.g.* (references are to Appendix I): Belgium-Paraguay, Art. 5 (1), No. 40; Belgium-Estonia, Art. 3 (1), No. 41; Belgium-Latvia, Art. 3 (1), No. 42; Belgium-Czechoslovakia, Art. 4 (2), No. 53; Austria-Finland, Art. 4 (1), No. 59; Belgium-Finland, Art. 3 (1), No. 58; Belgium-Lithuania, Art. 3 (1), No. 56; Belgium-Poland, Art. 3 (2), No. 85, also in Appendix V, No. 6.

³ See, *e.g.*, Switzerland-Uruguay, Art. 3 (d), Appendix I, No. 19; France-Czechoslovakia, Art. 4 (3), Appendix I, No. 60, also in Appendix V, No. 5.

⁴ See, *e.g.* (references are to Appendix I): Rumania-Czechoslovakia, Art. 3 (f), No. 36; Estonia-Czechoslovakia, Art. 3 (f), No. 37; Latvia-Czechoslovakia, Art. 3 (f), No. 38; Bulgaria-Czechoslovakia, Art. 3 (f), No. 39; Greece-Czechoslovakia, Art. 3 (f), No. 50; Spain-Czechoslovakia, Art. 3 (f), No. 51; Portugal-Czechoslovakia, Art. 3 (f), No. 52; Bulgaria-Greece, Art. 3 (f), No. 62; Bulgaria-Spain, Art. 3 (f), No. 73; Estonia-Sweden, Art. 5 (1), No. 80; Lithuania-Czechoslovakia, Art. 3 (e), No. 83; Netherlands-Czechoslovakia, Art. 3 (2), No. 86; Denmark-Czechoslovakia, Art. 3 (d), No. 89.

⁵ Art. 3 (a), Appendix III, No. 6.

⁶ Art. 5 (5), Appendix VI, No. 6. Italics inserted.

GREAT BRITAIN

In *Reg. v. Governor of Holloway Prison (ex parte Buddenborg)*,¹ England acceded to the request of the Netherlands to extradite, under the treaty of June 9, 1873, a person sentenced for violation of the bankruptcy laws. Buddenborg, having been once extradited, spent several months in prison pending his trial, which resulted in his conviction on some of the charges. At his request, he was permitted to return to England and to serve the remaining part of his sentence later. When he was rearrested at the request of the Netherlands Government, he argued that exemption from punishment had been acquired by lapse of time and he should not be extradited under Article 5 of the treaty. The court, discharging a rule for a writ of *habeas corpus*, held that the postponement of the execution of the sentence, at the request of the sentenced person, did not amount to lapse of time according to the laws of the requested State within the meaning of the treaty.²

In *King v. The Governor of Brixton Prison (ex parte Cablera)*,³ the fugitive was convicted and served part of the sentence in Germany, when he was temporarily released, under a provision of the German Code of Criminal Procedure, on account of ill health. When called upon to serve the residue of his sentence, he escaped to England, where he was arrested at the request of the German Government. On a writ of *habeas corpus*, extradition was granted on the ground, *inter alia*, that exemption from punishment had not been acquired through lapse of time in accordance with the law of the requested State (England) as provided in Article 5 of the extradition treaty of May 14, 1872, between England and Germany, as the time when he was out of prison at his own request did not count.⁴

In *Rex v. The Governor of Brixton Prison (ex parte Van der Auwera)*,⁵ the fugitive was convicted of larceny in Belgium in July, 1901. He was arrested in England, at the request of the Belgian Government in February, 1906, but his extradition was delayed because of a prison sentence imposed on him for a crime committed in England. He argued against extradition in February, 1907, after having served his sentence in England, on the ground that punishment was barred by lapse of time and he should not be extradited under the Anglo-Belgian treaty of October 29, 1901. The treaty referred lapse of time to the law of the requested State,⁶ but the case was argued on

¹ Queen's Bench (1898), 14 Times Law Reports, 252.

² Art. 5 of the treaty provided: "The extradition shall not take place if, subsequently to the commission of the crime or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time according to the laws of the State applied to."

³ Law Reports [1907], 2 King's Bench, 861.

⁴ The text of Art. 5 is identical with the provision contained in Art. 5 of the England-Netherlands treaty of 1873, *supra*.

⁵ King's Bench (1908), 96 Times Law Reports, 821.

⁶ Art. 9 of the treaty provided: "The surrender shall not take place if, since the commission of the acts charged, the accusation, or the conviction, exemption from prosecution or punishment, has been acquired by lapse of time, according to the laws of the country where the accused shall have taken refuge."

the alleged expiration of the prescriptive period under the law of the requesting State (Belgium). The court granted extradition, holding that extradition proceedings were taken and the committal order made before the expiration of the prescriptive period.

FRANCE

The extradition of Blackmer, convicted of perjury, requested by the United States from France on the ground of the extradition treaty concluded between the two countries on January 6, 1909, was refused by France¹ on the ground, *inter alia*, that legal proceedings for the acts on account of which the extradition was requested, were barred through lapse of time under the law of the requested State (Art. 8 of the treaty).²

BELGIUM

In the case *Min. Public v. X.*,³ the extradition of the fugitive to France, convicted *per contumaciam* for robbery, assault and battery, was refused on the ground, *inter alia*, that immunity had been acquired through lapse of time according to Belgian law (Art. 7 of Belgian extradition statute).⁴

SWITZERLAND

The decisions of the Swiss courts are conflicting. In one of the early cases, involving the Franco-Swiss Extradition Treaty of July 9, 1869, the court construed the treaty to mean that it merely leaves it to the discretion of the requested State whether or not it will extradite a person when lapse of time under its laws would bar prosecution; but the treaty does not absolutely bar extradition in such a case.⁵ This, however, should be regarded as a *dictum* only, since there was in this case no immunity acquired through lapse of time according to the law of the Canton where the fugitive had been apprehended. Two years later, the Federal Supreme Court held, in a case involving the Italian-Swiss Extradition Treaty of July 22, 1868, that the provision of the treaty concerning lapse of time is mandatory and extradition

¹ *Cour d'Appel (Chambre de Mise en Accusation)*, Paris, 1928. English translation in Hudson, *Cases on International Law* (1929), p. 1034. For an analysis of the issues involved in this case, see Lapradelle, *Causes Célèbres du Droit des Gens, Affaire Henry M. Blackmer, Extradition* (1929).

² Art. 8 of the treaty provided: "Extradition shall not be granted, in pursuance to the provisions of this convention, . . . if legal proceedings or the enforcement of the penalty for the act committed by the person claimed have become barred by limitation according to the laws of the country to which the requisition is addressed."

From an English lawsuit, reported in Clunet, 1895, p. 232, it appears that France refused, in 1886, to extradite a Henry Llewellyn Winter, sought for perjury, on the ground that prescription of the offense had been acquired under French law and, therefore, extradition may not be granted under Art. 11 of the Anglo-French treaty of August 14, 1876.

³ *Cour d'Appel*, Bruxelles, Jan. 9, 1897, *Pasicrisie Belge*, 1897. II. 207.

⁴ See Appendix VI, No. 2.

⁵ *In re Stanley* (Tribunal Fédéral, Aug. 2, 1875), 1 *Recueil Officiel des Arrêts* [hereafter cited: *Rec. Off.*], 432. Art. 9 of this treaty provided: "L'extradition pourra être refusée, si la prescription de la peine ou de l'action est acquise d'après les lois du pays où le prévenu s'est réfugié, depuis les faits imputés ou depuis la poursuite ou la condamnation."

must be refused when immunity through lapse of time had been acquired under the law of the requested State.¹ This point of view has been maintained for almost a half-century, and in several cases extradition of persons requested by France under the treaty of 1869 was refused by Switzerland on the ground that immunity from prosecution or punishment had been acquired through lapse of time under Swiss law.² But, in 1918, the court changed its position, and in the case *Ambassade de France v. Marcellin*,³ in a well-reasoned opinion explaining the *rationale* underlying the changed attitude, the court held that the question of lapse of time must be determined according to the laws of *both* the requested and the requesting States.

The position taken in Article 4 of this Convention finds, to some extent at least, support in existing treaty law. In view of the divergence of treaty provisions, and in view of the cleavage between the opinions of publicists and the practice of States, it seems advisable to take the middle ground, and the text of this article should be looked upon as a compromise of conflicting attitudes, most likely to secure general acceptance. It should be particularly emphasized that the text is drafted in permissive form and leaves it to the requested State to determine whether it wishes to decline extradition on the ground that immunity from prosecution or punishment has been acquired through lapse of time under its laws. It is believed that, with the progress of international coöperation, States may make little use of the option to refuse extradition on this ground.

ARTICLE 5. POLITICAL OFFENSES

(a) A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a political offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a political offense.

COMMENT

Paragraph (a) of this article provides, in addition to the grounds foreseen in Articles 3 and 4, a further exception to the duty, imposed by Article 2 upon the requested State, to extradite under the conditions there specified. The provision contained in this paragraph is based on the political character of the act, and is in conformity with a principle now accepted generally in

¹ *In re Matioti* (Tribunal Fédéral, Aug. 25, 1877), 3 *Rec. Off.* 546. Art. 14 of this treaty provided: "Non petere l'extradizione aver luogo se dal fatto imputato, dall'inelucta o dalla condanna in poi, secondo le leggi dello Stato nel quale il prevenuto od il condannato si è rifugiato, è maturata la prescrizione della azione o della pena."

² See, e.g., *In re Lucas* (Tribunal Fédéral, Oct. 28, 1879), 5 *Rec. Off.* 552; *In re Roubaud* (Trib. Féd., Sept. 18, 1880), 6 *Rec. Off.* 432; *In re Meunier* (Trib. Féd., Oct. 30, 1886), 6 *Rec. Off.* 616; *Ambassade de France v. Vaugon* (Trib. Féd., March 5, 1886), 12 *Rec. Off.* 140; *Ambassade de France v. Pellegrin* (Trib. Féd., Oct. 2, 1886), 12 *Rec. Off.* 579. For the text of the treaty provision see *supra*, note 29.

³ Tribunal Fédéral, Oct. 3, 1918, 44 *Rec. Off.* I, 180.

theory by the majority of text-writers¹ and universally in the practice of States as manifested in their treaties. Extradition treaties concluded in the past hundred years, with few exceptions, and all conventions and drafts contain a provision exempting, in mandatory or in permissive form and subject to various limitations, political offenses from the operation of the treaty. A great number of the national extradition statutes similarly provide for the non-extradition of persons accused of offenses of a political character.

Historically, the non-extradition of political offenders is a comparatively recent development in the international law of extradition. Early extradition cases usually concerned the surrender of persons sought for political offenses; and the few extradition treaties entered into prior to the 19th century were concluded exclusively or primarily with a view to political offenders.² The medieval State, whose interests and personality were in most instances identified with those of the reigning dynasty, was primarily interested in defending the political system, and sought above all to punish those who endangered it. The then existing means of communication made it difficult for criminals to escape even to neighboring countries, and once they succeeded in so doing, it was equally troublesome to bring them back. The country where the act was committed was seldom sufficiently concerned with the desirability of bringing common criminals to justice to put the machinery in motion whereby such criminals' surrender might have been obtained from the State of refuge. Nor had the country of refuge any keen interest in handing over the fugitive: there was little, if any, conscious feeling of the existence of an international community which may have an interest in the suppression of common crimes; hence, there was no incentive to coöperate to that end.

There was a complete reversal of attitude in this respect in the early part of the 19th century, when the making of extradition treaties really got under way, and from the turn of the century States began to refuse to extradite persons sought for political offences, and this practice rapidly became general. While various reasons have been assigned in explanation of this change, and several nations claim the distinction of having initiated the practice of non-extradition of political offenders,³ it seems that the about-face may be explained by two main factors. First, the evolution of political institutions following the French Revolution and, second, the growing consciousness of the interdependence of nations following the Industrial Revolution. As to the first, the more liberal, representative forms of governments

¹ As to political offenses in general, and as to the principle and practice of non-extradition for such offenses, see, e.g., Moore, *Extradition* (1891), Vol. I, §§205-218, pp. 303-326; Piggott, *Extradition* (1910), pp. 44-62; Oppenheim, *International Law* (4th ed., by McNair, 1928), Vol. I, §§333-337, pp. 573-579; Billot, *Traité de l'Extradition* (1874), pp. 102-119; Beauchet, *Traité de l'Extradition* (1899), §§324-473, pp. 181-278, and authorities cited.

² See Moore, *op. cit.*, §§6 and 205, pp. 10 and 303; Clarke, *Extradition* (4th ed., 1903), p. 22; Beauchet, *op. cit.*, §§324-327, pp. 180-183; Deere, "Political Offenses in the Law and Practice of Extradition," 27 *American Journal of International Law* (1933), p. 247, at p. 249.

³ See Beauchet, *Traité de l'Extradition* (1899), §§329-330, pp. 183-184.

which gradually replaced the absolutistic, dynastic governments of the Middle Ages, caused public opinion and, under its pressure, the various branches of the governments themselves, to look from a different angle at acts committed with a political motive or in furtherance of a political objective. As to the second, the appearance of the steam engine and the increasing rapidity of the means of transportation made escape from one country to another easy and convenient (see Introductory Comment). With the gradual realization of the interdependence of State and of the existence of an international community, extradition shifted its basis and aim and, instead of serving as a device in the furtherance of a *policy*, it became an instrumentality of the more effective administration of justice and a method of coöperation among States in the suppression of crime.

Paragraph (a) of this article is drafted, like Articles 3 and 4, in permissive form, leaving it to the discretion of the requested State to grant or to decline extradition for an act constituting a political offense. The use of the permissive form in treaties with respect to non-extradition for political offenses is decidedly the exception rather than the rule;¹ the great majority of treaties and draft conventions examined contain provisions phrased in mandatory form either precluding the requested State from surrendering a person sought for a political offense,² or enjoining the requesting State from seeking the extradition of a person accused of a political offense.³ The treaties to which the United States is a party are also mandatory on this point, although in a negative form.⁴ On its face, this provision would seem to preclude the requesting State from seeking the extradition of a person charged with a political offense; but in view of the construction placed by the courts

¹ Permissive form is used, *e.g.*, in the following treaties: Germany-Czechoslovakia, Art. 4, Appendix I, No. 11 (extradition "need not" be granted); Germany-Turkey, Art. 4, Appendix I, No. 75, also Appendix V, No. 3 (the parties "shall not be bound" to extradite); also in the Montevideo Convention of 1933, Art. 3 (e), Appendix III, No. 6 (no "duty" to extradite).

² Among the typical bipartite treaties printed in Appendix V, the mandatory form, providing that a person "shall" or "will" not be surrendered, is used in the following treaties: Italy-Brazil, Art. 5, No. 4; France-Czechoslovakia, Art. 4, No. 5 (extradition "shall not take place"); Belgium-Poland, Art. 6, No. 6; Colombia-Panama, Art. 4, No. 7; Finland-Netherlands, Art. 8, No. 8. The positive mandatory form is used in all treaties to which Great Britain is a party; see, *e.g.*, Great Britain-Finland, Art. 6, Appendix I, No. 25: "A fugitive criminal shall not be surrendered if the crime or offense in respect of which his surrender is demanded is one of a political character, . . ." See also the Pan American Convention of 1902, Art. 2, Appendix III, No. 2; the Caracas Convention of 1911, Art. 4, Appendix III, No. 4; the Bustamante Code (1928), Art. 355, Appendix III, No. 5. The Oxford Resolutions of the *Institut de droit international* (1880), Art. 13, Appendix IV, No. 2, provide that extradition "cannot take place" for political acts. The draft of the International Law Association (1928), Art. 7, Appendix IV, No. 5, provides that persons "shall not be surrendered" for political acts. Mandatory form is used also in the Draft of the International Penal and Prison Commission (1931), Art. 6, Appendix IV, No. 6.

³ See, *e.g.* (references are to Appendix I): Finland-Sweden, Art. 2 (1), No. 17; Austria-Norway, Art. 4, No. 34; Finland-Norway, Art. 4, No. 35; Latvia-Norway, Art. 4, No. 55; Estonia-Norway, Art. 4, No. 76; Latvia-Denmark, Art. 4, No. 79. The formula used in these treaties is: "no request may be made" or, "extradition may not be demanded" for political offenses.

⁴ See, *e.g.*, United States-Austria, Art. 3, Appendix V, No. 2: "The provisions of the present treaty shall not import a claim of extradition for any crime or offense of a political character . . ."

on extradition treaties, it seems that the United States is also precluded from surrendering a person sought for such an offense: the treaty does not "import" any claim for a political offender and, therefore, the executive has no power to effect the surrender. It may be mentioned that the majority of the national extradition statutes also use the mandatory form in precluding the extradition of persons charged with political offenses.¹ This form of statutory provision, however, has no bearing on the adoption of the mandatory rather than the permissive form in international treaties, for the use of the mandatory form in municipal law is merely expressive of the State's policy.

In justification of the adoption of the permissive form in paragraph (a) of this article, it may be pointed out that this formula seems to be better adapted to a multipartite convention than the peremptory terms of a mandatory prohibition; it is also in harmony with the general tendency of this Convention. There is no reason why a State should be precluded from surrendering, if it so chooses, a person sought for a political offense. It may well be that some States, because of close association or because of the close similarity of their political institutions, would find the extradition of political offenders desirable.² And there seems to be no reason why they should not be *allowed* to do so, especially when their discretion in this respect is in no way limited. There is no generally recognized rule of international law holding that extradition for a political offense is never permissible irrespective of whatever be the point of view of the requested State in this respect. This position has been taken recently by the German Supreme Court in a case where the accused, charged with murder, was surrendered by Hungary although no extradition treaty existed between Germany and Hungary. The Hungarian court before which the extradition proceedings took place, rejected the fugitive's allegation that the act was committed with a political motive, and he was surrendered without condition. The defendant in the course of his prosecution in Germany alleged that, having been extradited for a political offense, his surrender was without legal effect and, therefore, he could not be tried. The court dismissed his appeal based on such an argument and denied the existence of a rule of international law prohibiting the extradition of political offenders. Even if the Hungarian court erred, said the German Supreme Court, in denying the political nature of the offense, such an error would not entitle the accused to rely thereon before the German Criminal Court as invalidating his extradition.³

¹ See, *e.g.* (references are to Appendix VI): Argentina, Art. 3 (2), No. 1; Canada, Sec. 21, No. 4; France, Art. 5 (2), No. 6; Germany, Art. 3 (1), No. 7; Great Britain, Sec. 3 (1), No. 8; Sweden, Art. 7, No. 12; Switzerland, Art. 10, No. 13.

² See, *e.g.*, the Russian Penal Code of 1914, at present in force in Estonia, Latvia and Lithuania, Art. 852 (2) of which provides for the possibility of extradition for political offenses as follows: "Extradition . . . may also be effected when a crime was incited by political motives or was committed in connection with facts which are designated by international conventions as political, . . ."

³ *Reichsgericht* decision of March 18, 1926, *Entscheidungen des Reichsgerichts in Strafsachen*, 60, 202. Cf. with *Reichsgericht* decision of June 25, 1926, *Juristische Wochenschrift*, 1927, 2315, where, in an extradition effected under the German-Spanish treaty of May 2,

ARTICLE 5

States which do not wish to avail themselves of the discretion conferred on the signatories by paragraph (1) of this article, and which prefer, for reasons of their own, the mandatory inhibition found in the majority of treaties, may sign the declaration contained in Schedule B attached to this Convention. See comment thereunder.

Although not expressly so provided in paragraph (a) of this article, the determination of whether or not the request for extradition is based on an act which constitutes a political offense is left exclusively to the requested State. In view of the fact that the requested State is free to grant or to decline extradition for political offenses, it must obviously be free to determine alone the preliminary question of whether or not the act is such as would justify the exercise of discretion in granting or declining the request. See in this connection Article 17, paragraph 3 (c), entrusting the judicial authorities of the requested State with determining whether the extradition of the person is sought for a political offense. Although the majority of treaties and draft conventions expressly provide that the requested State alone decides whether or not the act serving as the basis of the extradition claim is of a political character, the number of treaties which do not contain an express stipulation to this effect is by no means negligible,¹ and the implication in these treaties is self-evident that the decision on this matter is within the exclusive competence of the requested State.² It was, therefore, not thought to be necessary to state expressly such a self-evident proposition.

Paragraph (a) of this article, in addition to permitting the refusal of extradition for acts constituting a political offense (*i.e.*, when the requisition is squarely based on an act which, in the opinion of the requested State, is an offense of a political character), also provides for the exercise of this discretionary power if it appears to the requested State that the extradition is

1878, the German Supreme Court held that the provision of Art. 6 of the treaty concerning the non-extradition of political offenders cannot be a bar to the prosecution of a person surrendered, without any condition, for murder, even if the Spanish Government, after the surrender, came to the conclusion that it erred in not recognizing the political character of the act.

¹The following treaties do not expressly provide who shall determine the political character of the offense (references are to Appendix I): United States-Siam, Art. 3, No. 7; Germany-Czechoslovakia, Art. 4, No. 11; United States-Venezuela, Art. 3, No. 13; United States-Latvia, Art. 3, No. 14; United States-Estonia, Art. 3, No. 15; Switzerland-Uruguay, Art. 3, No. 19; Great Britain-Latvia, Art. 6, No. 20; United States-Finland, Art. 3, No. 23; United States-Bulgaria, Art. 3, No. 24; Great Britain-Finland, Art. 6, No. 25; United States-Lithuania, Art. 3, No. 26; Hungary-Rumania, Art. 3, No. 27; Great Britain-Estonia, Art. 6, No. 30; Great Britain-Lithuania, Art. 6, No. 46; Great Britain-Albania, Art. 6, No. 47; Liberia-Monaco, Art. 3, No. 48; United States-Poland, Art. 3, No. 57; Latvia-Netherlands, Art. 3, No. 68; United States-Germany, Art. 4, No. 70; Germany-Turkey, Art. 4, No. 75, also in Appendix V, No. 3; Austria-Belgium, Art. 3, No. 90. See also the Pan American Convention of 1902, Art. 2, Appendix III, No. 3; the Montevideo Convention of 1933, Art. 3 (c), Appendix III, No. 6; Field's Code, Art. 215, Appendix IV, No. 1.

²Mention may be made of the limitation on the requested State's freedom to determine the political character of the act in some of the Latin American treaties which provide that the requested State should decide the question "according to the law more favorable to the fugitive." See, *e.g.*, Colombia-Panama, Art. 4 (b), Appendix I, No. 54; Colombia-Nicaragua, Art. 3, Appendix I, No. 63. To the same effect is the Montevideo Convention of 1889, Art. 23, Appendix III, No. 2.

sought in order that the person claimed may be prosecuted or punished for a political offense (*i.e.*, when the requisition, on its face, is for a common crime, but the requested State has reason to believe that in reality the extradition is sought for other offenses). Provision to this effect may be found in many extradition treaties, usually in the form of putting the burden of proving that the extradition is sought in order to prosecute or punish for a political offense, on the fugitive,¹ although some treaties and draft conventions use more cautious language which does not necessarily leave the raising of the delicate issue of the *bona fide* character of the extradition claim to the person sought.² The formula adopted in paragraph (a) of this article, which simply leaves in general terms the decision on the subject to the requested State, seems reasonable and likely to secure universal acceptance. It may appear to a requested State that the person claimed is wanted to be prosecuted or punished for a political offense when the person claimed would not himself be able to prove this fact. *In re Arton*³ extradition was demanded by France for various common crimes enumerated in the Anglo-French extradition treaty. Extradition was opposed on the ground, *inter alia*, that the request had been made with a view to try or punish Arton for a political offense. The court rejected this argument, partly on the ground that the fugitive did not enlighten the court as to the political offense for which his extradition was really desired; but it is apparent from the language of the opinion that the court was quite reluctant to examine, on the allegations of a fugitive from justice, charged with the commission of common crimes, the good faith of an extradition request, made by a friendly government under a treaty.⁴

The text of paragraph (a) of this article avoids the quandary in which the Court of Queen's Bench doubtless found itself in the *Arton* case, and leaves it to the requested State to consider the real character of the request on its own initiative, or permits the fugitive to raise the issue, if that be in conformity with the local procedure.

(b) As it is used in this Convention, the term "political offense" includes treason, sedition and espionage, whether committed by one or more per-

¹ Such formula is used in the treaties to which Great Britain is a party; see, *e.g.*, Great Britain-Finland, Art. 6, Appendix I, No. 25: "A fugitive criminal shall not be surrendered, . . . if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offense of a political character."

² See, *e.g.*, the Bustamante Code (1928), Art. 356, Appendix III, No. 5, which provides that extradition shall not be granted "if it is shown" that the request, in fact, was made for the purpose of punishing for a political offense. According to the Canadian Extradition Act, Sec. 21, Appendix VI, No. 4, the fugitive shall not be liable to surrender "if it appears" that such proceedings are being taken with a view to prosecute or punish him for a political offense. To the same effect is the British Extradition Act of 1870, Sec. 3 (1), Appendix VI, No. 8. The French extradition statute Art. 5 (2) Appendix VI, No. 6, excludes extradition "when it appears" that it is requested for a political end. The draft of the International Law Association (1928), Art. 7, Appendix IV, No. 5, takes an intermediary position by precluding extradition *either* if the person sought proves *or* if the requested State decides that the request is, in fact, made with a view to try or punish him for a political offense.

³ [1896] 1 Queen's Bench, 108.

⁴ For comments on this case, see "The Extradition of Arton," 8 *Green Bag* (1896), 100; notes in 100 *Law Times* (1896), 212, 364.

sons; it includes any offense connected with the activities of an organized group directed against the security or governmental system of the requesting State, and it does not exclude other offenses having a political objective.

COMMENT

In spite of the now universal acceptance of the practice of non-extradition for political offenses, the application of this practice may raise very delicate problems due to the difficulties in determining what acts constitute a political offense. No satisfactory and generally acceptable definition of a political offense has been found yet, and such as have been given are of little practical value, since, as Judge Moore pointed out, "the question whether a particular act comes within that category is preëminently circumstantial."¹ Paragraph (b) of this article seeks to solve this thorny problem by attempting to define, partially at least, acts which constitute a political offense. This is undoubtedly an innovation because, as will be indicated hereafter, apart from definitions given by courts and text-writers, existing treaties and statutes have very seldom attempted to define political offenses in positive terms. The definitions, such as can be found, are in most instances in negative form and endeavor to deal with the problem by exclusion from, rather than by inclusion in, the category of acts constituting political offenses.

The text of paragraph (b) of this article applies to acts committed by individuals as well as to group action. Political offenses which may be committed by individuals under the definition of paragraph (b) are those which may be called "purely" political crimes: treason, sedition and espionage. Apart from these "purely" political offenses, paragraph (b) lays down a two-fold test in order to bring an act, whether committed by one or more persons, within the category of political offenses:

- (a) That the act be connected with the activities of an organized group; and
- (b) That the activities of this group be directed against the security or the governmental system of a State.²

As has been indicated above, existing treaties and statutes offer little help and suggestion as to the definition of political offenses. Only one State at-

¹ Moore, *Extradition* (1891), Vol. I, §208, p. 308. On the difficulties of defining political offenses, see "The Nature and Definition of Political Offences in International Extradition" (discussion by J. Reuben Clark, Jr., Frederic R. Coudert and Julian W. Maek), 3 *Proceedings of the American Society of International Law* (1909), p. 95.

² A similar test is laid down by Stephen in his *History of Criminal Law of England* (1883), Vol. II, pp. 70-71; the offense must be part of a group activity, "incidental to and part of political disturbances." Cf. *In re Castioni* [1891], 1 Queen's Bench, 144. Castioni, charged with wilful murder of a member of the State Council of the Canton of Ticino, was arrested in England at the request of the Swiss Government. The extradition was opposed on the ground that the act was committed in the course of an uprising against the government of the Canton and, therefore, a political offense for which extradition is barred under Sec. 3 of the British Extradition Act. Reversing the magistrate's decision, the Court of Queen's Bench discharged Castioni. In considering the question of what constitutes a political offense, the court said (*per* Denman, J.): "The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part." For a detailed analysis of this case, see Piggott, *Extradition* (1910), pp. 50-56.

tempted to define political offenses for the purpose of their exclusion from extraditable crimes—Germany in the Extradition Statute of 1929 provides:¹

Political acts are punishable offenses directed immediately against the existence or the security of a State, against the Head or a member of the Government of a State in such a capacity, against a member of the legislative body, against the rights of citizens in electing or voting, or against friendly relations with a foreign State.

The problem of finding a satisfactory definition is further complicated by the fact that the overwhelming majority of treaties and many of the national extradition statutes exempt from extradition not only "political offenses", pure and simple,² but also acts connected with, or relating to, such offenses. The various tests laid down in treaties, not for the purpose of defining, but excluding from, the category of non-extraditable political offenses or acts connected therewith may be classified as follows:

(1) Treaties incorporating the so-called theory of predominance, or the Swiss theory, according to which an offense is not a non-extraditable political offense if—although committed in furtherance of a political objective—the common crime element predominates.³

(2) Treaties incorporating, in various forms, the so-called *attentat* or Belgian clause, according to which murder or attempt at life of the head of a State, or a member of his family (sometimes enumerated), or sometimes of a member of the government, shall not be considered a political offense.⁴

¹ Art. 3 (2), Appendix VI, No. 7.

² Non-extradition only for purely political offenses is foreseen in a few treaties, draft conventions and statutes; see, *e.g.*: Bulgaria-Rumania, Art. 4 (a), Appendix I, No. 22; Hungary-Rumania, Art. 3, Appendix I, No. 27; Latvia-Denmark, Art. 4, Appendix I, No. 79; Field's Code, Art. 215 (1), Appendix IV, No. 1; Oxford; Resolutions, Art. 13, Appendix IV, No. 2; International Law Association draft, Art. 7, Appendix IV, No. 5; International Penal and Prison Commission draft, Art. 6, Appendix IV, No. 6. See also the following statutes (references are to Appendix VI): Canada, Sec. 21, No. 4; France, Art. 5 (2), No. 6; Great Britain, Sec. 3 (1), No. 8; Sweden, Art. 7, No. 12; Switzerland, Art. 10, No. 13.

³ See the following treaties (references are to Appendix I): Chile-Colombia, Art. 3, No. 3; Estonia-Latvia, Art. 2, No. 4; Estonia-Lithuania, Art. 2, No. 5; Latvia-Lithuania, Art. 2, No. 6; Brazil-Paraguay, Art. 10 (5), No. 8; Italy-Yugoslavia, Art. 5 (3), No. 10; Italy-Czechoslovakia, Art. 5 (3), No. 12; Finland-Sweden, Art. 2 (1), No. 17; Finland-Latvia, Art. 3, No. 21; Estonia-Finland, Art. 3, No. 33; Austria-Estonia, Art. 3, No. 45; Austria-Finland, Art. 3, No. 59; Latvia-Hungary, Art. 3, No. 64; Finland-Italy, Art. 3 (3), No. 66; Turkey-Czechoslovakia, Art. 4 (1), No. 69; Austria-Sweden, Art. 3 (1), No. 72; Latvia-Sweden, Art. 3 (1), No. 78; Estonia-Sweden, Art. 3 (1), No. 80; Poland-Sweden, Art. 3 (a), No. 81; Italy-Panama, Art. 8 (5), No. 82; Brazil-Italy, Art. 5 (5), No. 87; Austria-Latvia, Art. 3 (1), No. 92. See the following draft conventions (references are to Appendix IV): Oxford Resolutions, Art. 14 (a), No. 2; International Law Association, Art. 7, second paragraph, No. 5 (restricted to crime involving the loss of life or grievous bodily harm); International Penal and Prison Commission draft, Art. 6, No. 6. See also the following statutes: Sweden, Art. 7, Appendix VI, No. 12; Switzerland, Art. 10, Appendix VI, No. 13; Finland (statute of Feb. 11, 1922), Art. 4. In this connection reference may be made also to the German extradition statute which provides, in Art. 3 (3), Appendix VI, No. 7, that extradition may be granted for a political offense if the act constitutes a deliberate offense against life, "unless committed in open combat." See also to the same effect the Finnish statute of 1922, Art. 5.

⁴ See the following treaties (references are to Appendix I): United States-Siam, Art. 3, No. 7 (the formula used in the treaties of the United States is as follows: "When the offence charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offense has been committed or attempted against the

(3) Treaties incorporating what may be called the “unqualified” *attentat* clause, according to which murder or attempt at life in general—that is to say, without reference to head of a state or of a government—is not a political offense unless committed in “open battle”.¹

(4) Treaties providing that anarchism or communistic activity does not constitute a political offense.²

Mention may be made of the provision found in a few statutes and in some of the draft conventions according to which acts, otherwise of a political character, may be extraditable if committed with unusual cruelty or barbarity³ or, if in case of civil war, they were in violation of the laws of war.⁴

life of the Sovereign or Head of a Foreign State, or against the life of any member of his family, shall not be deemed sufficient to sustain that such crime or offense was of a political character or was an act connected with crimes or offenses of a political character”); United States-Venezuela, Art. 3, No. 13; United States-Latvia, Art. 3, No. 14; United States-Estonia, Art. 3, No. 15; Bulgaria-Rumania, Art. 4 (a), No. 22; United States-Finland, Art. 3, No. 23; United States-Bulgaria, Art. 3, No. 24; United States-Lithuania, Art. 3, No. 26; Hungary-Rumania, Art. 3, No. 27; United States-Czechoslovakia, Art. 3, No. 31; France-Poland, Art. 4 (5), No. 32; Austria-Norway, Art. 4, No. 34; Finland-Norway, Art. 4, No. 35; Czechoslovakia-Rumania, Art. 3 (a), No. 36 (enumerates attempts against the life of either the head of State or the “Queen, or the Prince or Princess, heirs to the throne of Rumania” as not being political offenses); Estonia-Czechoslovakia, Art. 3 (a), No. 37; Latvia-Czechoslovakia, Art. 3 (a), No. 38; Bulgaria-Czechoslovakia, Art. 3 (a), No. 39; Belgium-Paraguay, Art. 4, No. 40; Belgium-Estonia, Art. 5, No. 41; Belgium-Latvia, Art. 5, No. 42; Albania-Yugoslavia, Art. 4, No. 44; Greece-Czechoslovakia, Art. 3 (a), No. 50; Spain-Czechoslovakia, Art. 3 (a), No. 51; Portugal-Czechoslovakia, Art. 3 (a), No. 52; Belgium-Czechoslovakia, Art. 4 (4), No. 53; Colombia-Panama, Art. 4 (b), No. 54; Latvia-Norway, Art. 4, No. 55; Belgium-Lithuania, Art. 5, No. 56; United States-Poland, Art. 3, No. 57; Belgium-Finland, Art. 5, No. 58; France-Czechoslovakia, Art. 4 (2), No. 60; Hungary-Yugoslavia, Art. 3, II (1), No. 61; Bulgaria-Greece, Art. 3 (a), No. 62; Colombia-Nicaragua, Art. 3 (a), No. 63; Bulgaria-Turkey, Art. 4 (a), No. 65; Italy-Venezuela, Art. 5 (4), No. 67; Turkey-Czechoslovakia, Art. 4 (1), No. 69; United States-Austria, Art. 3, No. 71; Bulgaria-Spain, Art. 3 (a), No. 73; Latvia-Spain, Art. 3 (a), No. 74; Germany-Turkey, Art. 4, No. 75, also in Appendix V, No. 3 (provides extradition in mandatory form for attack on the head of the state or of the government); Estonia-Norway, Art. 4, No. 76; Latvia-Denmark, Art. 4, No. 79; Poland-Sweden, Art. 3 (a), No. 81; Italy-Panama, Art. 8 (5), No. 82; United States-Greece, Art. 3, No. 84; Belgium-Poland, Art. 6, No. 85; Denmark-Czechoslovakia, Art. 3 (1a), No. 89; Iraq-Turkey, Art. 4 (a), No. 91. The *attentat* clause is also contained in the Caracas Convention of 1911, Art. 4, Appendix III, No. 4; in the Bustamante Code of 1928, Art. 357, Appendix III, No. 5; and in the following national extradition statutes (references are to Appendix V): Belgium, Art. 6, No. 2; Germany, Art. 3 (2), No. 7; Sweden, Art. 7, No. 12.

¹ See the following treaties (references are to Appendix I): Finland-Denmark, Art. 5, No. 18; Italy-Finland, Art. 3 (3), No. 66; United States-Germany, Art. 4, No. 70; Germany-Turkey, Art. 4, No. 75, also in Appendix V, No. 3; Estonia-Denmark, Art. 5, No. 77. See to the same effect the Oxford Resolutions, Art. 14 (a), Appendix IV, No. 2; the International Law Association draft, Art. 7, Appendix IV, No. 5; and the German extradition statute, Art. 3 (3) Appendix VI, No. 7.

² Colombia-Panama, Art. 4, Appendix I, No. 54 (acts defined as anarchical under the laws of both States); Hungary-Yugoslavia, Art. B (II), Appendix I, No. 61 (offenses against human life or property connected with communist movement); Colombia-Nicaragua, Art. 3, Appendix I, No. 63 (same provision as in the Colombia-Panama treaty); Bulgaria-Spain, Art. 3, Appendix I, No. 73 (seditious acts committed individually or collectively with anarchist or social revolutionary aims); Italy-Panama, Art. 8 (5), Appendix I, No. 82 (acts of an anarchist nature under the laws of the two countries). See to the same effect the Pan American Convention of 1902, Art. 2, Appendix III, No. 3 (anarchism by the legislation of both the requesting and requested States); and the International Penal and Prison Commission draft, Art. 6, Appendix IV, No. 6 (crimes directed not against a definite State authority but against all State authority).

³ See, e.g., the French extradition statute, Art. 5 (2), Appendix VI, No. 6; International Penal and Prison Commission draft, Art. 6, Appendix IV, No. 6.

⁴ See, e.g., Field's Code, Art. 215, Appendix IV, No. 1; Oxford Resolutions, Art. 14 (b), Appendix IV, No. 2.

The most important tests heretofore utilized by reason of the number of bipartite treaties incorporating them are the predominance theory and the *attentat* clause, neither of which has been followed in paragraph (b) of this article. The reason for not adopting either of these tests can be partly explained by the fact that both are tests of exclusion rather than inclusion and are intended as a limitation on the principle of non-extradition for political offenses. Such a limitation may be very desirable when non-extradition for political offenses is mandatorily enjoined; it becomes superfluous when extradition for such offenses is permissible at the requested State's discretion. Under the permissive provision in paragraph (a), the State is free to extradite a person charged with an offense in which the common crime element (murder, arson, theft) predominates, although the act was committed with a political motive or related to an act in furtherance of a political objective (connected or mixed crimes). Thus it seems that the definition of paragraph (b), in connection with the permissive provision of paragraph (a) is sufficient for determining when a State *may* refuse to surrender for a political offense in which the common crime element predominates, without incorporating the predominance test in the text of this article.

Also the inclusion of the *attentat* clause does not seem desirable. Although the number of treaties containing this clause is impressive, as shown above, the number of treaties omitting it is by no means negligible.¹ It is not contained in the United States-Great Britain treaty; in fact, Great Britain does not use it at all because such an act is treason by British law.² Switzerland, the Netherlands, and, until recently, Italy refused to include the clause in their treaties. It may be noted also that the *attentat* clause was subject to vigorous criticism by several Continental writers. Some writers objected to it on the ground that attack upon the head of a State must always be regarded as a political offense and, therefore, excepted from extradition.³

¹ The following bipartite treaties do not contain the *attentat* clause (references are to Appendix I): Chile-Colombia, No. 3; Estonia-Latvia, No. 4; Estonia-Lithuania, No. 5; Latvia-Lithuania, No. 6; Brazil-Paraguay, No. 8; Italy-Yugoslavia, No. 10; Germany-Czechoslovakia, No. 11; Italy-Czechoslovakia, No. 12; Bulgaria-Yugoslavia, No. 16; Finland-Sweden, No. 17; Great Britain-Latvia, No. 20; Finland-Latvia, No. 21; Great Britain-Finland, No. 25; Great Britain-Czechoslovakia, No. 28; Great Britain-Estonia, No. 30; Estonia-Finland, No. 33; Austria-Estonia, No. 45; Great Britain-Lithuania, No. 46; Great Britain-Albania, No. 47; Austria-Finland, No. 59; Persia-Afghanistan, No. 00; Latvia-Hungary, No. 64; Austria-Sweden, No. 72; Lithuania-Czechoslovakia, No. 83; Italy-Brazil, No. 87; Austria-Belgium, No. 90; Austria-Latvia, No. 92. The clause is not contained in the Pan American Convention of 1902, Appendix III, No. 3; in the Montevideo Convention of 1899, Appendix III, No. 2; in Field's Code, Appendix IV, No. 1; in the Oxford Resolutions, Appendix IV, No. 2; in the International Law Association draft, Appendix IV, No. 5. Many of the national extradition statutes do not include the *attentat* clause, *e.g.* (references are to Appendix VI): Argentina, No. 1; Canada, No. 4; France, No. 6; Great Britain, No. 8; Switzerland, No. 13; United States, No. 15.

The following treaties do not contain the *attentat* clause, but murder or attempt upon the life of the head of state or members of his family is included in the lists of extraditable crimes (references are to Appendix I): Liberia-Monaco, Art. 2 (1), No. 48; Latvia-Netherlands, Art. 2 (1), No. 68; Netherlands-Czechoslovakia, Art. 2 (1), No. 86; Finland-Netherlands, Art. 2 (1), No. 95.

² Deere, "Political Offenses in the Law and Practice of Extradition," 27 *American Journal of International Law* (1933), p. 247, at p. 253.

³ See report on extradition of M. Brocher to the *Institut de Droit International, Annuaire*, 1880, pp. 217-218.

Another criticism directed against the clause was that it was at the same time too broad and too narrow. Too broad and excessive because by its general terms it permits extradition even if the killing or attempt at the life of the head of State was committed, for instance, by revolutionary forces which may have later been subdued. Too narrow and insufficient because it denies the right of asylum to assassins of a head of State when assassins of other, lesser persons may escape extradition.¹

In view of these criticisms, the omission of the *attentat* clause appears desirable. While the definition contained in paragraph (b) of this article would not *compel* a State to extradite a political assassin, the refusal to extradite being optional, any State *could* surrender such an assassin. Thus, by force of the permissive form of paragraph (a), the result, which is compulsory under the *attentat* clause, can be accomplished without its inclusion in the text of this article.

Acts sometimes excluded from the category of non-extraditable political offenses, because directed against all governmental systems, such as acts committed by anarchists, would fall within the definition of paragraph (b); but the requested State is free to surrender anarchists or communists if this is in accordance with its national policy. There is some conflict in practice as to whether or not anarchistic activities constitute political offenses. An English court has held that a crime committed by a French anarchist did not constitute a political offense barring his extradition, although he belonged to an organized group.² The Swiss courts, on the other hand, have held that acts of anarchists can be deemed political offenses barring extradition.³

Finally, the test of "brutality" and, in case of revolution or of civil war, the test of conformity to the laws of war, have been omitted from the Convention. The former seems too indefinite to be of practical value. The latter is

¹ Lammasch, *Auslieferungsrecht und Asylrecht* (1887), p. 312 ff; Billot, *Traité de l'Extradition* (1874), pp. 112-113, 117; Bourgon, "*Crimes et délits contre la sûreté des Etats étrangers*," *Recueil des Cours* (1927), I, 212-213.

For a review and analysis of the various criticisms levelled against the *attentat* clause, see Grivaz, *Nature et effets du principe de l'asile politique* (1895), pp. 246-252; Bernard, *Traité de l'Extradition* (2nd ed., 1890), Vol. II, pp. 297-298; Teichmann, "*Les délits politiques, le régicide et l'extradition*," 11 *Revue du droit international et de la législation comparée* (1879), p. 475, at p. 501 ff.

² *In re Meunier* [1894], 2 Queen's Bench, 415. The fugitive, charged with wilfully causing two explosions in France, was arrested upon the request of the French Government. Extradition was opposed on the ground, *inter alia*, that the act was of a political character. Application for *habeas corpus* was refused, the court saying (*per* Cave, J.): "It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of the object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party with whom the accused is identified by the evidence, . . . namely, the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens. . . . I am of opinion that the crime charged was not a political offence within the meaning of the Extradition Act."

³ See decisions of the Swiss Federal Court of Sept. 11, 1891, *In re Malatesta*, 17 *Entscheidungen des Bundesgerichts*, 456; of March 30, 1901, *In re Jaffei*, *Semaine Judiciaire*, 1901, p. 721.

one which courts might well be reluctant to apply in view of the unreliability of evidence on this subject, with which any war generation is familiar. Although frequently discussed by text-writers,¹ these tests have not been used, as has been shown, in any of the treaties examined, and have found their way into a negligible number of draft conventions and national extradition statutes. The impracticability of these tests has been cogently pointed out by Judge Morrow in *Re Ezeta*.² In that case, Salvador sought the extradition of Ezeta and some of his followers for murder and robbery. The acts charged occurred while the fugitives were attempting, unsuccessfully, to combat a revolution. In denying extradition on the ground that the offenses were of a political character, the court said (at p. 997):

The testimony shows that they [the acts charged] were all committed during the progress of actual hostilities between the contending forces, wherein Gen. Ezeta and his companions were seeking to maintain the authority of the then existing government against the active operations of a revolutionary uprising. With the merits of this strife I have nothing to do. My duty will have been performed when I shall have determined the character of the crimes or offences charged against these defendants, with respect to that conflict. During its progress, crimes may have been committed by the contending forces of the most atrocious and inhuman character, and still the perpetrators of such crimes escape punishment as fugitives beyond the reach of extradition. I have no authority, in this examination, to determine what acts are within the rules of civilized warfare, and what are not.³

Here, as in previous contexts, we may keep in mind that the permissive form of paragraph (a) of this article allows extradition under the circumstances just discussed if such extradition conforms to the national policy of the requested State.

As a further safeguard, a number of treaties—especially those which forbid extradition for such offenses—provide that a person surrendered for a common crime shall not be tried or punished for a political offense committed prior to his extradition, or that—in case of treaties incorporating the predominance theory—in the punishment of a person surrendered for a common crime which is also a political offense, the political element shall not be taken into consideration.⁴ This Convention in Article 22 forbids trial in the re-

¹ For a review and analysis of the various views on these tests, see Beauchet, *Traité de l'Extradition* (1899), §§398-408, pp. 226-234.

² 62 Federal Reporter (D. C., N. D. Cal., 1894), 972.

³ For comments on the Ezeta case, see: "The Extradition Proceedings in the Case of Ezeta," 28 *American Law Review* (1894), pp. 784, 879; J. B. Moore, "The Case of the Salvadorean Refugees," 29 *American Law Review* (1895), p. 1.

⁴ Such provisions are contained in the following treaties (references are to Appendix I): United States-Siam, Art. 3, No. 7; United States-Venezuela, Art. 3, No. 13; United States-Latvia, Art. 3, No. 14; United States-Estonia, Art. 3, No. 15; Bulgaria-Rumania, Art. 5, No. 22; United States-Finland, Art. 3, No. 23; United States-Bulgaria, Art. 3, No. 24; United States-Lithuania, Art. 3, No. 26; Hungary-Rumania, Art. 3, No. 27; United States-Czechoslovakia, Art. 3, No. 31; Belgium-Paraguay, Art. 4, No. 40; Belgium-Estonia, Art. 5, No. 41; Belgium-Latvia, Art. 5, No. 42; Liberia-Monaco, Art. 3, No. 48; Belgium-Lithuania, Art. 5, No. 56; Belgium-Finland, Art. 5, No. 58; Italy-Venezuela, Art. 7, No. 67; United

requesting State, without the consent of the extraditing State, of the person extradited, for any act other than that for which he was extradited, committed prior to his extradition, unless he voluntarily remains in the requesting State for thirty days. This Convention does not include a prohibition directed to the requesting State against trying the person extradited for a political offense, when that offense consists of the very acts for which he was extradited. If the political character of the acts is not urged in the extradition proceedings, and the person claimed is extradited, or if they are urged and still the requested State determines to extradite under the permissive form of this Convention, the requesting State would have a right to put the person extradited on trial for a political offense consisting of the acts upon which the requisition is based. If any States desire to restrict the action of the requesting State in this regard, it is suggested that supplementary agreements be entered into by them on this subject as is permitted by Article 27 of this Convention.

ARTICLE 6. MILITARY OFFENSES

(a) A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a military offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a military offense.

COMMENT

Paragraph (a) of this article, phrased like paragraph (a) of Article 5, in permissive form, provides another exception to the duty, imposed by Article 2 upon the requested State, to extradite under the conditions there specified. The basis of the exception here foreseen is that the act serving as the basis of the extradition request constitutes a military offense. In harmony with the attitude taken towards extradition in connection with military offenses in Article 5, extradition may also be declined under this paragraph if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a military offense. The determination of the question whether or not the act constitutes a military offense is obviously within the exclusive competence of the requested State for the same reasons that the determination of the question of whether or not the act constitutes a political offense is left, under Article 5, to the requested State (see comment on Article 5).

The practice of non-extradition for military offenses has not gained such a universal acceptance—or at least has not been so universally incorporated in

States-Austria, Art. 3, No. 71; United States-Greece, Art. 3, No. 84; Brazil-Italy, Art. 5 (5), No. 87; Austria-Belgium, Art. 3, No. 90; Finland-Netherlands, Art. 8, No. 95. To the same effect see the Caracas Convention of 1911, Art. 4, Appendix III, No. 4; the International Penal and Prison Commission draft, Art. 6, Appendix IV, No. 6; and the extradition statutes of Belgium, Art. 6, Appendix VI, No. 2; and of Switzerland, Art. 10, Appendix VI, No. 13.

treaty- and statute law—as the practice of non-extradition for political offenses. As a matter of fact, the majority of treaties—52—listed in Appendix I, do not contain any provision relating to military offenses.¹ It may be noted, however, that in a large number of these treaties (43 out of 52) extradition for military offenses is excluded by implication, namely, by the use of lists of extraditable offenses which do not include acts constituting military offenses as the term is here used (see paragraph (b)). Of course, a military offense which is also a political offense is covered by Article 5.

A very considerable number of treaties and draft conventions and some statutes expressly exclude extradition for military offenses. These bipartite treaties are 36 in number, and 29 of them are of the no-list variety. The majority of these treaties preclude, in mandatory form, extradition for military offenses; only two bipartite treaties² and one multipartite convention³ use the permissive form. In view of the various phraseology used, these treaties may be, for clarity's sake, grouped as follows:

(1) Treaties simply providing for non-extradition “for purely military offenses”—*i.e.*, without any definition or qualification whereby the “military” character of the act is to be tested.⁴

(2) Treaties providing for non-extradition for “purely” military offenses and laying down the test: offenses which are punishable only (or exclusively)

¹ The following bipartite treaties make no mention of military offenses (references are to Appendix I): Chile-Colombia, No. 3; Estonia-Latvia, No. 4; Estonia-Lithuania, No. 5; Latvia-Lithuania, No. 6; United States-Siam, No. 7; United States-Venezuela, No. 13; United States-Latvia, No. 14; United States-Estonia, No. 15; Switzerland-Uruguay, No. 19; Great Britain-Latvia, No. 20; Finland-Latvia, No. 21; United States-Finland, No. 23; United States-Bulgaria, No. 24; Great Britain-Finland, No. 25; United States-Lithuania, No. 26; Hungary-Rumania, No. 27; Great Britain-Czechoslovakia, No. 28; France-Latvia, No. 29; Great Britain-Estonia, No. 30; United States-Czechoslovakia, No. 31; France-Poland, No. 32; Estonia-Finland, No. 33; Finland-Norway, No. 35; Belgium-Paraguay, No. 40; Belgium-Estonia, No. 41; Belgium-Latvia, No. 42; France-San Marino, No. 43; Austria-Estonia, No. 45; Great Britain-Lithuania, No. 46; Great Britain-Albania, No. 47; Liberia-Monaco, No. 48; Belgium-Czechoslovakia, No. 53; Latvia-Norway, No. 55; Belgium-Lithuania, No. 56; United States-Poland, No. 57; Belgium-Finland, No. 58; Austria-Finland, No. 59; France-Czechoslovakia, No. 60; Colombia-Nicaragua, No. 63; Latvia-Hungary, No. 64; Latvia-Netherlands, No. 68; United States-Germany, No. 70; United States-Austria, No. 71; Estonia-Norway, No. 76; Latvia-Denmark, No. 79; United States-Greece, No. 84; Belgium-Poland, No. 85; Netherlands-Czechoslovakia, No. 86; Austria-Belgium, No. 90; Austria-Latvia, No. 92; Great Britain-Iraq, No. 93; Finland-Netherlands, No. 95.

² Germany-Czechoslovakia, Art. 4 (3), Appendix I, No. 11; Germany-Turkey, Art. 5 (1), Appendix I, No. 75.

³ Montevideo Convention of 1933, Art. 3 (f), Appendix III, No. 6.

⁴ Unless otherwise indicated, the provision is contained in Art. 3 (b); (references are to Appendix I): Brazil-Paraguay, Art. 10 (5), No. 8 (no extradition when “the offense is of a military or political character”); Bulgaria-Rumania, Art. 4 (b), No. 22; Rumania-Czechoslovakia, No. 36; Estonia-Czechoslovakia, No. 37; Latvia-Czechoslovakia, No. 38; Bulgaria-Czechoslovakia, No. 39; Greece-Czechoslovakia, No. 50; Spain-Czechoslovakia, No. 51; (“for offenses of a purely military character”); Portugal-Czechoslovakia, No. 52; Bulgaria-Greece, No. 62; Bulgaria-Spain, No. 73; Latvia-Spain, No. 74; Lithuania-Czechoslovakia, No. 83; Denmark-Czechoslovakia, No. 89. See also the same phraseology used: in the Montevideo Convention of 1933, Art. 3 (f), Appendix III, No. 6; in the Rio de Janeiro draft of 1912, Art. 4 (b), Appendix IV, No. 3. The Swiss Extradition statute simply provides for non-extradition “for military offenses, Art. 11, Appendix VI, No. 13. The Oxford Resolutions, Art. 16, Appendix IV, No. 2, provide that extradition ought not apply (ne doit pas appliquer) to “purely military offenses”.

under military law. (In some of these treaties the word "purely" is omitted.)¹

(3) Treaties providing for non-extradition "for military offenses and acts connected therewith."²

(4) Treaties providing for the possibility of extradition for military offenses if extradition could be granted for the same act, had it been committed by a person not subject to military law.³

A unique provision is contained in the Colombia-Panama treaty⁴ which provides for the non-extradition for political offenses except in case of "contraventions of a purely military character".

Reference may be made finally to some of the draft conventions which deal specifically with desertion as a non-extraditable military offense.⁵

The above survey of treaties indicates that the majority of treaties do not contain any express provision concerning military offenses; no such provision is found in treaties to which the United States, Great Britain or France is a party. But these countries are among those which have up to the present time entered only into treaties containing lists of offenses, and which, by not including military offenses among those which are extraditable, exclude such offenses by implication. The list treaties which do not include military offenses, and the no-list treaties which expressly exclude military offenses constitute a very large majority of the extradition treaties entered into since the World War.⁶

¹ *E.g.* (references are to Appendix I): Italy-Yugoslavia, Art. 5 (2), No. 10; Germany-Czechoslovakia, Art. 4 (3), No. 11; Italy-Czechoslovakia, Art. 5 (2), No. 12; Bulgaria-Yugoslavia, Art. 4 (2), No. 16; Albania-Yugoslavia, Art. 4 (2), No. 44 (omits "purely"); Hungary-Yugoslavia, Art. 3, par. II (2), No. 61 (omits "purely"); Finland-Italy, Art. 3 (2), No. 66; Italy-Venezuela, Art. 5 (3), No. 67; Turkey-Czechoslovakia, Art. 4 (2), No. 69; Germany-Turkey, Art. 5 (1), No. 75; Italy-Panama, Art. 8 (4), No. 82; Italy-Brazil, Art. 5 (3), No. 87. See to the same effect the International Penal and Prison Commission draft, Art. 7, Appendix IV, No. 6: No extradition for "acts consisting solely of the contravention of military duties". The German Extradition statute precludes extradition "if the act under German law is punishable only under the Military Penal Law". Art. 2 (2), Appendix VI, No. 7.

² Bulgaria-Turkey, Art. 4 (b), Appendix I, No. 65; Iraq-Turkey, Art. 4 (b), Appendix I, No. 91.

³ *E.g.* (references are to Appendix I): Finland-Sweden, Art. 1, No. 17; Denmark-Finland, Art. 2, No. 18; Austria-Norway, Art. 2, No. 34 (with the proviso that extradition is granted only on condition that the requesting State will not prosecute the case as a military offense); Austria-Sweden, Art. 2, par. 2 (4), No. 72; Estonia-Denmark, Art. 2, No. 77; Latvia-Sweden, Art. 2 (4), No. 78; Estonia-Sweden, Art. 2 (II), No. 80; Poland-Sweden, Art. 1, No. 81. See to the same effect the extradition laws of: France, Art. 4, Appendix VI, No. 6 (extradition may be granted for offenses committed by soldiers and sailors "when they are punished under the French law as common offenses"); Sweden, Art. 6, Appendix VI, No. 12; Finland, statute of Feb. 11, 1922, Art. 5; Norway, Statute of June 13, 1918, Art. 2.

⁴ Art. 4 (b), Appendix I, No. 54.

⁵ See (references are to Appendix IV): Field's Code, Art. 215 (3), No. 1, which provides non-extradition only in case of "desertions from or evasions of, military or naval service." The Oxford Resolution, Art. 16, No. 2, provides non-extradition for desertion from the army or navy, in addition to for "purely military offenses". The Rio de Janeiro draft of 1912, Art. 4 (b), par. 3, No. 3, makes surrender of deserters from the army or navy optional, though under Art. 4 (b) extradition for "purely military offenses" is mandatorily precluded.

⁶ This subject seldom receives more than cursory treatment from text-writers. Judge Moore in his *Extradition* (1891), I, §§407-412, pp. 611-623, discusses desertion generally, but

The inclusion of this article seems desirable in view of the general disinclination of States to extradite persons sought for offenses against the military laws. In view of the permissive form of paragraph (a) of this article, every State is free to extradite for military offenses and there is no reason why it should not be allowed to do so if it so chooses.¹ Moreover, States which do not wish to avail themselves of the discretion which paragraph (1) leaves to the signatories, may, if that be in accord with their national policy, record themselves as declining to extradite for military offenses by signing the declaration contained in Schedule A, attached to this Convention.

(b) As the term is used in this Convention, a military offense is an offense which is punishable only as a violation of a military law or regulation, and which would not be punishable as a violation of a civil law or regulation if the military law or regulation did not apply.

COMMENT

Paragraph (b) of this article attempts to define an act which constitutes a military offense for the purposes of this Convention by laying down a two-fold test: first, that the act "is punishable only as a violation of a military law or regulation"; and second, that it "would not be punishable as a violation of a civil law or regulation if the military law or regulation did not apply." This twofold test is a combination of the test employed respectively by the treaties grouped *supra* under (2)—precluding from extradition offenses punishable by military laws only; and by those grouped under (4)—providing for the possibility of extradition for military offenses if extradition could be granted for the same act, had it been committed by a person not subject to military law. Triability before a military tribunal is not proof that the act constitutes a military offense. In most countries persons belonging to the armed forces are tried before military tribunals for common-law crimes. Thus, in the United States, courts martial have concurrent jurisdiction with the civil law courts over such offenses as homicide, burglary, arson, robbery, etc., committed by members of the military forces.² The Montevideo Convention of 1933, while providing that the signatories are not bound to extradite when the fugitive would be tried by an extraordinary court, expressly stipulates that military courts are not regarded as such.

lays emphasis on desertion of seamen and treats desertion as a military offense only incidentally. Billot, *Traité de l'Extradition* (1874), pp. 94-100, also treats the subject incidentally under the title of desertion. For a somewhat detailed discussion, see Beauchet, *Traité de l'Extradition* (1899), §§454-473, pp. 268-278.

¹ Art. 17 (3) (e) provides for judicial determination of the question whether the person claimed is wanted for a military offense or to be prosecuted or punished for such offense.

² See, for the United States, *Manual for Courts-Martial*, Art. 35, and *Articles of War*, Arts. 92-96.

PART III. PERSONS

ARTICLE 7. NATIONALS OF REQUESTED STATE

A requested State shall not decline to extradite a person claimed because such person is a national of the requested State.

COMMENT

This article is framed to impose a duty upon a State not to refuse extradition because the person claimed is one of its nationals. It is appreciated that this rule may be difficult for some States to accept at the present time, and for this reason, a reservation on this subject has been provided. (See Schedule A.) However the exception of nationals from those whom it is the duty of a State to extradite, is so inadequately supported by the reasons given for it, and is so generally condemned by thoughtful students, that one may hope that the careful consideration which would be given to it at a general conference would result in its abandonment.

The non-extradition of nationals seems first to have arisen as a national policy between the Low Countries and France in the application of mutual ordinances for the surrender of criminals enacted by those two countries in 1736. This was due to the application in the territory of the former, in extradition cases, of the *Bulle Brabantine*, which guaranteed that the inhabitants should not be withdrawn from the jurisdiction of the local courts. France reciprocated.¹

However, during the 18th century France made a treaty with Spain (1765), expressly providing for the extradition of nationals.² An imperial decree issued by Napoleon expressly recognized the possibility of extradition by France of French nationals, but provided that such a demand should be submitted to the Emperor. Billot says that this decree was never given effect, and is supposed to have been nullified by the Charter of 1814,³ but Bonafos actually produces an *Ordonnance d'Extradition* of 1820 of a French citizen to the Canton of Geneva.⁴

In 1834 the rule against the extradition of nationals first found its place in a treaty, the parties very naturally being Belgium and France. Since then this provision has been included in all French treaties, except those made in 1843 with Great Britain and the United States, and under those two treaties neither Great Britain nor the United States was able to obtain a Frenchman from France.⁵ It is interesting to note that France's practice, denying ex-

¹ Billot, *Traité de l'Extradition* (1874), pp. 38 and 39.

² *Ibid.*, pp. 42 and 43; Bonafos, *De l'Extradition* (1866), p. 98. Bonafos says that a similar treaty was made between France and Switzerland in 1877, but this is an error. The Swiss treaty neither provided for nor prohibited extradition of nationals of the requested State. Under it we are told that the practice was generally not to extradite nationals, at least with the exception of crime "*grave et public*." Billot, *op. cit.*, p. 41.

³ *Op. cit.*, p. 72. Travers, *Droit Pénal International* (1922), Vol. V, p. 23, denies that the Charter, Arts. 4 and 62, had any such effect.

⁴ *Op. cit.*, pp. 101 and 121 to 123. See also Travers, *op. cit.*, p. 22.

⁵ Billot, *Traité de l'Extradition* (1874), pp. 72 and 73.

tradition of her nationals, was firmly established for many years before her laws provided for their punishment in France for crimes committed abroad (except crimes aimed at her own safety, money or financial interests).¹ Before the middle of the 19th century the Belgian and French rule against the extradition of nationals was generally adopted on the European continent, whether States acted under treaties or on the basis of reciprocity,² where it has persisted and has largely spread to Latin America.³

Great Britain⁴ and the United States⁵ have favored the extradition of nationals. To meet the desires of other contracting parties, however, Great Britain has at times put clauses in extradition treaties forbidding surrender of nationals, but she has recently been substituting for such provision a clause declaring merely that no party is compelled to extradite its nationals, thus leaving to herself freedom of action in the matter.⁶ "In negotiating extradition treaties the United States has oftentimes sought the omission of a common provision exempting a contracting party from the duty to surrender its own nationals.⁷ The attempt has, however, rarely been successful . . ." ⁸ In several instances during the middle of the last century, negotiations were broken off by the United States because of the fact that the other country refused to surrender its nationals.⁹ Nevertheless, to facilitate extradition so far as it is possible, we have come to accept a clause providing that the parties are not under a duty to extradite their nationals when other States insist upon it.¹⁰ Where the treaty says nothing about the surrender

¹ *Loi concernant les Crimes, les Délits, et les Contraventions commis a l'Etranger*, 27 Juin-3 Juillet, 1866, XI Bull. 1400, No. 14, 336. See evidence of M. Treitt, *Report from the Select Committee [of the House of Commons] on Extradition* (1868), pars. 1372-1384, pp. 73 and 74, also appendix to that report, p. 96.

² "§2. L'Extradition des malfaiteurs est soumise à des restrictions dont il faut bien se rendre compte. En premier lieu, les puissances ne consentent pas à livrer leurs nationaux: il en résulte que la France ne peut réclamer que l'extradition d'un Français ou d'un étranger réfugié dans un pays autre que celui auquel il appartient." *Circulaire du Ministre de la Justice du 5 Avril 1841*, Billot, *Traité de l'Extradition* (1874), pp. 72 and 416.

³ Billot, *Traité de l'Extradition* (1874), p. 73; Moore, *Extradition* (1891), §119, p. 152; Oppenheim, *International Law* (4th ed. by McNair, 1928), §330, p. 568; Travers, *Droit Pénal International* (1922), V, pars. 2224, 2231, 2232, pp. 11, 25 to 28.

⁴ Report of Royal Commission, 1878, see Piggott, *Extradition* (1910), pp. 18 to 20; Oppenheim, *International Law* (4th ed. by McNair, 1928), §330, pp. 568 and 569; Extradition Statute, 1870, Appendix VI, No. 8.

⁵ Moore, *Extradition* (1891), §§129 to 141, pp. 159 to 177.

⁶ Oppenheim, *op. cit.*, §330, p. 569, n. 1. See *Regina v. Wilson* (1877), 3 Queens Bench Division 42, where the prohibition in the treaty prevented extradition by Great Britain of her own national, and the case of *Tourville* (Oppenheim, *op. cit.*, §330, p. 569, n. 1), where a British subject was extradited under a treaty declaring the parties to be under no obligation to extradite their nationals.

Under circumstances similar to those in the *Tourville* case, Nicaragua extradited one of her nationals to Honduras. *In re Rodriguez*, *Boletín Judicial de la Gaceta* (1919), pp. 2333 to 2387; *Annual Digest of Public International Law Cases*, 1919 to 1922, p. 269.

⁷ Citing, "Mr. Fish, Sec'y. of State, to Mr. Delfoese, Belgian Minister, Aug. 11, 1873, *Foreign Relations of the United States*, 1873, Pt. I, p. 84; Mr. Gresham, Sec'y. of State, to Mr. Bartleman, No. 110, June 11, 1894, *Ms. Inst. Venezuela*, IV, 304. Moore, *Digest of International Law* (1906), Vol. IV, p. 288; Mr. Olney, Sec'y. of State, to Mr. Ransom, Minister to Mexico Dec. 13, 1895, *For. Rel.* 1895, Pt. II, p. 1008, Moore, *Digest*, Vol. IV, p. 289."

⁸ Hyde, *International Law* (1922), Vol. I, §319, p. 578.

⁹ Moore, *Extradition* (1896), Vol. I, §§129 to 133, pp. 159 to 162.

¹⁰ *Ibid.*, §133, p. 163. Under such treaty the President has no constitutional power to surrender a national *Ibid.*, §135, pp. 166 to 169.

of nationals, it is the position of our government that they are included in its general provisions.¹

As would be expected, the non-extradition of nationals is expressly provided for in the municipal legislation of a number of States.² In the case of others, the same result is reached by definition of extradition as the "surrender of aliens," and by referring to the persons claimed as "aliens,"³ or by inference from the provisions for the establishment at the hearing of the nationality of the persons claimed.⁴ The statutes of certain States declare a national policy opposed to extradition of nationals, subject only to exception when the contrary is expressly provided for by treaty.⁵

The municipal statutes of Great Britain, of other members of the British Commonwealth of Nations and of States under British mandate or guidance,⁶ of the United States,⁷ and of Chile⁸ and Paraguay,⁹ contain no provisions as to non-extraditability of nationals and so permit their extradition. The laws of Mexico vest discretionary power to extradite nationals in the executive, as an exception to the generally expressed policy,¹⁰ while the laws of Ecuador,¹¹ Spain¹² and Sweden¹³ expressly make the extradition of nationals permissive.

As is pointed out in the historical sketch at the beginning of the comment to the present article, under the leadership of Belgium and France the practice became widespread, during the 19th century, of excepting nationals of requested States from the operation of bipartite extradition treaties. There is a tendency, however, in recent years in the direction of making such exception permissive rather than mandatory, which is favored by the United States and Great Britain.¹⁴ This movement is at least in the direction of a

¹ Moore, *Extradition* §§138 to 141, pp. 170 to 177; Hyde, *International Law* (1922), Vol. I, §319, pp. 578 and 579; *Charlton v. Kelly* (1913), 229 U. S. 447.

² Austria and Hungary under Criminal Code, 1878, Art. 17; Costa Rica, Penal Code, Art. 230; Czechoslovakia, Penal Code, Art. 235; France, Extradition Law, March 10, 1927, Arts. 2 and 5 (Appendix VI, No. 6); Finland, Extradition Law, Feb. 11, 1922, Art. 2; Estonia, Latvia, Lithuania, under the provisions of the old Russian Penal Code, 1914, Art. 852 (3); Haiti, Law August 27, 1912, Art. 4; Liechtenstein, Penal Code, Art. 36; Norway, Extradition Law, June 13, 1908, Art. I; Panama, Extradition Law (No. 44) Nov. 22, 1930, Art. 5; Peru, Extradition Law, Oct. 23, 1888, Art. 3; Switzerland, Extradition Law, Jan. 22, 1892, Art. 2 (Appendix VI, No. 13); Turkey, Penal Code, Art. 9 (Appendix VI, No. 14); Uruguay, Penal Code, Art. 10.

³ Belgium, Extradition Law, March 15, 1874, Art. 1 (Appendix 6, No. 2); Poland, Extradition Act, April 6, 1875, Art. 1; Luxembourg, Extradition Law, March 13, 1870, Art. 1.

⁴ Germany, Extradition Law, Dec. 23, 1929, Art. 15 (Appendix VI, No. 7); Yugoslavia, Penal Code, 1929, Art. 494; Siam, Extradition Act, E.E. 2472, Arts. 13 and 16.

⁵ Italy, Penal Code, Art. 13 (Appendix VI, No. 10)—"Extradition of citizens is not granted unless specifically provided for in international convention"; Japan, Law No. 42, Aug. 10, 1895, Art. 1 (Appendix VI, No. 11); El Salvador, Penal Code, Art. 41.

⁶ Great Britain, Extradition Act, 1870 (Appendix VI, No. 8); British India, Extradition Act, Nov. 4, 1903; Australia, Extradition Act, Oct. 21, 1903; Canada, Extradition Act, 1927 (Appendix VI, No. 4); Iraq, Extradition Law, 1923; Transjordan, Extradition Law, 1927.

⁷ United States Code Annotated, Vol. 18, §§651-668, pp. 241-353 (Appendix VI, No. 15).

⁸ Code of Penal Procedure, Bk. III, Title 6 (Appendix VI, No. 5). ⁹ *Ibid.*, Arts. 590-615.

¹⁰ Mexican Law, May 17, 1897, Arts. 10-11. ¹¹ Ecuador, Law of Oct. 8, 1921, Art. 41.

¹² Spain, "Instructions for Administration and Despatch of Business of the Ministry of State," Art. 148.

¹³ Sweden, Extradition Law, June 4, 1913, §2 (Appendix VI, No. 12).

¹⁴ Oppenheim, *International Law* (4th ed. by McNair, 1928), §330, p. 569; Moore, *Extradition* (1896), §133, p. 163. See, for example, Estonia-Latvia, Appendix I, No. 4; Latvia-

general extradition of nationals, which the United States and Great Britain practice between themselves,¹ and which Great Britain practices to a considerable extent in her dealings with other States, under permissive treaties.²

The situation with regard to multipartite conventions is as follows: The extradition article of the Treaty of Amiens (1802) is silent on the subject of nationality.³ The South American Convention of 1889, Article 20, expressly declares that the nationality of the person claimed shall in no case constitute an obstacle to extradition.⁴ The Pan American Convention of 1902, Article 3, provides that a State has the right to surrender its nationals, but is not bound to do so.⁵ The South American Convention of 1911 makes no exception with regard to nationals.⁶ The Bustamante Code of 1928, Art. 3, declares that a State is not obliged to extradite one of its own citizens, but that if it does not do so it undertakes to bring him to trial.⁷ The Montevideo Convention of 1933, by Art. 2, makes extradition of nationals optional. The article also requires that a State which refuses to extradite its national shall try him. There is also appended to the convention an optional clause which, if signed, requires the signing States to extradite nationals between themselves.⁸ The Central American Convention of 1934, by Art. 4, declares that "the Contracting Parties shall not be obliged to deliver their nationals," but if extradition is refused, the person claimed must be tried in the requested State, and the requesting State must furnish all relevant evidence.⁹

The various drafts, projects and resolutions contain provisions as follows: Field in his Code made no exception as to nationals.¹⁰ The *Institut de Droit International* in the Resolutions of Oxford, Article 6, strongly favored extradition of nationals, so that they might be tried in *for odelecti commissi*.¹¹ The Rio de Janeiro Draft of 1912, Article 5, declared that "the nationality of the fugitive shall never constitute a hindrance to extradition."¹² It goes on to say that if a requested State fails to surrender its national, it shall try him itself. Travers in his *Projet*, Article 2, makes two suggestions as to extradition of nationals: (1) the requested State assumes the obligation to prosecute its nationals each time when their extradition is refused; (2) national-

Lithuania, Appendix I, No. 6, Great Britain-Czechoslovakia, Appendix I, No. 28, Great Britain-Lithuania, Appendix I, No. 45.

¹ Appendix V, No. 1.

² Oppenheim, *op. cit.*, §330, p. 569. Under treaties to which the United States is a party and which provide that neither party shall be bound to extradite its nationals, the President has been held without constitutional power to deliver a national of the United States. Moore, *op. cit.*, §135, pp. 166 and 167.

³ Appendix III, No. 1.

⁴ *Ibid.*, No. 2.

⁵ *Ibid.*, No. 3.

⁶ *Ibid.*, No. 4.

⁷ *Ibid.*, No. 5.

⁸ *Ibid.*, No. 6. The United States by reservation refused to assume an obligation to try its own nationals in case it failed to extradite them (Art. 2), denied the right of the requested State to refuse extradition when the person claimed is wanted for a trial before an extraordinary tribunal (Art. 3-d), allowed a subsequent requisition after the extradition had been refused for the same act, contrary to the provisions of the convention (Art. 12), denied the delivery of property in cases when the person claimed cannot be extradited (Art. 15), charged to the requesting State the expenses of extradition (Art. 16), and denied the obligation of extradition in transit (Art. 18).

⁹ *Ibid.*, No. 7.

¹⁰ Appendix IV, No. 1.

¹¹ *Ibid.*, No. 2.

¹² *Ibid.*, No. 3.

shall be extradited to the State where the crime was committed.¹ The Draft Convention approved by the International Law Association declares that "none of the High Contracting Powers shall be obliged to extradite its own subjects or citizens, but the required party undertakes to bring such persons to trial where, but for this provision, extradition could have been accorded."² In the Model Draft prepared by a subcommittee of the International Penal and Prison Commission it is provided, Article 5, that "nationals shall not be surrendered except in case of criminals constituting a special public danger. The State applied to shall decide alone whether this is the case."³

Thus we see that no one of the multipartite conventions, drafts or projects in the field of extradition prohibits the extradition of nationals. Several of them expressly provide for such extradition. Those which permit a State to refuse to extradite its nationals generally require that, when there is such refusal, the requested State shall itself prosecute the person claimed. The latest Pan-American Convention, signed at Montevideo in 1933, while making concession to the practice of the majority of States of not extraditing nationals, provides an Optional Clause for those States which desire to bind themselves to extradite their nationals. In the present Convention the emphasis has been reversed—the extradition of nationals has been laid down as the rule, and the possibility of an exception to the rule has been provided in reservations in Schedule A.

The Report of the British Royal Commission of 1878 states with great fairness the arguments for the non-extradition of nationals as follows:⁴

In favor of such provision it is said that a man should not be withdrawn from his natural judges; that the State owes to its subjects the protection of its laws, and that it fails in this duty if it hands over any of them to a foreign jurisdiction, and thus deprives them of the guarantees afforded by the law of their own country; that it is impossible to place entire confidence in the justice of a foreign State especially with regard to subjects of another country; and that it is a serious disadvantage to a man to be tried in a foreign language, and where he is separated from his friends and his resources, and from those who could bear witness to his previous life and character.

The same commission stated in part the reasons for extradition of nationals as follows:⁵

The offense is an offense against the law of the country in which it is alleged to have been committed. A person commorant in a foreign country owes obedience to its law in exchange for the protection which it affords him, as much as one of its proper subjects. Why, because he has escaped beyond the jurisdiction of that law, should an offender, whose surrender is asked for, be in a different position from that in which he would have been in the country from which he has escaped.

¹ Appendix IV, No. 4.

² *Ibid.*, No. 5.

³ *Ibid.*, No. 6.

⁴ Piggott, *Extradition* (1910), pp. 18 and 19; Travers, *Droit Pénal International* (1922), Vol. V, §2225, p. 11.

⁵ *Ibid.*

The argument advanced above for non-extradition of nationals proves too much. If justice as administered in other States is not to be trusted, then there should be no extradition at all. If a State owes to its nationals a duty to apply its own laws to them as to acts, wherever committed by them, then it should demand extradition of nationals who have committed acts abroad and have been taken into custody there. In fact, in the latter situation, the State of allegiance contents itself with watching to see that its nationals obtain justice. The same protection of nationals should suffice after extradition.

The argument that a man accused of crime should not be withdrawn from his "natural judges" is misdirected when it is used against extradition of nationals. This is shown by the usual rule of municipal law that a person shall be tried where he is alleged to have committed the crime,¹ and by the general opinion of jurists that efficient international coöperation for the suppression of crime calls for his trial in *foro delicti commissi*.² The argument that nationals should not be extradited, because they should not be withdrawn from their "natural judges," had its origin in France, and was there based upon the declaration in Article 62 of the French Charter of 1814 that "*nul ne pourra être distrait de ses juges naturels*." However, Travers and other French writers take the position that the "natural judges" here meant are rather those of the place of the offense than those of the nationality of the accused.³ It is generally agreed that the place where the crime was committed is the place where proof with regard to it can best be adduced.

It is also true that the State where an offense is committed is likely to be much more interested in the trial of the criminal than any other State, though it may happen to be that of the accused's nationality.

The argument that an alien, put on trial as the result of extradition, will be the victim of prejudice before a court of justice is a very dubious one, especially in view of the right of his State to see that he obtains equal justice, and would seem to be more than offset by the probability of indifference, if not

¹ See, for example, Constitution of the United States, Amendment VI; New York Code of Criminal Procedure, §§233, 355; Halsbury's *Laws of England*, Vol. IX, pp. 66 to 70; Bourdeaux, *Code d'Instruction Criminelle* (29th ed., 1931), Art. 6.

² See opinions quoted later in this comment.

Originally Great Britain refused to extradite to the United States persons charged with piracy by international law, though the treaty between the two countries included "piracy" in the list of extraditable crimes. This refusal was based upon the fact that British courts by international and municipal law had jurisdiction to punish such piracy, and so there was no reason to extradite for that offense, and the piracy provided for in the treaty must mean piracy by municipal law only. However, this was thought to be bad policy, where British and foreign courts have concurrent jurisdiction, and proof of the offense can better be advanced in the other country. The British law was changed to allow extradition in such a case. Moore, *Extradition* (1891) Vol. I, §113, p. 143; British Extradition Act, 1870, Art. 6 (Appendix No. 8); Piggott, *Extradition* (1910), p. 72.

³ Travers, *Droit Pénal International* (1922), Vol. V, §2229, pp. 23 and 24. Travers cites: Weiss, *Des Conditions a l'Extradition*, p. 38; Garrand, *Traité de Droit Pénal Français* (3d ed., 1913), I, §217, p. 452, note 17; Le Poittevin, *Code d'Instruction Criminelle Annoté*, app. to arts. 5, 6, 7, §104 citing authors on both sides; Merignhac, *Traité de Droit Public International*, II, p. 744.

of intentional leniency, when one is tried in the courts of his own country for acts done abroad which have no domestic repercussions.

The difficulty which a foreigner may suffer as a result of a trial conducted in a foreign language may be largely obviated if his State insists upon the use of an adequate interpreter; and the same situation exists if he is caught in the foreign State.

It is also important to remember that while, by the law of many States, it may be possible to put on trial a national for acts done abroad, on the ground that they constitute offenses against the State of his allegiance, when he has been convicted abroad and has fled to his own country before serving out the penalty imposed upon him, that penalty for breach of a foreign law will not be enforced in his own country. He will therefore ordinarily go unpunished, if he is not extradited, for the doctrine *non bis in idem* (Article 9, *infra*) will usually prevent his being tried a second time.

OPINIONS

The territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects or by domiciled aliens in his territory. But a sovereign government which pursues its subjects into foreign countries, and keeps its criminal law suspended over them, attempts a task in which, even if undertaken with earnestness, it is sure to fail; but which will probably be performed in a careless, indifferent, and intermitting manner. A government has no substantial interest in punishing crimes in the territory of another state; it has not on the spot officers of justice to discover and arrest the criminal; the transport of witnesses to a distance is a troublesome and costly operation; the difference of language, law, and customs creates further impediments. A failure of justice, and an acquittal, is therefore likely to occur, even if the utmost diligence is used; but it may be assumed as certain that, unless some special motive exists, little diligence will be used. A government would feel, with respect to offenses committed abroad in a civilized country, that it was, at the best, undertaking a work of supererogation; perhaps that it was interfering in a matter which, as the law of the place provided for it, would most properly be left alone. The experience of this and other countries shows that a criminal law applicable to offenses committed in foreign lands (such as the act of 33 Hen. 8 and 9 Geo. 4) is for the most part a *brutum fulmen*, and that it is rarely carried into execution. (Lewis, *Foreign Jurisdiction and the Extradition of Criminals* (1859), p. 30.)

It is laid down by Berner, as a universal principle, that a State ought never to surrender a native to a foreign criminal jurisdiction. The reasons by which he supports this position are that every man has an innate right to remain on the soil where he was born; that a man's right to his own home is of divine origin; and that the surrender of a native subject is inconsistent with national dignity. Such declamatory reasons as these raise a presumption that the writer was unable to adduce arguments founded on political utility. (Lewis, *op. cit.*, p. 51.)

Cette idée (l'extradition des nationaux) suppose l'abandon du principe, l'une des conquêtes politiques les plus incontestables de l'esprit libéral depuis un demi-siècle. C'est l'abandon de ce principe qu'un accusé revenu dans

son pays ne peut être distrait de ses juges naturels. C'est cette idée, qu'on appellerait monstrueuse, si nous l'avions présentée, à savoir qu'un Français rentré dans sa patrie, entouré de ses parents, de ses amis, placé sous la présomption d'innocence . . . et aussi sous la protection de ses antécédents, pourrait être arraché aux juges qui le connaissent, sur une dénonciation venue de l'étranger; pourrait être enlevé à la justice de son pays et livré à des procédures ignorées de notre législation et peut-être contraires à ses principes: tout cela au mépris de cette garantie écrite dans plusieurs constitutions, que le Français ne peut être distrait de ses juges naturels! . . . Il n'y a pas un pays en Europe qui ait consenti à abandonner le jugement de ses nationaux revenus sur son territoire. . . . (M. de Parieu in legislative debate, June 27, 1866, Billot, *Traité de l'Extradition* (1874), p. 66.)

[La situation du national jugé par un tribunal de son pays, pour un fait commis à l'étranger] sera . . . cent fois pire que s'il était livré par l'extradition à une justice étrangère. Devant la juridiction étrangère, il serait sur les lieux, il pourrait produire des preuves, faire entendre des témoins, il aurait tous les moyens d'information si précieux dans une affaire criminelle. Si tout lui manque à la fois, il lui sera impossible de trouver dans la loi nationale les garanties qu'il rencontrerait devant les juges du pays où il serait renvoyé. (M. Jules Favres in legislative debate, May 31, 1866, *Moniteur Universel*, 31 Mai 1866, p. 657, Vol. I; Travers, *Droit Pénal International* (1922), Vol. V, §2225, pp. 14 and 15.)

I would suggest whether any point could be raised, or whether the matter should be considered by this Committee, about the delivery up of what are called nationals. Foreign countries refuse to deliver up their own subjects; it is called the question of nationals. Recently, in 1863, I had the case of an Austrian subject who committed an enormous fraud in London, and fled to Hungary. The Foreign Office gave me letters to our Ambassador at Vienna, and the man was arrested by the Austrian police in Hungary, and taken to Vienna. We made an application, not a demand, but a request to the Austrian Government that, under the special circumstances of the case, they would send him to England; but after consulting their law officers they declined to do so, upon the express ground that he could be tried in Austria for the crime committed in England. . . . We conducted the prosecution to a great extent, but we found that it was impracticable to carry it on to a conviction without taking a great many witnesses from London to Vienna, and therefore we dropped it. . . . I think the Austrian Government would have been only too glad to have tried the man, but they wanted so much evidence that I found it could only be satisfactorily done by so many witnesses going to Vienna that I gave it up . . . ultimately he was released. (Richard Mullen, Solicitor to the Association of Bankers, in the *Report from The Select Committee [of the House of Commons] on Extradition* (1868), pars. 1162 to 1166, p. 60.)

When the *solidarité* of human justice is complete between nations that [the desirability that all persons should be tried where crimes were committed] may be the case, but up to the present time no Government has been found which has delivered up its nationals. (M. Treitt, French Avocat, *ibid.*, par. 1374, p. 73.)

D'abord, est-il vrai de dire que l'État manquerait à ses devoirs de protection s'il livrait un régnicole à la justice étrangère? l'affirmative entraînerait des conséquences inadmissibles. La protection de l'État suit le national à l'étranger; si l'on admet que l'État lui doive les garanties de la juridiction de son pays, il faut, pour être conséquent, décider que l'État doit intervenir

toutes les fois qu'un national est traduit devant un tribunal étranger. . . . Cette idée nous amène à insister sur l'intérêt qu'il y a, pour la justice répressive, à ce que le jugement et la punition du coupable aient lieu dans l'endroit même où la faute a été commise. En matière criminelle, le juge compétent est, avant tout autre, le juge du lieu de l'infraction. C'est là que les éléments de l'instruction sont réunis le plus facilement, et que la découverte de la vérité est assurée, si elle peut l'être. C'est aussi là que l'infraction a produit ses effets et que le besoin de la répression se fait surtout sentir. Aussi la théorie et la pratique sont-elles d'accord pour reconnaître à la loi pénale le caractère territorial. . . . On connaît déjà les motifs qui ne permettent pas de compter sur l'impartialité absolue du juge, lorsqu'il doit prononcer sur l'innocence ou la culpabilité d'un étranger. Ces motifs ont de la valeur; mais il ne faut pas en exagérer l'importance. La défiance peut être légitime, s'il s'agit d'une nation éloignée, régie par une organisation défectueuse, peu avancée encore sur la voie de la civilisation; on comprend alors qu'on hésite à livrer un national à la juridiction de ce pays. Mais la question se présentera rarement dans de telles conditions; car deux nations de mœurs si différentes ne sont pas liées par des rapports d'extradition. Il faut admettre que les deux pays entre lesquels la question se débat ont conclu une convention d'extradition. Chacun d'eux a, par la même, rendu hommage à l'organisation administrative et judiciaire de l'autre. . . . On prétend que l'extradition des nationaux n'est pas réclamée par les intérêts de la justice répressive. C'est une erreur. Le résultat, que se propose la répression, n'est pas complètement atteint, alors même que la législation du pays de refuge permet de poursuivre le national pour une infraction commise à l'étranger. Il est difficile, loin du lieu du crime, de réunir tous les éléments de preuve et d'arriver sûrement à la découverte de la vérité. . . .

De la discussion qui précède, il faut conclure qu'aucun principe ne s'oppose à ce que les nationaux soient soumis à l'extradition. . . . Il est donc permis de croire, qu'avec les progrès continus des relations internationales, un jour viendra où le coupable, ne pouvant plus s'abriter derrière sa nationalité, sera jugé sur les lieux mêmes de son crime, et puni par la loi qu'il aura violée. (Billot, *Traité de l'Extradition* (1874), pp. 67 to 70.)

But the chief object of extradition is to secure the punishment of crime at the place where it was committed, in accordance with the law which was then and there of paramount obligation. It is for this purpose that extradition treaties are made, and, except in so far as their stipulations may prevent the realization of that design, they are to be executed so as to give it full effect. It is at the place where the offense was committed that it can most efficiently and most certainly be prosecuted. It is there that the greatest interest is felt in its punishment and the moral effect of retribution most needed. There, also, the accused has the best opportunity for defense, in being confronted with the witnesses against him; in enjoying the privilege of cross-examining them; and in exercising the right to call his own witnesses to give their testimony in the presence of his judges. These and other weighty considerations, which it is not necessary to state, have led what I am inclined to regard as the great preponderance of authorities on international law at the present day to condemn the exception of citizens from the operation of treaties of extradition. (Mr. Blaine, Secretary of State, *Foreign Relations*, 1890, pp. 559, 566.)

Und in der That lässt es sich nicht verkennen, dass je vollständiger die Umwandlung der Auslieferung aus einer ausnahmsweisen Gunstbezeugung einer Regierung gegenüber einer anderen in ein Institut des regelmässigen

Reehes sie vollzieht, um so mehr die Befreiung der Inländer von der Auslieferung den Charakter der Singularität, der Ausnahme annimmt.¹ . . . Wenn die beiden Grundsätze der Mündlichkeit und Unmittelbarkeit des Strafverfahrens unseren continentalen Juristen einmal so tief in Fleisch und Blut übergegangen sein werden wie den Engländern, so werden auch sie nicht mehr geneigt sein, die Durchführung eines Strafprocesses vor den Gerichten eines anderen Staates als dem des Thatortes zu begünstigen.² (Lamasch, *Auslieferungsrecht und Asylrecht* (1887), pp. 397 and 399.)

Le juge naturel d'une infraction n'est pas le juge national compétent *ratione personnae*, mais le juge du lieu de l'infraction compétent *ratione materiae*. . . . En matière pénale, en effet, la compétence territoriale est prééminente à la compétence personnelle. Si le principe de la personnalité est appelé, par suite de la solidarité qui lie désormais les puissances, à favoriser des combinaisons, afin d'assurer la punition du coupable à son lieu d'origine, lorsqu'il n'a pu être atteint sur le territoire étranger par le juge du lieu de l'infraction, il ne perd point pour cela le rôle secondaire auquel il est condamné par la nature des choses. On a fait justement remarquer à quelles énergiques résistances ce principe s'était heurté avant de prendre place dans le Code d'instruction criminelle français. . . .

Comment comparer, en effet, les moyens dont dispose la compétence territoriale à ceux de la compétence personnelle? C'est sur les lieux que la démonstration du crime doit être faite, parce que le plus souvent l'état des lieux dénonce le coupable. C'est là qu'est la victime; c'est là que ses habitudes sont connues et que peuvent être recherchées les circonstances préliminaires et lointaines de l'assassinat ou de l'empoisonnement longuement prémédités par le coupable. . . .

La maxime qu'on ne livre pas les nationaux pouvait se justifier alors que les peuples étaient séparés par l'hostilité et la défiance, par des divergences graves dans les règles de la répression ou même lorsque l'extradition, au lieu d'être soumise à des garanties organisées par l'expérience des nations, était exposée aux tâtonnements d'une institution nouvellement introduite dans les rapports internationaux ou abandonnée à l'appréciation exclusive et arbitraire du pouvoir exécutif; il paraissait injuste de faire servir le pouvoir des souverains à placer le regnicole sous l'empire d'une justice étrangère. Les craintes qui avaient fait modifier sur ce point la prédominance de la compétence territoriale sont aujourd'hui dissipées et il est conforme à la raison autant qu'à la justice d'effacer un privilège préjudiciable à ceux-là mêmes à qui on prétend l'attribuer et qui constitue une atteinte grave à la partie lésée ainsi qu'aux droits de souveraineté de la nation qui revendique l'exercice de la prérogative répressive.* (Bernard, *Traité Théorique et Pratique de l'Extradition* (1890), Vol. II, pp. 111, 112, 113, 114, 122 and 123.)

The exemption of citizens from extradition has been maintained on various grounds. The only one which need seriously be noticed is that by the laws of most countries provision is made for the trial and punishment of their citi-

¹ In the following discussion the author points out that confidence in the judicial systems of other States must be assumed for extradition, that if it does not exist there should be no extradition at all, and the advantages of trial in *foro delicti commissi*.

² The opposing view is expressed by Von Martitz, *Internationale Rechtshilfe in Strafsachen* (1888), pp. 235, 237.

*[Author's note: Conf. Kluit, *De deditione prof.*, 2^o partie, p. 32 et 34.—Calvo, *Dr. intern.*, t. I, p. 529.—Bonafos, p. 70.—Billott, p. 70.—Villebrun, *L. du 27 juill. 1863*, p. 110.—Mareschal, p. 33.—Charles-Antoine, p. 33.—Fiore, *Dr. pen. intern.*, p. 526, et Renault, p. 17.—Asser, Bluntschli, Brocher, Brusa, Dubois, Holland, Holtzendorff, Hornung, Martens, d'Olivecrona, Saripolos, Westlake, Weiss.]

zens for offenses committed abroad, and that a state should not deliver up one of its citizens to be tried before a foreign tribunal when he can be punished at home under its own laws.*

It is unnecessary to cite further arguments and opinions to show that the ends of repressive justice are best attained by the trial of a criminal at the place where he committed his offence. The proposition may, indeed, be regarded as self-evident. The refusal to surrender citizens must, therefore, be regarded as resting upon sentimental considerations and an exaggerated notion of the protection which is due by a state to its subjects. . . . Admitting, as must be done, the superiority of the local punishment of offenses over that at a distant place, where their prosecution is inconvenient and often impracticable, there appears to be no valid reason why the system of extradition, which is intended to avert a failure of justice, should not be extended to citizens or subjects. As long as the citizens of a country are accorded justice abroad, no right of intervention of their government in their behalf accrues, and there is no occasion for the assertion of its protective power. . . . Moreover, it is at the place where the offence was committed that the accused can best make his defence. In attempting to punish offenses committed in foreign countries, reliance is generally and often necessarily placed on written evidence. This evidence is taken in the absence of the accused, without opportunity for cross-examination, and without the great privilege of being confronted with the witnesses and of testing their character and credibility; and questions of foreign law are often raised which the authorities of the foreign state are alone competent to determine. (Moore, *Extradition* (1891), Vol. 1, §§122 and 127, pp. 153, 157 and 158.)

Der Grundsatz der Nichtauslieferung von Inländern bietet ernste Nachteile. Unleugbar kann in der Regel nur am Tatort eine richtige Untersuchung und Aburteilung stattfinden. Im Grunde hat der ersuchende Staat, in dessen Gebiet das Verbrechen begangen wurde, ein Recht, den Verbrecher zu richten. Der Heimatstaat nimmt, obschon es sich um seinen Bürger handelt, keinen Anstoß an der Aburteilung und Bestrafung desselben durch einen ausländischen Staat. Man sieht daher nicht recht ein, warum der Heimatstaat, wenn der Verbrecher dessen Gebiet zufällig zu erreichen vermag, denselben grundsätzlich behalten und selber strafen soll, statt dass er ihn an den Staat des Tatortes abliefert. (Langhard, *Das Schweizerische Auslieferungsrecht* (1910), p. 88.)

. . . On ne peut sérieusement soutenir que l'extradition des nationaux est contraire à la dignité de l'État et aux devoirs de protection dont il est tenu vis-à-vis de ses ressortissants alors que Napoléon I^{er} a signé le décret du 23 Oct. 1811 que nous étudierons, *infra*, n° 2229 et que des pays, comme l'Angleterre et les États-Unis, acceptant de livrer leurs ressortissants.

M. Jules Favre a même développé avec un peu d'exagération, il est vrai, lors des débats qui ont abouti au vote de la loi du 27 juin 1866, modificatrice des art. 5 et s., C. inst. crim., la thèse qu'à la vérité c'est l'État, qui substituée, par principe, des poursuites sur son territoire à l'extradition de ses nationaux qui risque de compromettre la dignité nationale. "Quand il

* [Author's note: "It is laid down by Berner, as a universal principle, that a state ought never to surrender a native to a foreign criminal jurisdiction. The reasons by which he supports this position are, that every man has an innate right to remain on the soil where he was born; that a man's right to his own home is of divine origin; and that the surrender of a native subject is inconsistent with national dignity. Such declamatory reasons as these raise a presumption that the writer was unable to adduce arguments founded on political utility." Lewis on Foreign Jurisdiction, etc., p. 51.]

s'agit, a dit M. Jules Favre dans la séance du corps législatif du 30 Mai 1866 * de l'extradition d'un national, on s'écrie: Comment on va le livrer à la justice étrangère! Mais nous lui devons protection; il peut rencontrer des haines, des préventions sous lesquelles il succombera. Voyons si le sort qu'on lui fait n'est pas cent fois plus dangereux. Quel sera donc le criterium sur lequel on décidera de son innocence ou de sa culpabilité? On vous le disait tout à l'heure,—et cette considération se rattache à la souveraineté,—le juge français ne peut rien par lui-même; il faut qu'il s'adresse au juge étranger, qu'il procède sur des informations écrites. Nous avons une procédure qui veut que tout soit oral; nous sommes en présence d'un pays où tout se fait par écrit. *Nous nous humilions devant ce pays* et en ce qui concerne ce qu'il y a de plus capital, de plus considérable dans notre législation comme dans notre civilisation, la vie pour le dernier des citoyens. Nous ne nous contenterions pas d'un procès-verbal rédigé par un fonctionnaire français; nous irons immoler son honneur, sacrifier sa liberté au procès-verbal d'un agent russe, d'un agent chinois, car enfin, il n'y a point de limite. Les preuves peuvent venir de tous les coins du globe. Ce sera *en vous soumettant aux agents étrangers* que vous déciderez, vous, de la liberté et quelquefois de la vie d'un citoyen. . . .

Le juge répressif naturel d'un acte est celui qui a été institué par l'État dont l'ordre social est le plus gravement atteint et qui est, en fait, dans les meilleures conditions pour instruire l'affaire. . . .

Normalement, en outre, le juge le mieux à même de statuer est celui qui est sur place. Il peut, en général, entendre les témoins plus rapidement, dans leur langue, sans commissions rogatoires et avec un minimum de frais; il en cite, par conséquent, un plus grand nombre; il les interroge mieux et, au besoin, plusieurs fois. Ce n'est pas tout, il est le plus aisément ou même seul en état de faire des visites sur lieux et constatations sur place, et a seul, au cas où il y a des coauteurs ou des complices, des raisons de se saisir de l'ensemble de l'affaire, condition essentielle pour bien juger. . . .

En second lieu, et c'est une idée sur laquelle il est nécessaire de revenir, souvent la juridiction française légalement compétente pour statuer, n'aura pas, en raison de l'éloignement du lieu de perpétration et de la difficulté de réunir les preuves, les éléments nécessaires, d'où possibilité d'erreurs judiciaires, probabilité d'acquittements dus à l'incertitude et encouragement de la criminalité générale.

Il ne suffit pas qu'un législateur déclare la loi nationale applicable à une infraction commise hors du territoire pour qu'une instruction utile soit possible. . . .

Les considérations que nous venons de développer ont créé, en faveur de l'extradition des nationaux, un courant d'opinion qui s'est manifesté à la fois dans la doctrine, † dans un document officiel français, l'exposé des motifs du projet de loi portant approbation de la convention anglo-française du 14

* [Author's note: *Moniteur Universel*, 31 Mai 1866, p. 657, col. 1.]

† [Author's note: Bernard, *Traité de l'extradition*, t. II, pp. 109 et s.; Bomboy et Gilbrin, *De l'extradition*, pp. 34, 35; Saint-Aubin, *L'extradition*, p. 300; Billot, *Traité de l'extradition*, pp. 67 et s.; Weiss, *Étude sur les conditions de l'extradition*, pp. 46 et s.; Louis Renault, *Ann. de l'Institut de dr. internat.*, t. V, 1881-1882, p. 78; Mérignhac, *Traité de dr. internat.*, t. II, p. 742, reproduisant les conditions formulées par l'Institut de droit international, voir, *infra*, ce n°; Stieglitz, *De l'extradition*, p. 58; Beauchet, *Traité de l'extradition*, p. 68, n° 115; Despagne, *Cours de dr. internat. public*, 4^e éd. par de Boeck, 1910, §285m p. 410. Voir, sur l'extradition des nationaux, Le Poittevin, Cl., *De l'extradition des nationaux*, 1903, pp. 24 et s.; et, contre son admission, Deloume, *Principes généraux de dr. international en matière criminelle*, p. 81.

août 1876* et dans les résolutions de plusieurs sociétés savantes. (Travers, *Droit Pénal International* (1922), Vol. V, §§2225 and 2226, pp. 12 to 18.)

The majority of States decline to extradite their own nationals. Great Britain and the United States, regarding criminal jurisdiction as essentially territorial, are prepared in principle to do so; actually, the treaties of these two States contain varying provisions on this point, doubtless on account of the difficulty of securing reciprocity for their policy. It is, however, not easy to justify in principle the policy of refusing to extradite nationals. The theory that a State should try its own nationals for crimes wherever committed fails as a justification for two reasons: (a) Because in many cases it is impracticable to try a crime committed in another country on account of the impossibility of securing the relevant evidence; and (b) because the argument cannot have any application to a national who has escaped to his own country *after conviction* in a foreign country, since on general principles of justice such a person may not be tried again for the same offense. If, on the other hand, the refusal to surrender a national arises from a lack of confidence that justice will be rendered to him in the foreign State, that would seem to be a reason which would justify the refusal of extradition to that State altogether, but could not justify the practice of differentiating between nationals and other persons. But whatever the respective merits of these different views as to the extraditability of nationals may be, and even if the States should be unwilling to adopt a uniform practice on the point, we do not think that this question of itself creates any insuperable bar to a general convention on extradition, since the divergent policies might be reconciled by the insertion of an optional clause under which those States which were prepared to surrender their own nationals would agree to do so, either on terms of reciprocity or on such other terms as they might choose to specify in adhering to the clause. (Professor J. L. Brierly's Report to the Committee of Experts for the Progressive Codification of International Law 20 *American Journal of International Law*, Supplement, (1926), pp. 244 and 245.)

Like the Rapporteur, I am, in principle, of opinion that the authorities of the country where an offense has been committed are the authorities best qualified to punish it, and that, in this respect, they possess a natural jurisdiction which it would be desirable to see recognized as widely as possible. Nevertheless, in practice, one has to take account, not merely of the strong repugnance which the great majority of States display against handing over their nationals to a foreign country, but also of the reasons which explain this feeling and which, as a matter of fact, vary considerably from country to country. For example, there is no doubt that a country's attitude in this matter will always be influenced by the amount of confidence which it feels in the administration of justice in a particular other country and—despite all theoretical considerations—one cannot be surprised that a country should be more exacting in its appreciation when it is called on to hand over one of its own nationals than when the subject of extradition is a foreigner. It might be useful, as Mr. Brierly suggests, to provide for the insertion of a general clause declaring that extradition of nationals was allowable unless the contrary was provided. There are already various treaties containing clauses

* [Author's note: "Un jour viendra peut-être, . . . où, par l'effet du rapprochement des peuples, grace au progrès des lumières, à l'uniformité des lois et des institutions, cette exception (refus de remise des nationaux) n'aura plus de raison d'être et où tous les malfaiteurs, nationaux ou autres, seront indistinctement livrés à la justice étrangère qui les réclamera." Journ. off., 11 déc. 1876, p. 9227, col. 3.]

to this effect; this is the case, for example, with general extradition treaties concluded by France. (M. De Visscher's observations on Professor Brierly's Report, *supra*, *ibid.*, p. 249.)

It seems clear that on principle there should be no impediment to a requested State's extradition of a person claimed, in the fact that he is a national of a third State (even though the requested State does not extradite its own nationals); and that, when a national of a third State is asked for, the requested State should be held to be under no duty to extradite to the State of allegiance rather than to requesting State, where the offense is alleged to have been committed, or, under these circumstances, to obtain the consent of the State of allegiance, or to notify such State of the requisition.¹

The United States has written into its treaties no limitations upon its freedom to deal with nationals of third States when their extradition is sought,² and when consulted, under the terms of treaties between other States, as to the extradition of American nationals, has taken the position that it does not object to such extradition, but desires only to see that such nationals obtain their legal rights in foreign countries.³ This seems also to be the British position.⁴ For the most part, French treaties and practice conform to the same lines.⁵ Treaties might, of course, provide against the extradition of nationals of third States;⁶ may require the consent of the State of allegiance before the national of a third State can be extradited;⁷ or may require notice to the third State that a requisition has been received for one of its nationals.⁸

¹ Moore, *Extradition* (1891), Vol. I, §142, p. 177; Billot, *Traité de l'Extradition* (1874), Ch. III; Travers, *Droit Pénal International* (1922), Vol. V, §2261, p. 51; *Regina v. Ganz* (1883), Law Reports, 9 Queens Bench Division, 93.

² Moore, *op. cit.*, §142, pp. 177 and 178.

³ *Ibid.*, §§143 to 147, pp. 178 to 193.

⁴ *Regina v. Ganz*, *supra*, n. 52.

⁵ Travers, *Droit Pénal International* (1922), Vol. V, §2264, pp. 53 and 54; Bomboy & Gibbons, *Traité Pratique de l'Extradition* (1886), p. 26.

⁶ Travers, *op. cit.*, §2267, p. 57, but the only example given is an agreement applicable between Algiers and Tunis.

⁷ Billot, *Traité de l'Extradition* (1874), pp. 87 to 89, referring to various French treaties on the subject.

⁸ Treaty between France and Portugal, July 13, 1854, Art. 6, providing that: "If the person accused or condemned is not a subject of that one of the contracting parties which demands him, he shall not be delivered up until his government shall have been consulted and given opportunity to make known the reasons which it may have to oppose his extradition," involved in the *Case of Silveira* (1867) Moore, *Extradition* (1891), Vol. I, §144, pp. 179 to 184.

Treaty between Belgium and Italy of Jan. 15, 1875, in accordance with the terms of which the Italian minister gave notice to our government that United States citizens had been demanded by Belgium and that his government was "waiting to be informed whether the Government of the United States intends to ask that these persons be surrendered to it, or not." *Ibid.*, §146, pp. 187 to 191.

In the present treaty between Germany and Czechoslovakia (Art. 2, par. 2) Appendix I, No. 11, it is declared that either party, to whom requisition is presented for a national of a third State, may give notice to such third State, so that that State may also have an opportunity to make requisition for the person claimed.

A group of modern treaties provide that, when two or more States have already requested the extradition of the same person, the requested State shall give notice to the State of allegiance, "granting it a period of 15 days in which to decide whether it also intends to apply for extradition." Rumania-Czechoslovakia, Appendix I, No. 36; Estonia-Czechoslovakia, *ibid.*, No. 37; Latvia-Czechoslovakia, *ibid.*, No. 38; Bulgaria-Czechoslovakia, *ibid.*, No. 39;

One may argue that notice to the State of allegiance is a reasonable courtesy. Many States exercise criminal jurisdiction over nationals, and so the State of allegiance might want to put in a competing requisition if it knew one of its nationals was accused of crime committed abroad. Though the State of allegiance might not want to claim the person in question, it might want to follow the extradition proceedings in the interest of its national, especially where, as in the present Convention (Articles 5 and 6), persons *may* be surrendered to be tried for political and military offenses. However, it has not been thought desirable to put in this Convention a requirement that such notice be given, which might lead, in an appreciable number of cases, to uncertainty and delay. It is believed that the person claimed can adequately meet the situation, so far as concerns protection against improper extradition, by application to the proper diplomatic or consular officer of his government.

ARTICLE 8. CONFLICTING REQUISITIONS

(a) When a requested State receives from two or more States requisitions for the same person for the same act, the requested State shall, in extraditing the person claimed, give preference to that requesting State in whose territory the act was committed. If the act was committed in the territory of more than one requesting State or in the territory of a non-requesting State, the requested State shall extradite the person claimed to the requesting States whose requisition is first received.

COMMENT

A number of bipartite treaties make no distinction between multiple requisitions for the same act and for different acts, in both cases leaving the discretion of the requested State untrammelled by any rules of precedence.¹ The same result would seem to follow from the absence of any provision in a treaty as to preference in case of multiple requisitions. Half a dozen bipartite treaties, also making no distinction between multiple requisitions for the same act and for different acts, establish as the first test that of nationality and as the second that of territoriality.² Fourteen bipartite treaties, to all of which, except one, the United States or Great Britain is a party, provide only for extradition where a request is made for an offense committed "within the jurisdiction" of the requesting State, which means

Greece-Czechoslovakia, *ibid.*, No. 50; Spain-Czechoslovakia, *ibid.*, No. 51; Portugal-Czechoslovakia, *ibid.*, No. 52; Bulgaria-Greece, *ibid.*, No. 62; Bulgaria-Spain, *ibid.*, No. 73; Latvia-Spain, *ibid.*, No. 74. A similar clause is proposed in the Draft of an Extradition Convention, Art. 13, approved by the International Penal and Prison Commission, Appendix IV, No. 6.

¹ See (references are to Appendix I): Finland-Sweden, No. 17; Denmark-Finland, No. 18; Estonia-Finland, No. 33; Austria-Estonia, No. 45; Colombia-Panama, No. 54; Austria-Finland, No. 59; Hungary-Latvia, No. 64; Austria-Sweden, No. 72; Denmark-Estonia, No. 77; Estonia-Sweden, No. 80; Brazil-Italy, No. 87.

² See (References are to Appendix I): Germany-Czechoslovakia, No. 11; Italy-Czechoslovakia, No. 12; Bulgaria-Yugoslavia, No. 16; Albania-Yugoslavia, No. 44; Hungary-Yugoslavia, No. 61.

within the territorial jurisdiction;¹ as between two or more States requesting extradition under these circumstances, preference is given by the treaty provisions to the State whose requisition is first received.² By the terms of three bipartite treaties, in case of conflicting requisitions for the same offense, preference is given to the State within whose territory the offense was committed, or if it was committed in both States, then to the State where the principal act was committed.³ Another considerable group of bipartite treaties allows the requested State, in case of multiple requisitions for the same act or different acts, to choose between the State within whose territory the act was done and the State of nationality of the person claimed, with provision for notifying the latter State if it has not put in a requisition.⁴

In these bipartite treaties, which have just been discussed, we certainly do not have uniformity, but in the aggregate, where a preference is stated, the tendency is towards emphasizing territoriality of the act rather than nationality of the actor.

In the municipal statutes, which deal with the subject of multiple requisitions for the same act, preference is given generally to the claim of the State where the act was done.⁵ The French statute provides that preference shall be given to the State against whose interests the wrong was directed, or to the State within whose territory the act was committed.⁶

Of the multipartite conventions on extradition, two base a preference upon territoriality, where claims are made because of the same act,⁷ while two base a preference upon priority of requisition.⁸ Of the drafts and projects, all six, set out in Appendix IV, give preference to the test of territoriality, where multiple claims are based upon the same offense.⁹

¹ Moore, *Extradition* (1891) I, §103, pp. 134 and 135; Case of *Carl Vogtalius Stupp*, 14 Opinions of Atty.-General (1873), 281; Hyde, *International Law* (1922), I, §328, p. 591; Clarke, *Extradition* (4th ed., 1903), pp. 111 and 145; Case of *Allsop* (1858), Forsyth, *Cases and Opinions on Constitutional Law*, 368.

² See (references are to Appendix I): United States-Siam, No. 7; United States-Venezuela, No. 13; United States-Latvia, No. 14; United States-Estonia, No. 15; United States-Finland, No. 23; United States-Bulgaria, No. 24; Great Britain-Finland, No. 25; United States-Lithuania, No. 26; United States-Czechoslovakia, No. 31; Great Britain-Albania, No. 47; Liberia-Monaco, No. 48; United States-Poland, No. 57; United States-Austria, No. 71 and United States-Great Britain, Appendix V, No. 1.

³ See (references are to Appendix I): Finland-Norway, No. 35; Latvia-Norway, No. 55; Norway-Estonia, I, No. 76.

⁴ See (references are to Appendix I): Rumania-Czechoslovakia, No. 36; Estonia-Czechoslovakia, No. 37; Latvia-Czechoslovakia, No. 38; Bulgaria-Czechoslovakia, No. 39; Greece-Czechoslovakia, No. 50; Spain-Czechoslovakia, No. 51; Portugal-Czechoslovakia, No. 52; Bulgaria-Greece, No. 62; Bulgaria-Spain, No. 73; Latvia-Spain, No. 74.

⁵ Brazil, Law No. 2416, of June 28, 1911, Art. 7 (1), Appendix VI, No. 3; Ecuador, Law of Oct. 8, 1921, Art. 48; Estonia, Latvia and Lithuania, following the Russian Penal Code of 1914, Art. 852 (9); Finland, Extradition Law, Feb. 11, 1922, Art. 10; Norway, Extradition Law, June 13, 1908, par. 7; Sweden, Extradition Law, June 11, 1913, §12, Appendix VI, No. 12; Switzerland, Extradition Law, Jan. 22, 1892, Art. 14, Appendix VI, No. 13. Panama gives preference to the State of nationality: Extradition Law, No. 44, Nov. 22, 1930, Art. 14.

⁶ Extradition Law, Mar. 10, 1927, Art. 6, Appendix VI, No. 6.

⁷ Bustamante Code, Art. 347, Appendix III, No. 5; Montevideo Convention of 1933, Art. 7, Appendix III, No. 6.

⁸ South American Convention of 1911, Art. 13, Appendix III, No. 4; Central American Convention of 1934, Art. 6, Appendix III, No. 7.

⁹ This is clear in the Oxford Resolutions, Art. 9, Appendix IV, No. 2, and the Rio de

Since territorial jurisdiction for the trial and punishment of crime is believed to be that which results in the most efficient administration of justice,¹ it seems wise in the present paragraph to make it mandatory for a State, which is the recipient of two or more requisitions based upon the same act or acts, to give preference to the State where the act or acts were committed, as against the State of nationality of the person claimed, or the State which first presents its requisition. There is no controlling practice at the present time to prevent this; in fact the preponderant rule in treaties and statutes seems to favor the present text.

When the act was committed in the territory of more than one requesting State, or in the territory of no one of the requesting States, territoriality cannot control. For the convenience of administration of the extradition machinery within its territory it seems sensible to direct that, in these circumstances, preference shall be given by the requested State to the requisition which is first received.

OPINIONS

Il est, d'ailleurs, en cette matière, un principe qui trouvera une application fréquente, et sera d'un grand secours pour diriger le pays requis dans l'examen comparé des diverses requêtes. La loi pénale peut être considérée comme étant, à la fois, territoriale et personnelle. Cependant personne ne soutient qu'elle réunisse ces deux caractères à un degré égal. Elle est, avant tout, territoriale; elle oblige, sans distinction, tous ceux qui résident sur le territoire, et frappe toutes les infractions qui y sont commises. Le caractère personnel a été et est encore contesté à la loi pénale par un certain groupe de juriconsultes; il a été imaginé principalement pour obvier aux inconvénients de la règle, mal établie elle-même, qui s'oppose à l'extradition des nationaux. De là résulte que la compétence territoriale doit conserver la prépondérance sur la compétence personnelle. Lorsqu'en matière d'extradition, ces deux compétences se trouveront en présence, c'est la première, à moins de motifs exceptionnels, qui devra l'emporter. C'est dans le pays où le crime a été commis que le droit de punir existe surtout; c'est là que le besoin de la répression et de l'exemple se fait particulièrement sentir, que la découverte de la vérité est le mieux assurée. La compétence territoriale donnera plus complète satisfaction aux véritables intérêts de la justice. (Billot, *Traité de l'Extradition*, 1874, pp. 231 and 232.)

It may be that two nations make request (réclamation) for the delivery of the same offender. The only course which the State harbouring the offender is *obliged* to pursue, in such a case, is, not to show partiality to either re-

Janciro Draft of 1912, Art. 12, Appendix IV, No. 3. This seems also to be the intent of the Draft of the International Law Association of 1928, Art. 14, Appendix IV, No. 5. The Draft of the International Penal and Prison Association of 1931, Art. 13, leaves full discretion to the requested State, but points out that preference is usually based upon territoriality, Appendix IV, No. 6. Traver's Draft gives preference to the State agreeing to re-extradite, and if that provision is not applicable to the State where the act was done, and, clearly, when claims are made for the same act, the provision for re-extradition is not ordinarily applicable, Appendix IV, No. 4. Field says (Art. 224): "In case two or more nations claim a person, upon the charge of violating a provision of the Code, the nation within which the offense was committed has the prior right, unless proceedings upon the charge have already been commenced by the other nation." Appendix IV, No. 1.

¹ See Opinions in the COMMENT on Article 7 of this Convention.

requesting State. According to Martens, the request of the State which claims the offender as attached to her *service*, e.g., as an officer, or a public functionary, is preferable to the request of the country against which, or more especially in which, the crime has been committed; while on the other hand, the request of the latter State is preferable to that of the State which claims the offender merely as an individual subject. It is hardly necessary to discuss this nice point of international casuistry, as it is clear that the wisest conduct which a State can adopt is to refuse the request of both applicants. (Phillimore, *Commentaries upon International Law*, 3d ed., 1879, I, §CCCLXVIII, p. 522.)

. . . Lorsque l'infraction a été commise par le réfugié sur le territoire d'un pays autre que son pays d'origine. Ici le pays requis n'a d'autre question à résoudre que celle de savoir si la demande du pays requérant est la première en date. Nulle difficulté alors. La cause de la priorité puisée dans la date du dépôt de la requête se trouve ici d'accord avec la supériorité qu'il faut accorder à la compétence territoriale puisque généralement le pays du lieu de l'infraction sera le premier à réclamer l'extradition. Si la demande du pays d'origine est parvenue au pays requis à la même date que celle de l'État requérant, la compétence territoriale l'emportera. Le pays d'origine n'obtiendra donc l'extradition que dans le cas invraisemblable où sa réclamation aurait précédé celle de l'État requérant. Ce dernier subirait alors les conséquences de sa négligence. . . . Bernard, *Traité Théorique et Pratique de L'Extradition*, 1890, II, p. 146.)

A difficulty may arise in the case of concurrent demands for the surrender of the same fugitive. Where one of the demands is based on the territorial and another on the personal competence of the penal law, it is the sounder and better doctrine to comply with the demand based upon territorial competence. In the United States, however, no question of this sort can arise, since the government does not recognize demands for the extradition of fugitives for offenses not committed within the territorial jurisdiction of the demanding government, as coming within the purview of the treaties. Few of the extradition treaties contain any stipulation on the subject of concurrent demands. Phillimore says that in such a case the wisest course is to refuse both or all of the demands. Such a course, however, would not be consistent with the ends of justice. Other writers hold that that demand should be preferred which is based upon the gravest offense; and still others contend that the demand should be honored which is first in order of presentation. The treaties of the United States, so far as they contain any stipulation on the subject, embody the latter rule.¹ (Moore, *Extradition*, 1891 I, §372, pp. 568 and 569.)

. . . il faut, si la remise est sollicitée par plusieurs gouvernements en raison du même acte, faire droit à la requête de celui qui se prévaut d'une compétence territoriale². Son ordre social peut être présumé le plus lésé.

Le plus souvent, la présomption de plus grande gravité déduite de la nature territoriale de la compétence sera exacte en fait.

Si elle ne l'est pas, la fixité et la précision de la règle auront, au moins, l'avantage d'éviter toute récrimination.

. . . Aucune exception ne doit être apportée à la prééminence de la com-

¹ *I.e.*, the United States treaties provide only for extradition to a State within whose territory an extraditable offense has been committed, and some of those treaties, where requisitions are made by two such States, provide for extradition to the one first making requisition.

² Saint-Aubin, *L'Extradition*, p. 775.

pétence territoriale lorsque l'un des Etats, entre lesquels s'élève le conflit, excipe d'un crime portant atteinte à son crédit ou à sa sécurité¹. Nous ne croyons pas que l'on doive considérer les actes de cette comme constituant une catégorie spéciale d'infractions nécessairement plus graves que toutes autres même commises sur le territoire. Des peines identiques à celles qui les répriment ou d'autres plus sévères sont édictées pour punir des faits complètement différents. (Travers, *Droit Penal International* 1922, V, §2343, pp. 116 and 117.)

A uniform rule is also desirable, and should not be difficult to achieve, on the question of priority as between two States, each claiming the extradition of the same person from a third State. If one of these is the State of which he is a national and the other that in which his alleged crime was committed, it would seem proper that the claim of the latter should be preferred. Indeed, it would be a matter for consideration, which the treaty should determine, whether extradition should in any case be granted except to the State on whose territory a crime is alleged to have been committed. But it may be that the same person is charged with two or more crimes committed in different States, and in that event it would be desirable to determine which claim should be preferred, *e.g.*, whether that of the State whose claim is first received, or that of the State alleging the more serious crime. This is a point which also can hardly be satisfactorily dealt with except in a general convention. (Brierly's Report to the Committee of Experts, 1926, 20 American Journal of International Law, 1926, Supplement, p. 247.)

(b) When a requested State receives from two or more States requisitions for the same person for different acts, the requested State shall in extraditing the person claimed decide to which State it will extradite, taking account of the seriousness of each act, the place where each act was committed, the nationality of the person claimed, the times when the requisitions were received, and engagements which may be made for re-extradition by one requesting State to another.

COMMENT

As has been pointed out in the first paragraph of the comment attached to paragraph (a) of this article, some bipartite treaties expressly leave it, under all circumstances, to the discretion of the requested State to choose between two or more States requesting the extradition of the same person. The requested State would undoubtedly be vested with such discretion in the absence of any treaty provision on the subject. As is also pointed out in the same paragraph above, some bipartite treaties, in all cases of multiple requisitions for the same person, make nationality the guiding principle. Certain bipartite treaties say that when different States make requisitions for the same person for different offenses, preference is to be given to the State in whose territory the most serious offense was committed, but, if the offenses are of equal gravity, to the State whose requisition is first received.² Two

¹ *Contra*, Maurice Bernard, *Des conflits de souveraineté en matière pénale*, p. 45.

² Finland-Norway, Art. 8, Appendix I, No. 35; Latvia-Norway, Art. 8, Appendix I, No. 55; Norway-Estonia, Art. 8, Appendix I, No. 76.

French treaties provide for preference first on the basis of relative gravity of the offense, second on the basis of nationality, and third on the basis of time of receipt of requisitions.¹ Another group of treaties permits the requested State to choose between the State where the act was done and the State of nationality of the person claimed, whether the claims are for the same act or for different acts; provides for notice to the State of the person's nationality, if it is not one of the requesting States; and declares that if that State after such notice does not make requisition, the person claimed shall be surrendered to the State in whose territory the most serious offense was committed, or, if the offenses are of equal gravity, to the State whose requisition was first received.² United States and British treaties usually provide for extradition only to a State within whose territory an offense has been committed, and as between two such States, give preference to that one which first makes requisition.³

In cases where requisitions are made by different States for different offenses, some municipal laws provide that primary consideration shall be given to the relative gravity of the offenses,⁴ while others stress the order of receipt of the requisitions.⁵ The French Law of 1927 says that in such a case all of the circumstances are to be taken into consideration, and particularly the relative gravity and the place of each offense, the respective dates of the demands, and the undertaking which may be given by one of the requesting States for re-extradition.⁶

Of the multipartite conventions, the Treaty of Amiens is silent;⁷ four give preference to the State making claim for the gravest offense, and, if offenses are deemed of equal gravity, then to the State first making the request;⁸ and two give preference to the State first making the request.⁹ Of the drafts and projects for multipartite action, Field's Code makes no provision on this point;¹⁰ two give preference to the State making claim for the gravest offense, and, if the offenses are deemed of equal gravity, then to the State first making the request;¹¹ Travers would stipulate a preference in favor of the State agreeing to re-extradite, but if this factor is not controlling, then to the State in which one of the offenses was committed, and if all States have territorial

¹ France-Latvia, Art. 10, Appendix I, No. 29; France-San Marino, Art. 5, Appendix I, No. 43.

² *Supra*, note 4.

³ *Supra*, notes 1 and 2.

⁴ Ecuador, Law of Oct. 8, 1921, Art. 48; Estonia-Latvia and Lithuania following Russian Penal Code of 1914, Art. 852 (10); Finland, Extradition Law, Feb. 11, 1922, Art. 10; Panama, Extradition Law, No. 41, Nov. 22, 1930, Art. 14; Switzerland, Extradition Law, Jan. 22, 1882, Art. 14, Appendix VI, No. 13.

⁵ Norway, Extradition Law, June 13, 1908, Par. A; Sweden, Extradition Law, June 4, 1913, §13, Appendix VI, No. 12.

⁶ Art. 6, see Appendix VI, No. 6.

⁷ Appendix III, No. 1.

⁸ South American Convention of 1889, Art. 27, Appendix III, No. 2; Pan American Convention of 1902, Art. 6, Appendix III, No. 3; Bustamante Code, Art. 348, Appendix III, No. 5; Montevideo Convention of 1933, Art. 7, Appendix III, No. 6.

⁹ South American Convention of 1911, Art. 13, Appendix III, No. 4; Central American Convention of 1934, Art. 6, Appendix III, No. 7.

¹⁰ Appendix IV, No. 1.

¹¹ Resolutions of Oxford, Art. 10, Appendix IV, No. 2; Rio de Janeiro Draft of 1912, Art. 12, Appendix IV, No. 3.

jurisdiction, then to the one making the first request.¹ The Penal and Prison Association would leave the discretion of the requested State untrammelled, but states that usually the bases of preference are, first, territorial jurisdiction of the offense, and second priority of request.² The International Law Association apparently would base a preference upon territorial jurisdiction of the offense, and after that would leave the decision to the discretion of the requested State.³

Where two or more States request extradition of the same person for different acts, situations may be so varied that it seems unwise to attempt to frame a rule or rules to control the discretion of the requested State. Here perhaps the greatest weight should be given to the relative gravity of the various offenses, but when the offenses do not differ much in this regard, nationality or promptness in making demand may be persuasive. Even when the relative seriousness of the offenses involved is clear, international coöperation may be better served by handing the person claimed to the requesting State which wants him for the lesser offense, if it appears that he will later be handed over to the other requesting State, than by handing him to the State which wants him for the greater offense, but which will not, when finished with him, hand him on to the other State which has put in a requisition. Such a situation will be presented if the State making the requisition for the more serious offense has made a reservation under this Convention against extraditing its nationals.

A number of bipartite treaties and municipal statutes provide expressly for extradition to one State upon condition that the person in question shall be re-extradited to another requesting State, when, in the first State, justice has run its course.⁴ It is believed that the purpose of those treaties is accomplished by the present paragraph, which leaves the decision as to conflicting claims wholly in the discretion of the requested State, directing that, in reaching its decision, the requested State shall take account, among other things, of "engagements which may be made for re-extradition from one requesting State to another." This treatment follows closely that to be found in the present French Extradition Law.⁵

A number of the French writers have treated this situation quite at length. While they do not agree in details, they do agree that situations are so varied, when we have multiple requisitions for the same person for different offenses, that the establishment of rules for preferences under different circumstances

¹ Art. 15, Appendix IV, No. 4.

² Model Convention, Art. 13, Appendix IV, No. 6.

³ Art. 14, Appendix IV, No. 5.

⁴ See (references are to Appendix I): Finland-Sweden, Art. 8, No. 17; Denmark-Finland, Art. 10, No. 18; Austria-Estonia, Art. 10, No. 45; Colombia-Panama, Art. 11, No. 54; Austria-Finland, Art. 9, No. 59; Hungary-Latvia, Art. 10, No. 64; Austria-Sweden, Art. 9, No. 72; Denmark-Estonia, Art. 10, No. 77; Estonia-Sweden, Art. 9, No. 80; Brazil-Italy, Art. 11, No. 87. Estonia, Latvia and Lithuania, in accordance with the Russian Penal Code of 1914, Art. 852 (10); Finland, Extradition Law, Feb. 11, 1922, Art. 10; Sweden, Extradition Law, June 4, 1913, §13, Appendix VI, No. 12; Switzerland, Extradition Law, Jan. 22, 1892, Art. 14, Appendix VI, No. 13.

⁵ Article 6, Appendix VI, No. 6.

is hardly practicable. However, they stress particularly two factors—relative gravity of the offense charged, and the importance of arrangements for re-extradition, so that the person claimed may ultimately answer before appropriate tribunals for all of the criminal acts with which he is charged.¹

Under Article 22 of this Convention, re-extradition must be consented to by the State which granted the original extradition. There is no reason why that consent should not be given at the time of extradition, nor why extradition should not be conditioned upon an agreement to grant the re-extradition which is consented to.²

(c) For the purposes of this article vessels and aircraft in the public service of a State, and the private vessels and aircraft, which have its national character, are assimilated to a State's territory; but while a private vessel is within the territorial waters of another State, or while a private aircraft is on or over the land or territorial waters of another State, acts done upon such vessel or aircraft are also done within the territory of that other State.

COMMENT

As the "territory" within which the extraditable act was committed, is made the controlling factor by the first sentence of paragraph (a) of this article, when a State receives from two or more States requisitions for the same person for the same act, and by paragraph (b) of this article is declared to be a factor to be considered, when two or more States request the extradition of the same person for different acts, it seems desirable, for the purpose of this article, to assimilate to a State's territory its vessels and aircraft in the same sense in which this is done in Article 3, paragraph (c) of this Convention. See the comment on that section.

ARTICLE 9. NON BIS IN IDEM

(a) A requested State may decline to extradite a person claimed if such person has been prosecuted by the requesting State for the same act or acts for which his extradition is sought and has been acquitted; or if he has been convicted in such prosecution unless the extradition is sought in order that the person claimed may serve an unexpired term of the sentence imposed as the result of such conviction.

(b) A requested State may decline to extradite a person claimed if such person has been prosecuted by the requested State or by a third State for the same act or acts for which extradition is sought and has been acquitted or convicted.

¹ Billot, *Traité de l'Extradition* (1874), pp. 233 to 236; Bernard, *L'Extradition* (2d ed., 1890), pp. 148 to 155; Travers, *Droit Pénal International* (1922), V, §2343, pp. 114 to 119.

² The decision upon conflicting requisitions is to be made by the executive, when the sufficiency of the requisitions has been judicially determined. *In re Doelitzsch* (1923), *Foro Italiano* II (1924), pp. 6 to 8; *Annual Digest of Public International Law Cases* (1923-24), p. 274.

COMMENT

The rule *non bis in idem* is a rule of general application, which opposes itself to all practices, both municipal and international, which would subject a person to repeated harrassment for the same act or acts.

Applied to intrastate affairs, the doctrine finds expression in declarations, such as those in the Constitutions of the United States and the various States of the American Union, against the putting of a person twice in jeopardy by the same State for the same offense.¹

As applied to interstate relations, this doctrine may find expression in a rule, similarly self-imposed by a State, against the prosecution or punishment by that State of a person for acts for which he has been prosecuted in another State. This broad application of the doctrine is outside the field of extradition.²

It is possible that, where two States might assert a jurisdiction to punish certain acts, one of them may agree not to exercise such jurisdiction in the future, as a necessary inducement to the other to proceed in the present with its prosecution of the person accused, who is within its territory. While this situation involves international coöperation for the suppression of crime on the basis of a single prosecution for a single offense, in practice it touches very slightly upon extradition. It does so only when an alien commits an offense and is later found within the State of his nationality, and that State refuses to extradite its nationals, and also refuses to prosecute this national for acts done abroad, unless the State, within whose territory the acts were done, agrees not to prosecute him if he is apprehended later within its territory. This situation is pertinent only to reservations in Schedule A, as to the non-extradition of nationals, and is there discussed.

Consideration of the rule *non bis in idem* is directly called for in connection with extradition when the requesting State desires extradition to prosecute the person claimed for the same act or acts for which he has already been prosecuted and convicted or acquitted in the requested State or in a third State. Notwithstanding the proceedings already had in another State, the requesting State may wish to try the person claimed, because it believes itself in better position than the other State with regard to the evidence, or because it does not believe that the other State was in a position properly to appreciate the gravity of the offense. It would not be often that a State would request the extradition of a person, already acquitted or convicted in its own courts, in order to prosecute him itself a second time for the same acts—usually the municipal application of the doctrine *non bis in idem* would prevent it; but such a situation is possible, where the municipal law allows such a case to be reopened, and where (in case of persons acquitted) impor-

¹ United States Constitution, Amendment V; Stimson, *American Statute Law* (1886), §137, p. 30. And see, generally, Barbey, *De l'Application Internationale de la Règle Non Bis in Idem en Matière Répressive* (1930), pp. 23 to 48.

² See Barbey, *op. cit.*, Draft Convention on Jurisdiction with Respect to Crime, of the Research in International Law.

tant new evidence has been discovered, or where (in case of previous conviction) the requesting State thinks the penalty already imposed wholly inadequate.

The present article does not apply the doctrine *non bis in idem* in mandatory form so as to compel the requested State to refuse extradition under the circumstances just dealt with, but, on the other hand, does allow it to do so.

Paragraph (a) of this article makes it clear that the rule *non bis in idem* does not apply to the situation, where the requesting State has prosecuted and convicted the person claimed, and he has escaped to the requested State without serving out his sentence. Properly, under these circumstances, the present article does not allow refusal of extradition, where the person claimed is wanted only in order that he may fulfil the terms of the judgment already pronounced against him by the requesting State.

Sixty years ago France was party to only one treaty which touched the subject-matter of the present article, namely, one with the Low Countries which provided:¹

L'extradition n'aura pas lieu, lorsque la demande en sera motivée sur le même crime ou délit pour lequel l'individu réclamé aura été ou sera encore poursuivi dans le pays ou il s'est réfugié.

The only other treaty which at that time dealt with this subject seems to have been one between Great Britain and Germany, which was to the same effect.² A similar provision was written in a treaty between the United States and the Netherlands in 1880.³

In a very large number of modern bipartite treaties on extradition it is declared that extradition shall not be granted where proceedings have already been had in the requested State, based upon the same acts which are the basis of the requisition.⁴

¹ Treaty of Nov. 7, 1844, Art. 2, Sec. 1, Billot, *Traité de l'Extradition* (1874), p. 239.

² Treaty of May 14, 1872, Art. 4, *id.*

³ Treaty of May 22, 1880, Art. 4, Moore, *Extradition* (1891), II, p. 1123.

⁴ Travers, *L'Entr'aide Répressive Internationale* (1928), §§144 to 148, pp. 138 to 142; Barbey, *De l'Application de la Règle Non Bis in Idem en Matière Répressive* (1930), pp. 81 to 83.

a. Bipartite treaties which say nothing as to the situation (dealt with in Article 10) of receipt of the requisition while the prosecution is in progress in the requested State (references are to Appendix I): Switzerland-Uruguay, Art. 3, No. 19; France-Latvia, Art. 5, No. 29; France-Czechoslovakia, Art. 4, No. 60; Hungary-Yugoslavia, Art. 3, No. 61; Finland-Italy, Art. 5, No. 66; Turkey-Czechoslovakia, Art. 6, No. 69 (exception made where law of requested State allows trial to be reopened); Brazil-Italy, Art. 6, No. 87.

b. Bipartite treaties in which there is also a provision covering the situation (here dealt with in Article 10) in which a criminal prosecution is in progress in the requested State when the requisition is received. (References are to Appendix I. Asterisks indicate treaties in which an exception is made where law of requested State allows trial to be reopened): Germany-Greece, Art. 4, No. 2; Austria-Hungary-Greece, Art. 4, No. 1; Brazil-Paraguay, Art. 10, No. 8; Finland-Sweden, Art. 4, No. 17; Denmark-Finland, Art. 6, No. 18; Great Britain-Latvia, Art. 4, No. 20; Bulgaria-Rumania, Art. 4, No. 22; Great Britain-Finland, Art. 4, No. 25; Hungary-Rumania, Art. 6, No. 27; Great Britain-Czechoslovakia, Art. 6, No. 28; Great Britain-Estonia, Art. 4, No. 30; France-Poland, Art. 4, No. 32; Austria-Norway, Art. 5, No. 34; Rumania-Czechoslovakia, Art. 3, No. 36; Estonia-Czechoslovakia, Art. 5, No. 37; Latvia-Czechoslovakia, Art. 5, No. 38; Bulgaria-Czechoslovakia, Art. 5, No. 39; Belgium-Paraguay, Art. 5, No. 40; Belgium-Estonia, Art. 3, No. 41; Belgium-Latvia, Art. 3, No. 42;

Two treaties¹ between Yugoslavia, on the one hand, and Bulgaria and Albania, respectively on the other, leave extradition discretionary with the requested State when extradition of an alien is sought for acts done abroad for which he has been tried and convicted or acquitted in the requested State, and the laws of that State provide no method for reopening the criminal proceedings. Application of the rule *non bis in idem* is made permissive and not mandatory in treaties² between Germany, on the one hand, and Czechoslovakia and Turkey, respectively, on the other, the treaties providing that there is no obligation to extradite when sentence has been passed upon the person claimed by the requested State. In treaties³ between Poland, on the one hand, and Sweden and Belgium, respectively on the other, it is declared that the verdict of acquittal or the abandonment of the prosecution shall not prevent extradition if such acquittal or abandonment occurred solely because the offense was committed in the territory of a foreign State.

Of the multipartite conventions, the Treaty of Amiens⁴ and the Pan American Convention of 1902⁵ have no provisions touching the doctrine *non bis in idem*, which is also true of Field's Code⁶ and the Resolutions of Oxford.⁷ Other multipartite conventions and drafts forbid extradition if in the requested State the person claimed has been tried and convicted or acquitted of the offense for which extradition is sought.⁸ Some of them leave it discretionary with the requested State to refuse extradition under the circumstances just stated.⁹

The Montevideo Convention of 1933¹⁰ and the Central American Convention of 1934¹¹ are interesting as the only ones which deal with the applicability of the *non bis in idem* idea to judicial proceedings which have

Great Britain-Lithuania, Art. 4, No. 46; Liberia-Monaco, Art. 5, No. 48; Greece-Czechoslovakia, Art. 5, No. 50; Spain-Czechoslovakia, Art. 3, No. 51; Portugal-Czechoslovakia, Art. 3, No. 52; Belgium-Czechoslovakia, Art. 4, No. 53; Colombia-Panama, Art. 4, No. 54; Belgium-Lithuania, Art. 3, No. 56; United States-Poland, Art. 5, No. 57; Belgium-Finland, Art. 3, No. 58; Austria-Finland, Art. 4, No. 59; Bulgaria-Greece, Art. 3, No. 62; Colombia-Nicaragua, Art. 3, No. 63; Bulgaria-Turkey, Art. 4, No. 65; Latvia-Netherlands, Art. 3, No. 68; United States-Germany, Art. 6, No. 70; Austria-Sweden, Art. 5, No. 72; Bulgaria-Spain, Art. 3, No. 73; Estonia-Norway, Art. 5, No. 76; Denmark-Estonia, Art. 6, No. 77; Latvia-Sweden, Art. 5, No. 78; Latvia-Denmark, Art. 5, No. 79; Lithuania-Czechoslovakia, Art. 3, No. 83; Belgium-Poland, Art. 3, No. 85; Denmark-Czechoslovakia, Art. 3, No. 89; Iraq-Turkey, Art. 4, No. 91; Austria-Latvia, Art. 3, No. 92; Finland-Netherlands, Art. 4, No. 95.

¹ Appendix I, Nos. 16 and 44 (Art. 4 of each treaty).

² Art. 4, Appendix I, No. 11, and Art. 4, Appendix V, No. 3.

³ Art. 4, No. 81, and Art. 3, Appendix V, No. 6.

⁴ Appendix III, No. 1.

⁵ *Ibid.*, No. 3.

⁶ *Ibid.*, IV, No. 1.

⁷ *Ibid.*, No. 2.

⁸ The following say nothing about receipt of a requisition while prosecution is in progress (see Article 10); South American Convention of 1911, Art. 4, Appendix III, No. 4; Central American Convention of 1934, Art. 2 (4), Appendix III, No. 7; International Law Association Draft of 1928, Art. 4, Appendix IV, No. 5.

The following deal also with receipt of a requisition while prosecution is in progress: Bustamante Code, 1928, Art. 358, Appendix III, No. 5; Rio de Janeiro Draft of 1912, Art. 4(a), Appendix IV, No. 3; Draft of International Prison and Penal Association, 1931, Art. 11, Appendix IV, No. 6.

⁹ South American Convention of 1889, Art. 19(5), Appendix III, No. 2; Montevideo Convention of 1933, Art. 3(c), Appendix III, No. 6; Travers' Draft Convention, 1922, Art. 3, Appendix IV, No. 4.

¹⁰ Art. 3(b), Appendix III, No. 6.

¹¹ Art. 2(J), Appendix III, No. 7.

taken place in a third State. In the former it is declared that there is no obligation to extradite if the person claimed has served a sentence in the country where the crime was committed or has there been pardoned. In the latter it is said that the requested State shall not extradite a person claimed if he has served a sentence for the same offense in any other country.

It is natural that in municipal statutes we should find a nationalistic attitude reflected in declarations that persons claimed, having been tried in the local courts for certain acts and acquitted or convicted, are not to be extradited for further proceedings connected with the same acts, the assumption apparently being that in the local courts full justice will be done.¹

The Siamese law further provides against extradition where the person has been previously tried in a third State and judgment rendered in the cause.²

By statute in Yugoslavia among the necessary data for extradition is the fact that the person claimed has not been tried in Yugoslavia for the same acts, and acquitted, or convicted and sentence inflicted or pardon granted, unless in case of acquittal sufficient cause may be shown for reopening the case against him.³

Bipartite treaties, multipartite conventions and drafts, and statutes vary in the extent to which they apply the doctrine *non bis in idem* to extradition. Some of them make the application of the doctrine imperative and some discretionary. Most of them deal only with past judgment in the requested State, though a few touch the case of previous trial in a third State.

For the reasons given earlier in this comment, it seems wise, in drafting this Convention, to vest in the requested State the discretion here provided for, rather than to make the rule *non bis in idem* the basis of an absolute prohibition of extradition. Having framed the rule for this Convention in the discretionary form, there seems no reason why the rule should not apply uniformly to cases of previous conviction or acquittal in the requesting State, in the requested State and in a third State.

ARTICLE 10. PENDING PROSECUTION FOR THE SAME ACTS

A requested State may decline to extradite a person claimed if he is being prosecuted for the act or acts for which extradition is sought, or if he has been apprehended with a view to such prosecution, either at the time of receipt of a request for provisional arrest, or (in the absence of such request) at the time of receipt of a requisition.

COMMENT

In 1844 France made a treaty of extradition with the Low Countries, which was the first to incorporate the rule *non bis in idem*, as pointed out in

¹ "Extradition is not granted . . . when the offenses though not committed in France, or French colonies, have been there prosecuted and definitely judged." French Extradition Law of 1927, Art. 5, Appendix VI, No. 6. See also to the same effect: Argentine Law No. 1612, Aug. 25, 1885, Art. 3; Costa Rica, Penal Code, Art. 230(2); Germany, Extradition Law of 1929, Art. 4, Appendix VI, No. 7; Panama, Law No. 44, Nov. 22, 1930, Art. 5; Mexico, Extradition Law of 1897, Art. 7; Peru, Law of Oct. 23, 1888, Art. 3.

² Extradition Act, B.E. 2472, Art. 5.

³ Criminal Code, 1929, Art. 494.

the comment on Article 9. The clause there used also declared that extradition would not be granted if the person claimed was being prosecuted in the country of refuge.¹ Great Britain accepted a similar provision in her treaty with Germany in 1872.² As all earlier treaties of the United States dealt only with extradition of crimes committed within "the jurisdiction" of the contracting parties, which has been interpreted, as far as the United States is concerned, as meaning within its territory,³ and as the United States has made very little provision for punishing acts done outside of its territory, it is not surprising that its earlier treaties provided for delay of extradition when the person claimed was being tried or punished in the requested State for a different crime,⁴ while only two up to 1891 referred to the situation where he was on trial in the requested State for the extradition offense. In 1880 a provision appears in a treaty between the United States and the Netherlands which is substantially the same as that in the French treaty referred to above;⁵ in 1886 the situations, where the person claimed is being held for trial in the requested State either for the extradition offense or for some other act, is covered in a single article as follows:⁶

If the person demanded be held for trial in the country on which the demand is made, it shall be optional with the latter to grant extradition or to proceed with the trial. Provided that, unless the trial shall be for the crime for which the fugitive is claimed the delay shall not prevent ultimate extradition.

As was pointed out in the comment on Article 9, a large number of modern treaties, including a number to which Great Britain and the United States are parties, combine the rule against extradition of the person claimed to be tried a second time for an offense for which he has already been acquitted or convicted (*non bis in idem*), with a provision against extradition when proceedings are pending for the same offense for which extradition is sought.⁷

¹ "L'extradition n'aura pas lieu, lorsque la demande en sera motivée sur le même crime ou délit pour lequel l'individu réclamé aura été ou sera encore poursuivi dans le pays ou il s'est réfugié." Treaty of Nov. 7, 1844, Art. 2, Billot, *Traité de l'Extradition* (1874), p. 239.

² Treaty of May 12, 1872, Art. 4, *id.*

³ Moore, *Extradition* (1891), I, §103, pp. 134 and 135.

⁴ See the texts of treaties in Moore, *op. cit.*, II, pp. 1072 to 1161.

⁵ Treaty of May 22, 1880, Art. 4, Moore, *op. cit.*, II, p. 1123.

⁶ Treaty of April 29, 1886, Art. 3, Moore, *Extradition* (1891), II, p. 1110.

⁷ See (references are to Appendix I): Germany-Greece, Art. 4, No. 2; Austria-Hungary-Greece, Art. 4, No. 1; Brazil-Paraguay, Art. 10, No. 8; Finland-Sweden, Art. 4, No. 17; Denmark-Finland, Art. 6, No. 18; Great Britain-Latvia, Art. 4, No. 20; Bulgaria-Rumania, Art. 4, No. 22; Great Britain-Finland, Art. 4, No. 25; Hungary-Rumania, Art. 6, No. 27; Great Britain-Czechoslovakia, Art. 6, No. 28; Great Britain-Estonia, Art. 4, No. 30; France-Poland, Art. 4, No. 32; Austria-Norway, Art. 5, No. 34; Rumania-Czechoslovakia, Art. 3, No. 36; Estonia-Czechoslovakia, Art. 5, No. 37; Latvia-Czechoslovakia, Art. 5, No. 38; Bulgaria-Czechoslovakia, Art. 5, No. 39; Belgium-Paraguay, Art. 5, No. 40; Belgium-Estonia, Art. 3, No. 41; Belgium-Latvia, Art. 3, No. 42; Great Britain-Lithuania, Art. 4, No. 46; Liberia-Monaco, Art. 5, No. 48; Greece-Czechoslovakia, Art. 5, No. 50; Spain-Czechoslovakia, Art. 3, No. 51; Portugal-Czechoslovakia, Art. 3, No. 52; Belgium-Czechoslovakia, Art. 4, No. 53; Colombia-Panama, Art. 4, No. 54; Belgium-Lithuania, Art. 3, No. 56; United States-Poland, Art. 5, No. 57; Belgium-Finland, Art. 3, No. 58; Austria-Finland, Art. 4, No. 59; Bulgaria-Greece, Art. 3, No. 62; Colombia-Nicaragua, Art. 3, No. 63; Bulgaria-Turkey, Art. 4, No. 65; Latvia-Netherlands, Art. 3, No. 68; United States-Germany, Art. 6, No. 70; Austria-Sweden, Art. 5, No. 72; Bulgaria-Spain, Art. 3, No. 73; Estonia-

In all of the treaties just noted the provision is mandatory against extradition, as is true in a number of statutes,¹ but there is a group of treaties in which the language is permissive,² and there seems no reason why a requested State should not be allowed by the terms of this Convention to extradite under such circumstances if it believes that thereby justice will be better served. For this reason the present article provides that "a requested State may decline to extradite," etc.

Only five of the treaties just referred to expressly state that proceedings must have been commenced in the requested State before the requisition is received, in order to prevent extradition.³ Such language as that the person claimed shall not be extradited if "proceedings shall have been instituted" against him, or if he "is being prosecuted" (or "is being proceeded against," or "has been placed on trial") would seem fairly open to the interpretation that extradition of the person claimed should only be refused, if the requested State has taken steps against him when the requisition is received.⁴ Yet it must be said that there is ambiguity in such terms, for they may be interpreted to mean that extradition shall not be granted if the condition named exists at any time before the formal surrender of the person claimed. There is perhaps greater ambiguity in those treaties which say that extradition shall not take place if the person claimed is "still under trial," or is "still being proceeded against," or "so long as he is under prosecution," or "during such time as he is being proceeded against."⁵

It is thought that the provision making it clear that this article is applicable only in cases where the requested State has moved against the person claimed before receipt of a request for provisional arrest, or of a requisition, is reasonable. Ordinarily, the requesting State is the State of territorial

Norway, Art. 5, No. 76; Denmark-Estonia, Art. 6, No. 77; Latvia-Sweden, Art. 5, No. 78; Latvia-Denmark, Art. 5, No. 79; Lithuania-Czechoslovakia, Art. 3, No. 83; Belgium-Poland, Art. 3, No. 85; Denmark-Czechoslovakia, Art. 3, No. 89; Iraq-Turkey, Art. 4, No. 91; Austria-Latvia, Art. 3, No. 92; Finland-Netherlands, Art. 4, No. 95.

A similar provision is found in the Bustamante Code of 1928, Art. 358, Appendix III, No. 5; Rio de Janeiro Draft of 1912, Art. 4, Appendix IV, No. 3; Draft of International Penal and Prison Association, Appendix IV, No. 6.

¹ Ecuador, Law of Extradition and Naturalization, Chap. VI, Art. 39; Estonia, Latvia and Lithuania, following the Russian Penal Code of 1914, Arts. 852(4) and (5); Finland, Law of Feb. 11, 1922, Art. 7(1); Holland, Law of April 6, 1875, Art. 4; Sweden, Law No. 68 of June 4, 1913, sec. 9(1), Appendix VI, No. 12; Switzerland, Extradition Law of 1892, Art. 12, Appendix VI, No. 13.

² After declaring that extradition shall not be granted where there has been acquittal or conviction of the person claimed for the same act, the following treaties provide that "extradition may be refused while proceedings are in progress or if the case is not proceeded with" (referencees are to Appendix I): Estonia-Latvia, Art. 4, No. 4; Estonia-Lithuania, Art. 4, No. 5; Estonia-Finland, Art. 5, No. 33; Estonia-Austria, Art. 5, No. 45. Latvia-Hungary, Art. 5, No. 64, omits the second clause of the provision just quoted. The Finland-Latvia treaty makes clearer the meaning of the provision quoted above in these words: "Extradition may be refused while proceedings are in progress or if the case is dismissed for lack of sufficient ground."

³ Treaties 34, 63, 72, 76 and 78 in Appendix I. (See third preceding note.)

⁴ Treaties 1, 8, 17, 22, 27, 32, 36, 38, 40, 50, 51, 52, 53, 54, 55, 59, 62, 63, 65, 72, 73, 76, 77, 78, 79, 83, 85, 89, 91, and 95 in Appendix I. (See the fourth preceding note.)

⁵ Treaties, 2, 20, 25, 28, 30, 40, 41, 42, 46, 49, 56, 58, 68, 70 and 92 in Appendix I. (See the fifth preceding note.)

jurisdiction. The requested State which takes advantage of this article is not the State of territorial jurisdiction, for if it were it would base its refusal on Article 3 of this Convention. Also if the requested State does not believe in the extradition of nationals, it will have signed one of the reservations in Schedule A, and will base its refusal of extradition on that reservation. If it does not sign such reservation, there seems no reason why this Convention should provide it with a method of refusing extradition of its nationals by the institution of criminal proceedings, after the requesting State has indicated its desire for the person in question. It is fair to a requested State that, if it has jurisdiction of the subject-matter and of the person and has made an arrest with a view to prosecution, it should not be compelled to discontinue proceedings and surrender the person in question for trial by another State for the same acts. This is perhaps also fair to the person claimed, so that he will not be unduly harrassed. More than this is not required to protect legitimate interests of the requested State or of the person claimed.

ARTICLE 11. POSTPONED OR CONDITIONAL EXTRADITION

COMMENT

This article applies when, except for its provisions, a requesting State has made out a case for immediate extradition under this Convention. This article allows the requested State to postpone extradition when immediate extradition would interfere with the administration of justice within its borders; or, in the alternative, to grant extradition so that criminal proceedings may be had promptly in the requesting State against the person claimed, but upon condition that the person claimed be returned at the close of such prosecution and before he has served any sentence which the requesting State may have imposed upon him.

- (1) A requested State may postpone the extradition of a person claimed
 - (a) In order that the person claimed may be prosecuted and/or punished by the requested State for an act other than that for which extradition is sought; or

COMMENT

Billot in 1874 went at length into the subject-matter of this article.¹ He concluded that it needed no extended argument to support the right of the requested State to postpone extradition in order to try or punish the person claimed for another crime committed in its territory; that this right rests upon the fact that one within the territory of a State subjects himself to the laws of that State, and is not to be withdrawn from the application of its penal sanctions by force of an agreement with another State for extradition touching another crime.² Moore takes the same position,³ stating that,

¹ *Traité de l'Extradition* (1874), pp. 237 to 251.

² *Ibid.*, p. 239.

³ *Extradition* (1891), I, §366, p. 558.

without any express reservation to that effect, "it is . . . an undoubted rule of international law that a nation is not bound to give up a person whom it holds in custody for a crime committed against its own laws."¹ He goes on to discuss four cases recorded in the diplomatic correspondence of the United States, including negotiations with Great Britain, Canada and Mexico, in which this rule was applied by or against the United States without any question being raised.

The rule above stated must certainly have been well established by 1841, for in that year in France it is embodied in the *Circulaire du Ministre de la Justice Relatant les Principes de la Matière de l'Extradition*, in the following terms (Art. 4):²

Si l'étranger dont l'extradition est accordée, subit une peine en France, il ne pourra être livré qu'après que cette peine aura été subie. Si des poursuites ont été commencées contre lui, elles doivent être mises à fin; s'il est acquitté, l'ordonnance d'extradition sera immédiatement exécutée; s'il est condamné, elle ne le sera qu'après sa peine subie.

In the Low Countries the rule took statutory form in 1849,³ where it was provided that extradition would not be granted if it would withdraw the alien from prosecution instituted for an act punishable by the criminal law of the realm, or from the effects of a condemnation of imprisonment, pronounced before the receipt of the requisition.

It appears that under the British Seamen Deserters Act,⁴ passed in 1852, a question arose as to its application where the deserting seaman had committed a crime in British territory, and in 1855 the following clause was introduced into the Order in Council for putting the Act into operation:⁵

Provided always that if any such deserter has committed any crime in her Majesty's dominions, he may be detained until he has been tried by a competent court, and until his sentence (if any) has been fully carried into effect.⁶

Commencing in 1838, France began writing into her extradition treaties a clause prohibiting extradition of a person accused or condemned in the requested State of a crime there committed, until the sentence pronounced against him had been satisfied. After 1847, France began to substitute a clause allowing, but not requiring, such postponement.⁷

¹ He cites "Billot, *Traité de l'Extradition* (1874), p. 237; Foelix, *Droit int. privé*, tom. ii, §609; Heffter, Bergson's ed., §63; Brigstoeck's Case, 1 Op. 83, Lee, 1798; Case of Portuguese Seamen, 2 Op. 559, Taney, 1833."

² Billot, *Traité de l'Extradition* (1874), p. 419; *Report from Select Committee [of the House of Commons] on Extradition* (1868), p. 148.

³ Law of 13 August, 1849, Art. 17.

⁴ 15 and 16 Viet., c. 26.

⁵ *Report from Select Committee*, *ibid.*, pars. 1527 and 1528, p. 83.

⁶ This rule was carried into Extradition Act, 1870, Art. 3, par. (3), in the following terms: "A fugitive criminal who has been accused of some offense within English jurisdiction, not being the offense for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise."

⁷ Billot, *Traité de l'Extradition* (1874), pp. 249 to 251.

In 1856 the United States began to cover the situation under consideration by the following article:¹

Whenever any person accused of any of the crimes enumerated in this convention shall have committed a new crime in the territories of the State where he has sought an asylum or shall be found, such person shall not be delivered up, under the stipulations of this convention, until he shall have been tried and shall have received the punishment due to such new crime, or shall have been acquitted thereof.²

In the latest treaty between the United States and Great Britain it is provided (Article 4):³

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offense, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

Modern bipartite treaties generally allow postponement of extradition so that the person claimed may be prosecuted for a separate crime committed in the requested State, and/or may fulfil his punishment there in accordance with a criminal sentence.⁴

In many States municipal law makes provision for such postponement similar to that which is found in the treaties just referred to.⁵

All of the multipartite conventions dealing with extradition, except the Treaty of Amiens of 1802,⁶ provide for postponement of extradition to allow for prosecution and for punishment of the person claimed for an offense

¹ Moore, *Extradition* (1891), Vol. I, §366, pp. 557 and 558.

² Treaty with Austria-Hungary of July 3, 1856, Moore, *op. cit.*, Vol. II, p. 1074.

³ Appendix V, No. 1.

⁴ (Numbers refer to Appendix I): Greece-Germany, Art. 5 (No. 1); Estonia-Latvia, Art. 6 (No. 4); Estonia-Lithuania, Art. 6 (No. 5); Latvia-Lithuania, Art. 6 (No. 6); Finland-Sweden, Art. 5 (No. 17); Denmark-Finland, Art. 7 (No. 18); Switzerland-Uruguay, Art. 12 (No. 19); Bulgaria-Roumania, Art. 8 (No. 22); Hungary-Rumania, Art. 9 (No. 27); Estonia-Finland, Art. 6 (No. 33); Rumania-Czechoslovakia, Art. 11 (No. 36); Estonia-Czechoslovakia, Arts. 11 and 12 (No. 37); Latvia-Czechoslovakia, Art. 12 (No. 38); Bulgaria-Czechoslovakia, Arts. 11 and 12 (No. 39); Belgium-Estonia, Art. 4 (No. 41); Belgium-Latvia, Art. 4 (No. 42); Greece-Czechoslovakia, Arts. 11 and 12 (No. 50); Belgium-Lithuania, Art. 4 (No. 56); Belgium-Finland, Art. 4 (No. 58); Hungary-Serbs, Croats and Slovenes, Art. 6 (No. 61); Bulgaria-Greece, Arts. 11 and 12 (No. 62); Latvia-Hungary, Art. 6 (No. 64); Denmark-Estonia, Art. 7 (No. 77); Poland-Sweden, Art. 6 (No. 81); Lithuania-Czechoslovakia, Art. 11 (No. 83); Belgium-Poland, Art. 5 (No. 85); Austria-Belgium, Art. 9 (No. 90).

See cases of *Velasco*, 1923, 1^{er} Sem., *Gaceta de los Tribunales*, 351, where it was determined that person claimed would be surrendered to Uruguay, but only after trial in Chile for crimes committed there.

⁵ Argentina, Law No. 1612, Aug. 25, 1885, Art. 7 (Appendix VI, No. 1); Canada, Extradition Act, Revised Statutes, 1927, Chap. 155, sec. 24 (Appendix VI, No. 4); Costa Rica, Penal Code, Art. 231; Ecuador, Law of Extradition, etc., chap. VI, Art. 42; Estonia, Latvia, Lithuania, by Russian Penal Code of 1914, Art. 852 (6); Finland, Extradition Law, Feb. 11, 1922, Art. 8; France, Extradition Law, March 10, 1927, Art. 8 (Appendix VI, No. 6); Holland, Act of April 6, 1875, Art. 6; Italy, Criminal Procedure Code, Art. 670 (Appendix VI, No. 10); Japan, Law No. 42, Aug. 10, 1895, Art. 5 (Appendix VI, No. 11); Mexico, Extradition Law, May 19, 1897, Art. 6; Panama, Law No. 44, Nov. 22, 1930, Art. 5-d; Transjordan, Extradition Law, 1927, Art. 6-c; Sweden, Extradition Law, June 4, 1913, Sec. 10 (Appendix VI, No. 12); Switzerland, Extradition Law, Jan. 22, 1892, Art. 13 (Appendix VI, No. 13); Yugoslavia, Penal Code, 1929, Art. 493.

⁶ Appendix III, No. 1.

against the requested State.¹ The same is true of all of the drafts and projects for multipartite action,² except that this point is not covered by the Resolutions of Oxford.³

As jurisdiction to punish for crime is recognized as based on other factors than governmental control of the place where the act was done,⁴ it is felt that the section now under discussion is correct in not restricting the right of postponement of extradition to cases where the person claimed is charged with having committed an offense in the territory of the requested State. Though early texts of the rule frequently restricted its application to situations where the requested State desired to prosecute or punish the person claimed for acts done within its territory, the later texts are in accord with the present section. Compare, for instance, the provisions in the United States treaty with Austria-Hungary of 1856 and that in the treaty with Great Britain of 1932, quoted above in this comment.

Some treaties and conventions on extradition restrict the right of postponement to cases where the requested State undertakes to prosecute the person claimed for an offense committed before the requisition was received.⁵ There seems no reason for providing in this way against *mala fides* on the part of the requested State, while, on the other hand, there seems no reason why the requested State should not have the privilege of trying the person claimed, before extraditing him, if he has committed an offense against its sovereignty after receipt of a requisition but before apprehension, or while in prison awaiting extradition.

[(1) A requested State may postpone the extradition of a person claimed,]

[(b) In order that a pending civil proceeding, to which the person claimed is a party in the requested State, may be concluded; or]

(c) In order that the person claimed may testify as a witness in a criminal [or civil] proceeding pending in the requested State.

COMMENT

These paragraphs introduce novel provisions into an extradition agreement. There are a good many treaty provisions in conflict with paragraph (b), and no treaty provision has been found expressly covering the subject-matter of paragraph (c), though, as pointed out below, there are some which

¹ South American Convention of 1889, Art. 25 (Appendix III, No. 2); Pan American Convention of 1902, Art. 4 (Appendix III, No. 3); South American Convention of 1911, Art. 7 (Appendix III, No. 4); Bustamante Code, Art. 346 (Appendix III, No. 5); Montevideo Convention of 1933, Art. 6 (Appendix III, No. 6); Central American Convention of 1934, Art. 5 (Appendix III, No. 7).

² Field's Code, Art. 225 (Appendix IV, No. 1); Rio de Janeiro Draft of 1912, Art. 6 (Appendix IV, No. 3); Travers *Projet*, 1922, Art. 4 (Appendix IV, No. 4); International Law Association Draft, Art. 4 (Appendix IV, No. 5); Model Draft of International Penal and Prison Commission, Art. 38—by implication, since it provides for conditional extradition "in specially urgent cases"—(Appendix IV, No. 6).

³ Appendix IV, No. 2.

⁴ See the Draft Convention of the Research in International Law on this subject.

⁵ *E.g.*, Bustamante Code, Art. 346 (Appendix III, No. 5); Montevideo Convention of 1933, Art. 6 (Appendix III, No. 6).

are probably broad enough to cover it in fact. Nevertheless, it is believed that discretion should be vested in the requested State to postpone extradition of a person claimed until the conclusion of civil proceedings to which that person is a party, or to give opportunity to the person claimed to testify as a witness in a criminal or civil proceeding.

In 1836 the King of France, by an ordinance of the Council of State, decreed the extradition of one Casado to Spain. One Boidron thereafter, but while Casado was still in France, attempted to have Casado imprisoned for debt, opposing his extradition by judicial proceedings. The Council of State published an ordinance declaring lack of jurisdiction in the courts to interfere with, or to pass judgment upon, the administrative act of the Council in decreeing extradition.¹ This was, of course, merely a decision on a point of French constitutional law.

As a consequence of this decision, the French Minister of Justice, in his Circular of 1841 on the subject of extradition, declared² that extradition was only to be postponed in vindication of a right of the State, the interest of a private person was not to be considered, and therefore imprisonment for debt should not interfere with extradition. Here we have the declaration of the Council of State, as to the constitutional competence of the courts, used as the basis of a rule that civil rights and obligations can never prevail to postpone extradition.

In 1845 this rule was written into a treaty between France and Prussia in the following terms (Art. 4):³

Dans le cas où il [l'individu réclamé] serait poursuivi ou détenu dans le même pays à raison d'obligations par lui contractées envers des particuliers, son extradition aura lieu néanmoins, sauf à la partie lésée à poursuivre ses droits devant l'autorité compétente.

The last clause of this treaty provision does not seem to add anything to the rights of the obligee.

A number of modern treaties contain provisions similar⁴ to that just quoted,⁵ as do one multipartite convention⁶ and two drafts.⁷ On the other hand, some of the modern bipartite treaties recognize a right to postpone extradition "if he [the person claimed] is being kept there in custody for

¹ Billot, *Traité de l'Extradition* (1874), p. 248.

² Art. 4, *ibid.*, pp. 248 and 419.

³ Billot, *op. cit.*, p. 250.

⁴ The treaties between Belgium and Lithuania and between Belgium and Finland, referred to in the next note, contain the peculiar provision that any loss which private obligees may incur by reason of an extradition shall be borne by the State making the requisition.

⁵ (Numbers refer to Appendix I): Greece-Germany, Art. 5 (No. 1); Estonia-Latvia, Art. 6 (No. 4); Estonia-Lithuania, Art. 6 (No. 5); Latvia-Lithuania, Art. 6 (No. 6); Switzerland-Uruguay, Art. 12 (No. 19); Bulgaria-Rumania, Art. 8 (No. 22); Hungary-Rumania, Art. 9 (No. 27); Belgium-Estonia, Art. 4 (No. 41); Belgium-Latvia, Art. 4 (No. 42); Belgium-Poland, Art. 5 (No. 85; Appendix V, No. 6); Austria-Belgium, Art. 9 (No. 90).

⁶ Pan American Convention of 1902, Art. 4 (Appendix III, No. 2).

⁷ Rio de Janeiro Draft of 1912, Art. 7 (Appendix IV, No. 3); Model Draft of International Penal and Prison Commission, Art. 12 (Appendix IV, No. 6).

other reason," besides prosecution or punishment for a crime.¹ This would authorize postponement in case of any body execution, imprisonment for contempt, or the holding in custody of a witness.

States may be parties to civil proceedings in their own courts as well as individuals. Proceedings between individuals, where constitutional questions are to be decided, where tax questions are raised, or where public utilities are involved, may need prompt decision, in the public interest, quite as much as a criminal prosecution. It seems wise, therefore, to vest discretion in the requested State to postpone extradition "in order that a civil proceeding, to which the person claimed is a party in the requested State, may be concluded." The delay of criminal proceedings in the requesting State, which may be occasioned by the exercise of this discretion, is not likely to be great, because civil proceedings seldom lead to imprisonment today. Furthermore, the provision of paragraph (1-b) is to be read in connection with paragraph (2), as to conditional extradition.

In the administration of criminal justice the presence of a witness may be as necessary for conviction as the presence of the accused. For this reason paragraph (1-c), as to postponement of extradition of a witness in a criminal proceeding, seems desirable. If a case has been made out above for vesting in a requested State discretion to postpone extradition of a party to a civil proceeding, it would seem fairly to follow that it should also have discretion to postpone extradition of a witness in such proceeding. Here the postponement is likely to be brief, and if this proves not to be the case, conditional extradition, under paragraph (2), can be resorted to.

But proceedings based upon the requisition shall only be postponed in favor of the proceedings under municipal law above referred to so far as is reasonably necessary.

COMMENT

A number of treaties declare that the application of provisions for the postponement of extradition shall not work any postponement of the proceedings leading to extradition,² which should certainly be implied, if it is not expressed.³ It has been thought well to express this proposition in the present paragraph of this Convention.

¹ (Numbers refer to Appendix I): Rumania-Czechoslovakia, Art. 12 (No. 36); Estonia-Czechoslovakia, Art. 12 (No. 37); Latvia-Czechoslovakia, Art. 12 (No. 38); Bulgaria-Czechoslovakia, Art. 12 (No. 39); Greece-Czechoslovakia, Art. 12 (No. 50); Bulgaria-Greece, Art. 12 (No. 62); Lithuania-Czechoslovakia, Art. 12 (No. 83).

² See following bipartite treaties (references are to Appendix I): Rumania-Czechoslovakia, Art. 11 (No. 36); Estonia-Czechoslovakia, Arts. 11 and 12 (No. 37); Latvia-Czechoslovakia, Art. 12 (No. 38); Bulgaria-Czechoslovakia, Arts. 11 and 12 (No. 39); Greece-Czechoslovakia, Arts. 11 and 12 (No. 50); Hungary-Serbs, Croats and Slovenes, Art. 6 (No. 61); Bulgaria-Greece, Arts. 11 and 12 (No. 62); Poland-Sweden, Art. 6 (No. 81); Lithuania-Czechoslovakia, Art. 11 (No. 83). See also South American Convention of 1889, Art. 25 (Appendix III, No. 20); South American Convention of 1911, Art. 7 (Appendix III, No. 4); Montevideo Convention of 1933, Art. 6 (Appendix III, No. 6); Rio de Janeiro Draft of 1912, Art. 6 (Appendix IV, No. 3).

³ Billot, *Traité de l'Extradition* (1874), pp. 240 and 241.

(2) As an alternative to such a postponement of extradition the requested State may extradite the person claimed upon condition that such person be returned to the requested State, as soon as the prosecution in the requesting State is terminated, for one or more of the purposes enumerated in paragraph (1) of this article.

COMMENT

In nearly a score of modern bipartite treaties we find, combined with a declaration of the right of the requested State to postpone extradition, a provision, similar in effect to the present section, for conditional and temporary extradition.¹ The statutes of eight States contain such a provision,² though one of them applies only when the person claimed has been sentenced in the requested State for another crime.³ Existing and past multipartite conventions dealing with extradition have not contained provisions for conditional and temporary extradition, but such a provision is included in two drafts.⁴

It seems desirable to provide this alternative for postponement of extradition. Postponement, while the person claimed serves a long term in the requested State, may greatly handicap the requesting State in the application of its criminal law, while a temporary extradition, upon condition that the extradited person be returned "as soon as the prosecution in the requesting State is terminated," may not jeopardize any interest in the requested State. If, during the temporary extradition, the extradited person is convicted and a sentence of death or deprivation of liberty is imposed, and he is then returned to the requested State, he can be extradited again, when the requested State is through with him, so that the penalty imposed upon him by the requesting State can be exacted of him.

¹ (Numbers refer to Appendix I): Estonia-Lithuania, Art. 5 (No. 5); Latvia-Lithuania, Art. 5 (No. 6); Finland-Sweden, Art. 5 (No. 17); Denmark-Finland, Art. 7 (No. 18); Bulgaria-Rumania, Art. 8 (No. 22); Hungary-Rumania, Art. 9 (No. 27); Estonia-Finland, Art. 6 (No. 33); Rumania-Czechoslovakia, Art. 12 (No. 36); Estonia-Czechoslovakia, Art. 12 (No. 37); Latvia-Czechoslovakia, Art. 12 (No. 38); Bulgaria-Czechoslovakia, Art. 12 (No. 39); Greece-Czechoslovakia, Art. 12 (No. 50); Hungary-Serbs, Croats and Slovenes, Art. 4 (No. 61); Bulgaria-Greece, Art. 12 (No. 62); Latvia-Hungary, Art. 6 (No. 64); Denmark-Estonia, Art. 7 (No. 77); Poland-Sweden, Art. 6 (No. 81); Lithuania-Czechoslovakia, Art. 12 (No. 83).

² Argentina, Law No. 1612, Aug. 25, 1885, Art. 7 (Appendix VI, No. 1); Finland, Extradition Law, Feb. 11, 1922, Art. 8; France, Extradition Law, March 10, 1927, Art. 8 (Appendix VI, No. 6); Holland, Act of April 6, 1875, Art. 6; Italy, Criminal Procedure Code, Art. 670 (Appendix VI, No. 10); Sweden, Extradition Law, June 4, 1913, Sec. 10 (Appendix VI, No. 12); Switzerland, Extradition Law, Jan. 22, 1892, Art. 13 (Appendix VI, No. 13); Yugoslavia, Penal Code, 1929, Art. 493.

³ Sweden, see preceding note.

⁴ Those of Travers, Art. 4 (Appendix IV, No. 4), and of the International Penal and Prison Commission, Art. 38 (Appendix IV, No. 6).

PART IV. EXTRADITION PROCEDURE

ARTICLE 12. THE REQUISITION AND SUPPORTING DOCUMENTS

(1) A requisition shall be in writing and shall be communicated by a diplomatic or consular officer of the requesting State to the constituted authority of the requested State.

COMMENT

Writers generally assume, without stating, the requirement of a written requisition, when they speak of the requisition's formal character and of its transmission through the diplomatic channel.¹ It is also true of conventions, treaties and statutes that generally they do not specify a written requisition,² but the requirement of a writing is implicit in their requirement for its transmission through governmental channels, as well as in their declaration that it shall be accompanied by other documents.³ It has seemed well to express in the present paragraph the requirement that the requisition be "in writing."⁴

The orthodox channel of communication consists of the diplomatic officer of the requesting State, and its orthodox destination is the foreign office of the requested State.⁵ This is recognized in practically all modern bipartite treaties⁶ and in multipartite conventions and drafts.⁷ But communication

¹ See the citations in comment on paragraph (g) of Article 1.

² Japanese Law does specify a "written request" in Art. 12, Appendix VI, No. 11.

³ See the conventions, drafts, treaties and statutes in Appendices III, IV, V and VI.

⁴ Draft Convention of International Penal and Prison Association of 1931, Art. 22 (Appendix IV, No. 6), expressly calls for a written requisition.

⁵ Moore, *Extradition* (1891), Vol. I, §220, p. 327; Hyde, *International Law* (1922), Vol. I, §324, p. 586; Billot, *Traité de l'Extradition* (1874), pp. 137 to 139; Travers, *Droit Pénal International* (1922), Vol. V, §§2301 and 2303, pp. 81 and 82.

The Canadian statute permits communication by a minister of the requesting State to "the diplomatic representative of his Majesty in that State" who then communicates with the Canadian Minister of Justice. Art. 20, Appendix VI, No. 4.

In ease of colonial possessions, provision is sometimes made for communication of requisition to the Governor of a colony by a consular agent, or if the act is charged to have been committed in a colony, by the Governor of the colony of the requesting State. British Extradition Act, 1870, Art. 17 (Appendix VI, No. 8); Field's Code, Art. 213 (Appendix IV, No. 1); Moore, *op cit.*, §222, p. 329; Travers, *op cit.*, §2307, p. 85; United States—British Treaty of 1932, Art. 15 (Appendix VI, No. 8).

⁶ The only exceptions are (references are to Appendix I): Italy-Kingdom of Serbs, Croats and Slovenes, Art. 9 (No. 10); Italy-Czechoslovakia, Art. 9 (No. 12); Hungary-Kingdom of Serbs, Croats and Slovenes, Art. 7 (No. 61); Italy-Panama (No. 82). In these treaties, direct communication from Ministry of Justice to Ministry of Justice is substituted.

⁷ South American Convention of 1889, Art. 30 (Appendix III, No. 2); Pan American Convention of 1902, Art. 7 (Appendix III, No. 3); South American Convention of 1911 Art. 6 (Appendix III, No. 4); Bustamante Code, Art. 364 (Appendix III, No. 5); Montevideo Convention of 1933, Art. 5 (Appendix III, No. 6); Central American Convention of 1934, Art. 7 (Appendix III, No. 7); Field's Code, Art. 211 (Appendix IV, No. 1); Resolutions of Oxford of 1880, Art. 18 (Appendix IV, No. 2); Draft of Rio de Janeiro of 1912, Art. 13 (Appendix IV, No. 3); Travers' *Projet*, Art. 6 (Appendix IV, No. 4); Draft of International Law Association of 1928, Art. 8 (Appendix IV, No. 5). Draft of International Penal and Prison Association of 1931, Art. 21 (Appendix IV, No. 6), provides only for direct communication between Ministries of Justice.

A number of extradition statutes specify the diplomatic channel of communication: Argentine, Extradition Law, Aug. 25, 1885, Ch. 2, Art. 12 (Appendix VI, No. 1); Brazil, Law

of a requisition by a consular officer is often provided for in the absence of a diplomatic agent,¹ or as an alternative to the use of the diplomatic channel.² Sometimes treaties further provide for direct communication between governments in the absence of both diplomatic and consular agents.³ In a small group of treaties, direct communication from Ministry of Justice to Ministry of Justice is provided for as the usual method to be followed.⁴ In framing this Convention it has seemed reasonable to allow the requesting State the choice of the diplomatic or consular channel, and to leave to the municipal law of the requested State the determination of what is the "constituted authority" to which the requisition is to be communicated.

(2) The requisition shall contain:

(a) A description of the person claimed for the purpose of identification;

COMMENT

The identification of the person whose apprehension is sought as the person claimed is, of course, of immediate importance when a requisition is presented. A great many treaties, though not those to which the United States and Great Britain are parties, provide specifically that information to identify the person claimed must be forwarded, often specifying the inclusion of a photograph. Many of these treaties qualify this provision with the phrase

No. 2416 of June 28, 1911, V, Art. 8 (Appendix VI, No. 3); Estonia, Code of Criminal Procedure, Art. 858; Finland, Extradition Law, Feb. 11, 1922, Part I, Art. 11; France, Law of March 10, 1927, Art. 9 (Appendix VI, No. 6); Great Britain, Extradition Act, 1870, Art. 7 (Appendix VI, No. 8); Latvia, Code of Crim. Proc., 1926, Art. 858; Lithuania, Penal Code, Ch. 12, Art. 12; Mexico, Extradition Law, May 19, 1897, Art. 12; Panama, Law No. 44 of 1930, Art. 4; Paraguay, Code of Penal Proc., Heading 34, Ch. 2, Art. 597; Sweden, Extradition Law, June 4, 1913, Ch. 2, Sec. 14 (1) (Appendix VI, No. 12); Switzerland, Federal Extradition Law, Jan. 22, 1892, Art. 15 (Appendix VI, No. 13); Yugoslavia, Criminal Code of 1927, Art. 490.

¹ See, for instance, United States treaties with Austria, Art. 11 (text in Appendix V, No. 1), Venezuela, Art. 11 (Appendix I, No. 13), Czechoslovakia, Art. 11 (Appendix I, No. 31), Germany, Art. 10 (Appendix I, No. 70), Greece, Art. 11 (Appendix I, No. 84); Montevideo Convention of 1933, Art. 5 (Appendix III, No. 6); Central American Convention of 1934, Art. 7 (Appendix III, No. 7); Draft of Rio de Janeiro of 1912, Art. 13 (Appendix IV, No. 3).

² See, for instance, United States-British Treaty of 1932, Art. 14 (Appendix V, No. 1); Franco-Chilean Treaty of 1860, Art. 1 (Travers, *Droit Pénal International*, 1922, V, §2306, p. 84); South American Convention of 1889, Art. 30 (Appendix III, No. 2); Pan American Convention of 1902, Art. 7 (Appendix III, No. 3); Travers' *Projet*, Art. 6 (Appendix IV, No. 4); British Extradition Act, 1870, as amended in 1873, Art. 7, which includes a Consul General within the definition of a diplomatic representative (Appendix VI, No. 8).

³ Switzerland-Uruguay, Art. 9 (Appendix I, No. 19); Belgium-Paraguay, Art. 9 (Appendix I, No. 40); France-San Marino, Art. 8 (Appendix I, No. 43); Colombia-Panama, Art. 12 (Appendix I, No. 54); Colombia-Nicaragua, Art. 7 (Appendix I, No. 63); South American Convention of 1889, Art. 30 (Appendix III, No. 2); Pan American Convention of 1902, Art. 7 (Appendix III, No. 3); Montevideo Convention of 1933, Art. 5 (Appendix III, No. 6); Draft of Rio de Janeiro of 1912, Art. 13 (Appendix IV, No. 3).

⁴ Italy-Kingdom of Serbs, Croats and Slovenes, Art. 9 (Appendix I, No. 10); Italy-Czechoslovakia, Art. 9 (Appendix I, No. 12); Hungary-Kingdom of Serbs, Croats and Slovenes, Art. 7 (Appendix I, No. 61); Travers would have communication made either by diplomatic agent or directly to the court which will make the examination. Travers' *Projet*, Art. 6 (Appendix IV, No. 4).

"if possible" or "when possible."¹ Some treaties amplify this to require information on the subject of nationality.² As, in practice, the requisition is often forwarded before the requesting State forwards the supporting documents, provided for in paragraph (3) of this article, it seems desirable to provide that the requisition itself shall contain "a description of the person claimed for the purpose of identification," but without elaborating as to the form which such description shall take.

[(2) The requisition shall contain:]

(b) A statement that a warrant of arrest, or other document of equivalent import in the prosecution of the person claimed, has been issued;

COMMENT

As will appear in the comment on paragraph (3) (a) of this article, a requisition must be supported by such a warrant or other document as is referred to in the present paragraph. Knowledge of the existence of such warrant, or its equivalent, should be the basis of action by the requested State in making arrest, and information as to the existence of such warrant or its equivalent is required even for provisional arrest.³ The drafters of treaties and statutes have contented themselves with providing that the warrant, or equivalent document, shall accompany the requisition, but since the practice often is to forward the requisition by itself, to be followed by supporting documents, it seems desirable to call for a statement in the requisition that a warrant or equivalent document has been issued.

[(2) The requisition shall contain:]

(c) A statement of the act or acts for which it is intended to prosecute or punish the person claimed, and of the punishment or correctional measures which may be or which have been imposed for such act or acts by the law of the requesting State.

COMMENT

Many treaties, including those to which the United States and Great Britain are parties, do not require that the statement, called for by this para-

¹ Treaties in Appendix I, having the following numbers: 1, 2, 7, 9, 11, 15, 16, 17, 18, 20, 21, 26, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 47, 48, 49, 50, 51, 52, 53, 55, 57, 58, 59, 60, 62, 66, 69, 70, 71, 73, 75, 77, 79, 80, 82, 84, 84a, 85, 86; Pan American Convention of 902, Art. 7 (Appendix III, No. 3); Bustamante Code, Art. 365 (Appendix III, No. 5); Montevideo Convention of 1933, Art. 5 (Appendix III, No. 6); Draft of Rio de Janeiro of 1912, Art. 13 (Appendix IV, No. 3); Travers' *Projet*, Art. 6 (Appendix IV, No. 4); Draft of International Penal and Prison Association, Art. 22 (Appendix IV, No. 6).

See also the following statutes in Appendix VI: Argentine, Art. 12 (No. 1); Sweden, Art. 14 (2) (No. 12); Switzerland, Art. 15 (No. 13).

² Finland-Latvia, Art. 8 (No. 21); Finland-Norway, Art. 10 (No. 35); Austria-Sweden, Art. 8 (No. 72); Estonia-Denmark, Art. 9 (No. 77); Latvia-Denmark, Art. 8 (No. 79); Poland-Sweden, Art. 11 (No. 81); Sweden-Czechoslovakia, Art. 6 (No. 88); Denmark-Czechoslovakia, Art. 4 (1) (No. 89).

See also the following statutes in Appendix VI: Sweden, Art. 14 (2) (No. 12); Switzerland, Art. 15 (No. 13).

³ See Article 15 of this Convention.

graph, be included in, or accompany the requisition. A requirement that such a statement be contained on the requisition is expressed, however, in a number of treaties made by States of Continental Europe.¹ Other treaties require that the warrant of arrest or other document accompanying the requisition contain such statement.² Since, as already stated, it is a rather common practice to forward a requisition alone, to be followed by supporting documents, it seems desirable to call, in the requisition itself, for such a statement as is required by this paragraph of the Convention.

(3) The requisition shall be supported by:

(a) The original or an authenticated copy of the warrant of arrest or other document of equivalent import in the prosecution of the person claimed, or the original or an authenticated copy of the judgment of conviction against the person claimed and of any sentence imposed as in execution of such judgment;

COMMENT

It is the general, if not universal, practice to require, by extradition treaties and/or statutes, the submission by the requesting State of the documents specified in this paragraph, or of authenticated copies of such documents.³ This is not true in the extradition statutes of the United States⁴ and Great Britain,⁵ nor in the treaty between these two States of 1932,⁶ but in these States the documents dealt with in the present paragraph would be produced

¹ (References are to Appendix I): Austria-Hungary-Greece, Art. 9 (No. 3); Estonia-Latvia, Art. 9 (No. 4); Italy-Kingdom of Serbs, Croats and Slovenes, Art. 9 (No. 10); Finland-Sweden, Art. 10 (No. 17); Hungary-Rumania, Art. 14 (No. 27); Belgium-Paraguay, Art. 9 (No. 40); Belgium-Latvia, Art. 7 (No. 42); Turkey-Czechoslovakia, Art. 7 (No. 69).

² (References are to Appendix I): Brazil-Paraguay, Art. 2 (No. 8); Bulgaria-Serbs, Croats and Slovenes, Art. 8 (No. 16); France-Latvia, Art. 6 (No. 29); France-San Marino, Art. 8 (No. 43); Colombia-Panama, Art. 12 (No. 54), also Appendix V, No. 7; Hungary-Serbs, Croats and Slovenes, Art. 7 (No. 61); Belgium-Poland, Art. 9 (No. 85), also Appendix V, No. 6; Iraq-Turkey, Art. 7 (No. 91). The multipartite conventions and drafts fall also into this class: see Appendices III and IV (except for Central American Convention of 1934, Art. 8, Appendix III, No. 7; Travers' *Project*, Art. 6, Appendix IV, No. 4); see also to same effect the following statutes: Brazil, Art. 8 (Appendix VI, No. 3); France, Art. 9 (Appendix VI, No. 6); Sweden, Art. 8 (Appendix VI, No. 12); Switzerland, Art. 15 (Appendix VI, No. 13).

A number of bipartite treaties require that in offenses against property the amount of damage inflicted or intended shall be set forth (references are to Appendix I): Hungary-Rumania, Art. 14 (No. 27); Bulgaria-Greece, Art. 4 (No. 62); Latvia-Hungary, Art. 8 (No. 64); Austria-Sweden, Art. 8 (No. 72); Bulgaria-Spain, Art. 4 (No. 73); Latvia-Spain, Art. 4 (No. 74); Belgium-Poland, Art. 9 (No. 85), see Appendix V, No. 6, for text; Iraq-Turkey, Art. 7 (No. 91); the Czechoslovakian treaties (Nos. 36, 37, 38, 39, 50, 51, 52, 53, 60, 83 and 86).

³ See the bipartite treaties listed in Appendix I.

See the multipartite conventions in Appendix III: No. 2, Art. 30; No. 3, Art. 7; No. 4, Art. 8; No. 5, Art. 365; No. 6, Art. 5; No. 7, Art. 8.

See the multipartite drafts or projects in Appendix IV: No. 3, Art. 13; No. 4, Art. 7; No. 5, Art. 8; No. 6, Art. 22.

See for text of provision in Typical Bipartite Treaties, Appendix V: No. 2, Art. 11; No. 3, Art. 10; No. 4, Art. 9; No. 5, Art. 7; No. 6, Art. 9; No. 7, Art. 12; No. 8, Art. 9.

See for the text of provisions in Selected Statutes, Appendix VI: No. 1, Art. 12; No. 2, Art. 3; No. 3, Art. 8; No. 6, Art. 9; No. 7, Art. 5; No. 9, Art. 2; No. 13, Art. 15; No. 14 (Turkey), Par. B of attached *Note*.

⁴ Appendix VI, No. 15.

⁵ *Ibid.*, No. 8.

⁶ Appendix V, No. 1.

as part of the evidence necessary to establish a *prima facie* case against the person claimed.¹ However, in treaties with other States, both the United States and Great Britain are accustomed to introduce provisions on the subject of the documents in question.² It seems desirable, as it is usual, to expressly state the requirement of presentation of the documents named in the present paragraph. It also seems desirable to depart from the usual statement, that a requisition shall be "accompanied" by these documents, in view of the rather usual practice of transmitting the requisition in advance of the documents here dealt with, in favor of a declaration that the requisition shall be "supported" by the documents in question.

While the subject of authentication is sometimes covered by treaty,³ it seems more properly dealt with by statute.⁴ It is a subject of procedure

¹ See comment on Articles 17 and Reservations 5 and 6 of Schedule A.

² The provision usually employed by the United States is as follows:

If the fugitive criminal shall have been convicted of the crime for which his surrender is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced. If however the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case.

See the United States treaties listed in Appendix I, and United States-Austria, Art. 11, Appendix V, No. 2.

The British article is as follows:

The requisition for the extradition of an accused person must be accompanied by a warrant of arrest issued by the competent authority of the State requiring the extradition, and by such evidence as, according to the laws of the place where the accused is found, would justify his arrest if the crime or offence had been committed there.

If the requisition relates to a person already convicted, it must be accompanied by the sentence of condemnation passed against the convicted person by the competent court of the State that makes the requisition for extradition, provided that a sentence passed in contumaciam is not to be deemed a conviction, but a person so sentenced will be dealt with as an accused person.

See the British treaties listed in Appendix I.

³ See France-Czechoslovakia, Art. 7 (Appendix V, No. 5); Belgium-Poland, Art. 9 (Appendix V, No. 6); Colombia-Panama, Art. 12 (Appendix V, No. 7), which says that "the aforementioned documents shall be transmitted in the form prescribed by the laws of the applicant State."

⁴ United States, Statute of Aug. 3, 1889 (Appendix VI, No. 15). See *In re Heinrich* (1867), 5 Blatchford's Reports, 414; *In re McPhun* (1887), 24 Blatchford's Reports, 254; *Luis Oteiza y Cortes v. Jacobus* (1890), 136 United States Reports, 330; Moore, *Extradition* (1891), Vol. I, §§309 to 336, pp. 465 to 515. The instructions of the United States Department of State on the subject of authentication of documents to be sent abroad are as follows (for full text of these instructions see Appendix VI, No. 15):

Copies of all papers going to make up the evidence transmitted as herein required, including the record of conviction, or the indictment, or information, and the warrant of arrest, must be duly certified and then authenticated under the great seal of the State making the application or the seal of the Department of Justice, as the case may be; and this Department will authenticate the seal of the State or of the Department of Justice. For example, if a deposition is made before a Justice of the Peace, the official character of the justice and his authority to administer oaths should be attested by the county clerk or other superior certifying officer; the certificate of the county clerk should be authenticated by the Governor or Secretary of State under the seal of the State, and the latter will be authenticated by this Department. If there is but one authentication, it should plainly cover all the papers attached.

Great Britain, Extradition Act, 1870, Art. 16 (Appendix VI, No. 8); Piggott, *Extradition* (1910), p. 97.

Canada, Extradition Act, Art. 17 (Appendix VI, No. 4).

Argentina, Extradition Law, Art. 12 (Appendix VI, No. 1), calls for original document or

having to do with the proper form for evidence to take in the requested State, and it is therefore left by this Convention to be dealt with by municipal law.

[(3) The requisition shall be supported by:]

(b) An authenticated copy or statement of the law of the requesting State under which it is intended to prosecute or to punish the person claimed;

COMMENT

With few exceptions, all the treaties, excluding those to which the United States and Great Britain are parties, require that a statement of the applicable law, or an authenticated copy of its text, shall accompany the requisition.¹ A number of statutes also lay down the same requirement.² In the United States and Great Britain, part of the *prima facie* case, to be made out by the requesting State, involves inclusion of the offense alleged among the offenses covered by the extradition treaty in question.³ There cannot be an offense without a statute or a rule of common law creating it. Such law in the requesting State may be presumed from a warrant of arrest and evidence of guilt, or from a judgment of conviction, but if the issue were raised, the existence of such law in the requesting State would seem to be part of the case of the requesting State.⁴

It seems desirable that, even where the rule of the *prima facie* case may be retained under the appropriate reservation in Schedule A, the requisition should be "supported by an authenticated copy or statement of the law of

an "authenticated" copy, without definition of "authenticated." Supreme Court of Argentina held that an instrument transmitted by a foreign government, through diplomatic channel, and through the Minister for Foreign Affairs of the requested State, must be regarded as authentic without further requirements. *Leonardo Castanzo et Alia Case* (1927), 150 Fallos, p. 80; 26 *Jurisprudencia Argentina*, p. 865; *Annual Digest of Public International Law Cases*, 1927-28, p. 346.

¹ See, for example (references are to Appendix V): Brazil-Italy, Art. 9 (No. 4); France-Czechoslovakia, Art. 5 (No. 5); Belgium-Poland, Art. 9 (No. 6); Colombia-Panama, Art. 12 (No. 7).

Such provision is contained in all the multipartite conventions except the Treaty of Amiens (references are to Appendix III): No. 2, Art. 30; No. 3, Art. 7; No. 4, Art. 8; No. 5, Art. 365; No. 6, Art. 5; No. 7, Art. 8 declares that "provisions of the penal code which are applicable thereto must be indicated."

See also model drafts (references are to Appendix IV): No. 3, Art. 13; No. 4, Art. 7; No. 6, Art. 22.

² Argentina, Extradition Law, Aug. 25, 1885, Ch. 2, Art. 12 (4) (Appendix VI, No. 1); Brazil, Law No. 2416, June 28, 1911, V, Art. 8 (Appendix VI, No. 3); Ecuador, Extradition Law, Oct. 18, 1921, Art. 49 (4); Estonia, Code of Criminal Procedure, Art. 852 (13); France, Law of March 10, 1927, Art. 9 (Appendix VI, No. 6); Latvia, Code of Crim. Proc. 1926, Art. 859; Lithuania, Penal Code, Ch. 12, Art. 13; Mexico, Extradition Law, May 19, 1897, Art. 16 (2); Panama, Law No. 44 of 1930, Art. 4 (3); Paraguay, Code of Penal Proc., Heading 34, Ch. 2, Art. 597 (2); Peru, Extradition Law, Oct. 23, 1888, Art. 8 (3); Switzerland, Federal Extradition Law, Jan. 22, 1892, Art. 15 (Appendix VI, No. 13); Yugoslavia, Criminal Code of 1929, Art. 490.

³ Moore, *Extradition* (1891), Vol. 1, §§344 to 346, pp. 525-529; Piggott, *Extradition* (1910), pp. 101, 152.

⁴ Cf. statement in Piggott, *op. cit.*, p. 229, that "the magistrate cannot enquire into foreign law. . . ."

the requesting State under which it is intended to prosecute or to punish the person claimed." As has just been pointed out, this paragraph conforms to the rule usually found in treaties, though it is more explicit than that found in some of them in making provision for an authenticated "statement" of the law as an alternative to an authenticated "copy," to take care of common law as well as statutory definitions of crime.

With regard to authentication see the comment on paragraph (3-a) of this article.

(4) The requisition may be accompanied or followed by a request for the delivery of property.

COMMENT

Extradition conventions and treaties usually provide for the delivery of certain categories of property, as is true of this Convention. (See Article 25 and comment.) Though many treaties make no specific provision for request for such delivery, in quite a group we find a statement that delivery will take place at the request of, or at the desire of the requesting State, other requirements having been met.¹ The situation as to extradition statutes is similar. They generally contain a provision for delivery of property, but infrequently refer to the preceding request.²

It seems reasonable to provide that "the requisition may be accompanied or followed by a request for the delivery of property." This paragraph does not restrict such request to property which by the terms of Article 25 a requested State "shall deliver . . . if requested." It permits any request to be made for the delivery of property, leaving to the requested State to stand upon the limited duty imposed by Article 25, or to act more liberally, if it desires to do so, on principles of comity or reciprocity.

¹ (References are to Appendix I): Estonia-Latvia, Art. 12 (No. 4); Estonia-Lithuania, Art. 12 (No. 5); Latvia-Lithuania, Art. 13 (No. 6); Hungary-Kingdom of Serbs, Croats and Slovenes, Art. 16 (No. 61); Bulgaria-Spain, Art. 18 (No. 73); Latvia-Spain, Art. 18 (No. 74). The Czechoslovakian treaties with Rumania, Art. 17 (No. 36); Estonia, Art. 18 (No. 37); Latvia, Art. 18 (No. 38); Bulgaria, Art. 18 (No. 39); Greece, Art. 18 (No. 50); Spain, Art. 18 (No. 51); Portugal, Art. 18 (No. 52); France, Art. 22 (No. 60); Lithuania, Art. 18 (No. 83); Denmark, Art. 18 (No. 89).

See also Draft of International Penal and Prison Association, Art. 22 (Appendix IV, No. 6).

² Five statutes provide that property, "if demanded" and subject to certain limitations, will be delivered if the extradition is found to be permissible:

Estonia, Code of Criminal Procedure, Art. 852 (11); Germany, Extradition Law, Dec. 23, 1929, Art. 34 (1) (Appendix VI, No. 8); Latvia, Code of Crim. Proc. 1926, Art. 857; Lithuania, Penal Code, Ch. 12, Art. 11; Mexico, Extradition Law, May 19, 1897, Art. 15.

Two statutes contain provision for the seizure of property of evidential value, or the surrender of which might possibly be demanded ("pourrait être réclamée"—Finland), or may be assumed to be demanded (Sweden) by the plaintiff:

Finland, Extradition Law, Feb. 11, 1922, Part 2, Art. 19; Sweden, Extradition Law, June 4, 1913, Ch. 2, Sec. 26 (Appendix VI, No. 13).

ARTICLE 13. SUPPLEMENTARY DOCUMENTS

(a) After communicating its requisition to the constituted authority of the requested State, and before a final decision on the requisition has been made, a requesting State may present supplementary documents in support of, or in amplification of, such requisition.

COMMENT

It is believed that this paragraph states a quite obvious right of the requesting State, though it is not found in present treaties. This provision is somewhat similar to that contained in the Draft Convention of the International Penal and Prison Association of 1931, Article 23¹:

The applying State may bring forward the requisition for extradition while reserving the right to produce supplementary information. If this information does not arrive within the time fixed in the first paragraph [4 weeks], counting from the despatch of the requisition for extradition, the application may be decided on without further formalities.

However, the present paragraph gives no right to the requesting State to wait a given period, after dispatch of the requisition, before it transmits necessary supporting documents. The policy of this Convention is rather to encourage the dispatch of necessary documents with the requisition, but to allow transmittal of any of them "before a final decision on the requisition is made."

(b) Before or after apprehension of the person claimed, the requested State may invite the requesting State to present supplementary documents in support of, or in amplification of, its requisition.

COMMENT

The Rio de Janeiro Draft of 1912, Article 15,² provides that where the documents accompanying the requisition "are deemed insufficient or irregular, owing to form" the requested State shall return them to have the deficiencies supplied or the defects corrected, "and the party, if under arrest shall remain under arrest until the period referred to in the foregoing article [2 months] has expired."

In the Model Draft of the International Penal and Prison Commission of 1931, Article 23,³ it is provided that:

The State applied to may obtain supplementary information from the State making the application if it considers this necessary in order to decide on the requisition. If the supplementary information does not arrive within a reasonable time (4 weeks after the despatch of the request), the person to be surrendered shall be freed from any arrest or other preventive measure.

¹ Appendix IV, No. 6.

² *Ibid.*, No. 3.

³ *Ibid.*, No. 6.

The present paragraph, like the "Model Draft," goes further than the Rio draft in covering more than documents accompanying the requisition. It does not, however, get a time-limit for the despatch of the documents desired.¹ The procedure is thus left to be controlled by the law of the forum. If the invitation is not complied with within a reasonable time, the requested State would undoubtedly proceed on the documents previously transmitted.

ARTICLE 14. APPREHENSION AND DETENTION OF PERSON CLAIMED

Upon the receipt of a requisition, the requested State shall endeavor to apprehend and detain the person claimed, unless it clearly appears, on the face of the requisition and any supporting documents submitted, that the person whose extradition is sought may not be extradited under this Convention.

COMMENT

The immediate object of a requisition is the apprehension of the person claimed for the purpose of extradition. Many treaties do not expressly impose upon the requested State a duty of arrest.² Recent British treaties, however, generally provide that if the requisition for extradition is in accordance with the stipulation of the treaty, the competent authorities of the requested State will proceed to arrest the fugitive.³ The Czechoslovakian treaties all contain an article which states that upon the arrival of the requisition together with the documents, the requested State will take all necessary measures to arrest the person sought and prevent his escape, unless surrender appears *a priori* inadmissible.⁴ A similar provision is found in a number of other treaties.⁵ The treaty between France and Czechoslovakia of 1928⁶ declares that

On receipt of the requisition for extradition, together with the documents mentioned in the preceding Article, the State applied to shall take all necessary steps under the laws in force in its territory to trace the person claimed and, if necessary, to take him into custody.

The treaty between Brazil and Italy of 1931 uses this more cryptic expression:

¹ See the German-Turkish treaty of 1930, Art. 10, Appendix V, No. 3, and the Swedish Extradition Law, Art. 14, Appendix VI, No. 12, which provide for an invitation by the requested State addressed to the requesting State to furnish necessary information not already received. No time-limit is set in these documents.

² *E.g.* (references are to Appendix V): United States-Great Britain, No. 1; United States-Austria, No. 2; Germany-Turkey, No. 3; Belgium-Poland, No. 6; Colombia-Panama, No. 8.

³ *E.g.* (references are to Appendix I): Latvia, Art. 9, No. 20; Finland, Art. 9, No. 25; Czechoslovakia, Art. 9, No. 28; Estonia, Art. 9, No. 30; Lithuania, Art. 9, No. 46; Albania, Art. 9, No. 70; Iraq, Art. 10, No. 93.

⁴ See the treaties listed in Appendix I.
⁵ *E.g.* (references are to Appendix I): Bulgaria-Rumania, Art. 14, No. 22; Hungary-Rumania, Art. 14, No. 27; Albania-Yugoslavia, Art. 8, No. 44; Hungary-Yugoslavia, Art. 9, No. 61; Bulgaria-Turkey, Art. 8, No. 65; Poland-Sweden, Art. 12, No. 78; Italy-Brazil, Art. 10, No. 87; Iraq-Turkey, Art. 8, No. 91.

⁶ Art. 8, Appendix V, No. 5.

The requisition for extradition, duly accompanied by the documents in support thereof, must be complied with as soon as it is received by the State applied to.

In the Montevideo Convention of 1933¹ it is said:

Once a request for extradition in the form indicated in Article 5 has been received, the State from which the extradition is sought will exhaust all necessary measures for the capture of the person whose extradition is requested.

The Central American Convention of 1934² states more briefly that

The proper authority shall apprehend the fugitive, in order that he may be brought before the competent Judicial authority for examination.

The 1931 Draft Convention³ prepared by the International Penal and Prison Association says:

If a preliminary examination of the requisition for surrender, which must be instituted immediately, does not show that the application cannot be granted, the State applied to must take steps without delay to prevent the person escaping from extradition.

The subject of arrest of persons claimed is usually expressly provided for in the extradition statutes of the various States.⁴

It is desirable to include in this Convention an express statement of a duty which shall rest upon the requested State to "endeavor to apprehend and detain the person claimed," but with a saving clause, similar in effect to that in the treaties and drafts listed in notes 5, 6 and 8, *supra*, which discharges such State from this duty if "it clearly appears, on the face of the requisition and any supporting documents submitted that the person whose extradition is sought may not be extradited under the Convention."

The article does not say upon whose motion the arrest shall be made. That will depend upon the municipal law of each State.⁵ Nor does this article say when the arrest shall be made, but this would be within the territorial jurisdiction of the requested State.⁶

¹ Art. 9, Appendix III, No. 6. ² *Ibid*, No. 7. ³ Art. 25, Appendix III, No. 6.

⁴ See for example (references are to Appendix VI): Argentine, Art. 15, No. 1; France, Art. 10, No. 6; Germany, Art. 10 (1), No. 7; British Act of 1870, Art. 9, No. 8; Greece, Art. 12, No. 9; Sweden, Art. 16, No. 12; Switzerland, Art. 15, No. 13; United States, Revised Statutes sec. 5270, No. 15.

⁵ Cf. the French Extradition Law of 1927, Art. 10 (Appendix VI, No. 6), according to which the initiative is taken by the Minister of Justice; the British Extradition Law 1870, Arts. 7 and 8 (Appendix VI, No. 8), according to which a Secretary of State may require a police magistrate to issue a warrant of arrest, or a police magistrate or justice of the peace may issue such warrant upon an information or complaint; section 5270 of the United States Revised Statutes (Appendix VI, No. 15) which gives the judicial officers there named authority to act upon complaint made to them, though this procedure may be varied by specific mandatory provisions in treaties calling for an executive mandate (See Moore, *Extradition* (1891), I, Chap. X, pp. 357 to 394).

⁶ A State has authority to arrest for extradition a person who is upon a foreign ship in a port of the requested State, though by consular convention foreign consuls have jurisdiction to maintain order on their respective vessels in such port and to settle disputes there. *In re Doelitzsch* (1923), *Foro Italiano*, II (1924), pp. 68.

It has not seemed necessary or wise to deal with the subject of bail in this Convention. It seems best to leave to the municipal law of each State to determine whether enlargement upon bail is a safe means of detention under any circumstances, and, if so, the circumstances which shall justify such action.

There is no provision in the statutes of the United States on extradition¹ which deals with the subject of bail.² In the first two cases involving the question of bail before final commitment for extradition, the lower Federal courts held that there was no power to admit to bail because such power was not given by statute.³ The second of these cases was appealed to the Supreme Court of the United States. While the court upheld the refusal to admit to bail as a reasonable exercise of discretion, Chief Justice Fuller made the following statements:⁴

We are unwilling to hold that the Circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

In the four cases since *Wright v. Henkel*, in which the question of admitting to bail has arisen in the lower Federal courts, a power in the courts to accept bail has been recognized prior to final commitment for extradition. All agree, however, that the power should be exercised only under the most pressing circumstances. What constituted "most pressing circumstances" has been a matter of diverse opinion. In one of the four cases, the court asserted the inadvisability of ever admitting to bail prior to the date of a reasonably early examination, and, it not appearing that the examination

¹ Appendix VI, No. 15.

² That subject is dealt with in §§1015 and 1016 of the United States Revised Statutes, which follow a section which provides the manner of arrest of any person "for any crime or offense against the United States." These provisions as to bail are:

Sec. 1015. Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offender.

Sec. 1016. Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the Supreme Court, or a Circuit Court, or by a justice of the Supreme Court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law.

³ *In re Carrier* (District of Colorado, 1893), 57 Federal Reports 578; *In re Wright* (Circuit Court, Southern District of New York, 1903), 123 Federal Reports 463.

⁴ But at common law, admission to bail is regarded as inherent in judicial power. *Regina v. Spilsbury* [1898], 2 Queens Bench Division Report, 615; *ex parte Bridewell* (1897), 57 Mississippi Reports, 39. The Federal courts have recognized their possession of such other inherent powers as authority to control their process and to punish for contempt. *Ex parte Robinson* (1873), 19 Wall. (U. S.), 505, 513; *Gumbel v. Pitkin* (1888), 124 U. S. 131; *Michaelson v. United States* (1924), 266 U. S. 65; and in deportation cases they have exercised the power of admitting to bail without statutory authority. *In re Ah Tai* (1903), 125 Fed. Rep., 795; *United States v. Yee Yei* (1911), 192 Fed. Rep. 577; *contra*, *United States v. Curran* (1924), 297 Fed. Rep. 946; *Wright v. Henkel* (1903), 190 U. S., 40.

would be unduly delayed, denied bail.¹ In another case the court, fearing undue delay in the arrival of witnesses, granted bail.² In one of the other cases circumstances sufficiently pressing were found to justify enlargement upon bail.³ There the plaintiff in a civil action in New York State, involving a large sum, if not his whole fortune, was arrested at the instance of the adverse party on an extradition warrant from Canada the day before the trial of the case. Bail was accepted in the extradition proceedings in order that he might effectively protect his interests in the civil action. The other decision⁴ held that jail discomfort was not an unusual circumstance such as to warrant enlargement upon bail.⁵

No United States case has been discovered in which a person claimed has been enlarged on bail after commitment for extradition, and it is believed that bail would not be accepted after such commitment. The following dictum of Chief Justice Fuller in *Wright v. Henkel*⁶ appears to be the only judicial statement on this point:

Not only is there no statute providing for admission to bail in cases of foreign extradition, but Section 5270 of the Revised Statutes is inconsistent with its allowance after committal, for it is there provided that . . . the commissioner shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. . . .

The demanding government when it has done all that the treaty and the law require it to do is entitled to the delivery of the accused . . . an obligation which it might be impossible to fulfill if release on bail were permitted.

Under the British Extradition Act 1870, there has been a question as to whether powers given to the magistrate under sections 9 and 10⁷ include the power to admit the prisoner to bail. The case of *Regina v. Spilsbury*⁸ arose under the Fugitive Offenders Act, for extradition of offenses from one part of the Empire to another in which admission to bail is expressly referred to.⁹ Lord Russel said:

This court has independently of statute, by the common law, jurisdiction to admit to bail. . . . This inherent power to admit to bail is historical, and had long been exercised by the Court, and if the Legislature had meant to curtail or circumscribe this well-known power, their intention would have been carried out by express enactment.

Piggott¹⁰ and Biron and Chalmers¹¹ disagree with this judicial statement as to the inherent power of British courts to admit to bail in extradition cases,

¹ *United States ex rel. McNamara v. Henkel* (1912), 46 F. (2), 84.

² *In re Gannon* (1928), 27 (2d), 362.

³ *In re Mitchell* (1909), 171 Fed. Rep. 289.

⁴ *In re Klein* (1930), 46 F. (2d), 85.

⁵ Enlargement on bail was also allowed pending extradition proceedings *In re Keene's Extradition* (1934), 6 Federal Supplement, 308.

See Editorial comment in 4 American Journal of International Law (1910), pp. 422 to 430.

⁶ (1903), 190 U. S., 40 at 62.

⁷ Appendix VI, No. 8.

⁸ [1898] 2 Queens Bench Division Reports, 615.

⁹ 44 and 45 Vict., c. 69, s. 5.

¹⁰ Piggott, *Extradition* (1910), pp. 94 to 96.

¹¹ Biron and Chalmers, *Extradition* (1903), p. 50.

and doubt that the language of the Extradition Act grants such power. However, in 1922 the power of British courts to admit to bail, pending final commitment for extradition, was again judicially recognized, though the power was not in that case exercised.¹ The court revealed awareness that treaty obligations were at stake. But that

does not mean . . . that in no case under the Extradition Acts is the question of bail to be considered. What it does mean is that where a case is under the extradition acts there is, in addition to the normal considerations which apply to a question of bail, an added ingredient due to the fact that a treaty has been made with a foreign country.

In Great Britain, according to Lord Halsbury, who cites no cases, the Kings Bench Division has power to admit to bail *after* commitment for extradition.² Though it is believed that no case in Great Britain has been reported on the subject, the language quoted above from *Regina v. Spilsbury* is very broad.

While the Canadian Extradition Act³ does not expressly provide for bail, the right to admit to bail in extradition cases, pending final commitment, is recognized in the Canadian cases. In the first case⁴ the lower court held that it did not have such power, because not expressly granted it by the statute, but said that the power belonged to the judges of the High Court by virtue of the Habeas Corpus Act. However, in the next year the power of a judge before whom extradition proceedings were pending, to admit to bail was recognized, though the power was not exercised in that case.⁵ In *Re Gaynor and Green*,⁶ the court felt that enlargement upon bail should certainly be allowed if the facts warrant it. The application for bail in the case, however, was denied on the ground that it should have been made in another judicial district. In 1929 the Manitoba Court of Kings Bench declared:⁷

In my opinion an extradition Judge or commissioner has a right to consider the question of bail and a discretion to grant it if the circumstances seem to warrant it, but that specially strong grounds should be shown in support of such application.

In *Re Watts*,⁸ the person claimed petitioned for release upon bail pending an appeal. The court, expressing its reluctance to admit to bail a person who had been arrested and committed for extradition, nevertheless said it would do so if the petitioner would submit himself to close custody. As the accused failed to give himself into actual custody bail was never granted.

Looking to the South American countries,⁹ one finds that in some coun-

¹ *Rex v. Phillips* (1922), 126 Law Times Reports, 113.

² 14 Halsbury, *Laws of England*, §956, p. 414.

³ Appendix VI, No. 4.

⁴ *Re Stern* (1903), 7 Canadian Criminal Cases, 191.

⁵ *United States v. Weiss* (1904), 8 Canadian Criminal Cases, 62.

⁶ (1905), 9 Canadian Criminal Cases, 255.

⁷ *Re Gifford* [1930], 1 Dominion Law Reports, 800, 802.

⁸ (1902), Canadian Criminal Cases, 538.

⁹ See Puente, Julius I., "Principles of International Extradition in Latin America," 28 *Mich. Law Rev.* (1930), 665.

tries, as in Chile,¹ the person arrested in extradition proceedings cannot be admitted to bail, and in Argentina² bail is not allowed if the crime imputed carries, according to the local law, a minimum penalty of two years' imprisonment, while in other countries, such as Ecuador³ and Panama,⁴ the accused is entitled to be admitted to bail if his case would permit him to do so if he were to be tried under the local law.

By the law of Hungary the person arrested may not be released on bail.⁵ The Italian Penal Code has an interesting provision:⁶

The Minister of Justice must in all cases give immediate notice that an arrest has been made and may authorize the Attorney-General to release the person under whatever guarantee he thinks fit to require.

A provision found in some Belgian treaties⁷ declares that:

The foreigner may claim to be provisionally set at liberty in any case in which a Belgian enjoys that right, and under the same conditions.

ARTICLE 15. REQUEST FOR PROVISIONAL ARREST

(a) A State may ask for the provisional apprehension and detention of a person, if it indicates at the same time its intention promptly to request the extradition of that person.

COMMENT

The production by a requesting State of a requisition and of the necessary documents to support it, the transmission of such documents through diplomatic channels to the requested State and their consideration by the proper authorities of the latter take so much time, and give so much opportunity for information to get out, that, in an era of rapid communication and transportation, the person claimed is likely to have moved to another country before the formalities for his arrest are completed.

In 1868 Sir Thomas Henry, Chief Magistrate of the Metropolitan Police Courts in London, before whom English extradition proceedings were brought, said:⁸

. . . The fact is, it takes so much time to obtain a warrant that parties who abscond to this country generally get some intimation of it, and remove to America, or to Belgium, or to some other country. The cases have failed chiefly upon that ground.

¹ *Código de Procedimiento Penal*, Artículo 698.

² *In re Extradition of Andres Blott* (1895), 9 Fallos Sup. Ct. 66, 4^a ser.

³ Law concerning Foreigners, Extradition and Naturalization, Oct. 18, 1921.

⁴ *Código Administrativo*, Art. 2100.

⁵ Law XXXIII of 1896, Ch. XXIV.

⁶ Article 663.

⁷ For example, the treaty between Belgium and Great Britain, Oct. 29, 1901, Art. 111, Piggott, App. II, 40. The treaty signed by the United States with Belgium, Oct. 26, 1901, 1 *Malloy, Treaties, etc.*, 106, does not contain this clause.

⁸ *Report From the Select Committee [of the House of Commons] on Extradition* (1868), par. 331, p. 19.

In the same year Mr. Richard Mullens, Solicitor to the Association of Bankers, made the following suggestion for legislation:¹

One suggestion which I was going to make was whether a magistrate, or the Secretary of State, ought not have authority upon a *bona fide* statement of the circumstances, but upon less evidence of course than would be necessary for extradition, to order the detention of a person for a reasonable time, until the documents required by a treaty should be sent over.

These suggestions were acted upon and the British Extradition Act, 1870, Article 8,² provides for arrest by a police magistrate or justice of the peace of a person wanted by a foreign State in the same way and upon the same evidence as is appropriate in arresting a person for examination upon accusation of a crime committed in British territory.

We are told that on the European Continent provisional arrest undoubtedly took place rather early in the absence of treaty provisions on the subject, but only in exceptional circumstances.³ Before 1854 France made eleven treaties calling for provisional arrest, but only upon transmission of an order of arrest by the requesting State to the requested State through diplomatic channels, which accomplished little.⁴ From 1854 to 1868 France entered into a number of treaties which provided for provisional arrest without the production of any documents, but left such action discretionary with the requested State.⁵ In 1868 France began making extradition treaties which put upon the requested State the duty to make provisional arrest in the absence of documents, if the request came by telegraph through diplomatic channels.⁶

"Under the decisions of the courts as to the power of the judicial magistrates to arrest fugitives upon complaint duly made, and as to the power which such magistrates possess in respect to adjournments for the purpose of obtaining evidence, it is obvious that there exists in the United States a liberal system of provisional arrest and detention."⁷ This was said in 1891, when only three of our treaties dealt in terms with the subject.⁸

¹ *Report From the Select Committee [of the House of Commons] on Extradition* (1868), par. 1184, p. 61. Mr. Mullens points out (pars. 1199 to 1204, p. 62) that other means of detaining had sometimes been resorted to in the absence of arrangements for provisional arrest.

² Appendix VI, No. 8.

³ Billot, *Traité de l'Extradition* (1874), p. 150.

⁴ *Ibid.*, pp. 150 to 152.

⁵ *Ibid.*, pp. 153 to 155.

⁶ *Ibid.*, p. 155. See also *Circulaire du Ministre de la Justice, du 30 Juillet 1872, ibid.*, p. 422.

⁷ Moore, *Extradition* (1891), I, §275, pp. 406 and 407, and see §§270 to 274, pp. 400 to 406.

⁸ *Ibid.*, §273, pp. 404 and 405. The language of Art. 12, inserted by convention of 1882 in our extradition treaty of 1877 with Spain, seems to suggest the regularization of an existing practice (2 Malloy, *Treaties, etc.*, 1676-77):

"If, when a person accused shall have been arrested in virtue of the mandate or preliminary warrants of arrest, issued by the competent authority as provided in Article XI, hereof, and been brought before a judge or a magistrate to the end of the evidence of his or her guilt being heard and examined as hereinbefore provided, it shall appear that the mandate or preliminary warrant of arrest has been issued in pursuance of a request or declaration received by telegraph from the government asking for the extradition, it shall be competent for the judge or magistrate at his discretion to hold the accused for a period not exceeding twenty-

At the present time treaty and statutory arrangements for provisional arrest are general. All of the multipartite conventions, except the Treaty of Amiens¹ and the South American Convention of 1889,² expressly deal with provisional arrest,³ and all of the draft conventions on the subject do the same.⁴ This is true almost universally of the ninety-odd bipartite tradition treaties published in the *League of Nations Treaty Series*,⁵ whose provisions will be referred to later in this comment, and the subject is very often dealt with in municipal statutes on extradition.⁶

While the provision in the last clause of this paragraph, making the request for provisional arrest dependent upon an indication by the requesting State that it intends to forward a requisition promptly, is not usually expressed,⁷ it certainly is implied from the necessity of producing such requisition in order to obtain extradition, and from the general rule that a person claimed will only be held a reasonable time after provisional arrest.⁸ It therefore seems desirable to put this requirement in the text.

(b) A request for provisional apprehension and detention, based upon instructions and information obtained from his Government by any means of communication, may be made by a diplomatic or consular officer or other authorized agent of the one State to the government of the other State or directly to an official of the other State who is competent to order such apprehension and detention.

five days, so that the demanding government may have opportunity to lay before such judge or magistrate legal evidence of the guilt of the accused; and if, at the expiration of said period of twenty-five days, such legal evidence shall not have been produced before such judge or magistrate, the person arrested shall be released; provided that the examination of the charges preferred against such accused person shall not be actually going on."

By 1887, when we began to write provisions for provisional arrest into our treaties, the provisions took the following form (2 *Ibid.*, 1527):

"It shall be lawful for any competent judicial authority of the United States, upon production of a certificate issued by the Secretary of State, stating that request has been made by the Imperial Government of Russia for the provisional arrest of a person convicted or accused of the commission therein of a crime or offense extraditable under this Convention, and upon complaint, duly made, that such crime or offense has been so committed, to issue his warrant for the apprehension of such person. But if the formal requisition for surrender, with the formal proofs hereinbefore mentioned, be not made as aforesaid by the diplomatic agent of the demanding Government, or, in his absence, by the competent consular officer, within forty days from the date of the commitment of the fugitive, the prisoner shall be discharged from custody." ¹ *Appendix III*, No. 1. ² *Ibid.*, No. 2.

³ Pan American Convention of 1902, Art. 8, Appendix III, No. 3; South American Convention of 1911, Art. 9, Appendix III, No. 4; Bustamante Code, 1928, Art. 366, Appendix III, No. 5; Montevideo Convention, 1933, Art. 10, Appendix III, No. 6; Central American Convention, 1934, Art. 7, Appendix III, No. 7.

⁴ Field's Code, 1876, Art. 217, Appendix IV, No. 1; Rio de Janeiro Draft, 1912, Art. 14, Appendix IV, No. 3; Travers' Draft, 1922, Art. 7, Appendix IV, No. 4; International Law Association Draft, 1928, Art. 12, Appendix IV, No. 5; International Penal and Prison Association Draft, Art. 26, Appendix IV, No. 6. The Resolutions of Oxford, 1880, Appendix IV, No. 2, did not deal with this subject.

⁵ See the list of these treaties in Appendix I, and the group of typical bipartite treaties in Appendix V.

⁶ See the group of typical extradition statutes in Appendix VI.

⁷ In the Pan American Convention of 1902, Art. 8, Appendix III, No. 3, such a promise was called for expressly.

⁸ See Article 16 of this Convention.

COMMENT

Most British treaties on extradition do not specify the medium of communication.¹ For a good many years the phrase "on telegraphic or other information" was used as part of the normal United States formula as to provisional arrest,² but a number of our treaties are found in a group where only the telegraph is mentioned,³ while on the other hand we have entered into several which allow any "direct communication."⁴ The greatest number of treaties provides for provisional arrest upon a request made either by "post [or letter or writing] or telegraph."⁵ Undoubtedly the telephone and radio are being widely used now, though neither is mentioned in treaties.⁶ The French Law of 1927 provides:

Sur un simple avis transmis, soit par la poste, soit par tout mode de transmission plus rapide laissant une trace écrite, ou matériellement équivalente.⁷

¹ Piggott, *Extradition* (1910), Appendix II.

² United States treaties with the following countries: Bolivia, April 21, 1900, 1 Malloy, *Treaties, etc.*, 125; Brazil, May 14, 1897, 1 *ibid.* 146; Chile, April 17, 1900, 1 *ibid.* 192; Denmark, Jan. 6, 1902, 1 *ibid.* 390; Guatemala, Feb. 27, 1903, 1 *ibid.* 878; Mexico, Feb. 22, 1899, 1 *ibid.* 1184; Norway, June 7, 1893, 2 *ibid.* 1300; Panama, May 25, 1904, 2 *ibid.* 1357; Salvador, April 18, 1911, 3 *ibid.* 2820; Serbia, Oct. 25, 1901, 2 *ibid.* 1622; Sweden, Jan. 14, 1893, 2 *ibid.* 1736; Switzerland, May 14, 1900, 2 *ibid.* 1771; Uruguay, March 11, 1905, 2 *ibid.* 1825.

³ United States-Spain, June 15, 1904, 2 Malloy, *Treaties, etc.*, 1712; United States-Honduras, Jan. 15, 1909, 3 *ibid.* 2685; United States-Dominican Republic, June 19, 1909, 3 *ibid.* 2567; United States-Paraguay, March 26, 1913, 3 *ibid.* 2783; Colombia-Chile, Appendix I, No. 2; Germany-Czechoslovakia, Appendix I, No. 11; United States-Costa Rica, Nov. 10, 1922, 3 *ibid.* 2548; Italy-Czechoslovakia, Appendix I, No. 12; United States-Venezuela, Appendix I, No. 13; Albania-Yugoslavia, Appendix I, No. 44; Panama-Colombia, Appendix I, No. 54; United States-Poland, Appendix I, No. 57; Austria-Belgium, Dec. 1, 1930, 112 *League of Nations Treaty Series*, 37.

Similarly the telegraph is alone mentioned in the Pan American Convention of 1902, Art. 8, Appendix III, No. 3; South American Convention of 1911, Art. 9, Appendix III, No. 4; Bustamante Code, 1928, Art. 366, Appendix III, No. 5; Rio de Janeiro Draft of 1912, Art. 14, Appendix IV, No. 3.

⁴ United States-Latvia, Appendix I, No. 14; United States-Finland, Appendix I, No. 23; United States-Bulgaria, Appendix I, No. 24; Estonia-Finland, Appendix I, No. 33; Hungary-Latvia, Appendix I, No. 64.

See also Montevideo Convention of 1933, Art. 10, Appendix III, No. 6, allowing "any means of communication." Field Code of 1876, Art. 217, Appendix IV, No. 1, does not mention means of communication.

⁵ See (references are to Appendix I): Germany-Greece, No. 1; Sweden-Finland, No. 17; Denmark-Finland, No. 18; Switzerland-Uruguay, No. 19; Bulgaria-Rumania, No. 22; Hungary-Rumania, No. 27; France-Latvia, No. 29; France-Poland, No. 32; Norway-Finland, No. 35; Czechoslovakia-Rumania, No. 36; Latvia-Czechoslovakia, No. 38; Bulgaria-Czechoslovakia, No. 39; Belgium-Estonia, No. 41; France-San Marino, No. 43; Spain-Czechoslovakia, No. 57; Belgium-Czechoslovakia, No. 53; Norway-Latvia, No. 55; Belgium-Finland, No. 58; France-Czechoslovakia, No. 60; Hungary-Yugoslavia, No. 61; Bulgaria-Greece, No. 62; Bulgaria-Turkey, No. 65; Austria-Sweden, No. 72; Spain-Latvia, No. 74; Norway-Estonia, No. 75; Denmark-Estonia, No. 77; Denmark-Latvia, No. 79; Sweden-Estonia, No. 80.

The Central American Convention of 1934, Art. 7, Appendix III, No. 7, speaks of "telegraphic and postal communication."

⁶ The telephone is mentioned in Statutes of Hungary, Law XXXIII of 1896, Chap. XXIV, and of Yugoslavia, Code of Criminal Procedure of 1929, Chap. XXVI, Art. 491.

⁷ Art. 19, Appendix VI, No. 6.

Travers in his Draft Convention of 1928, Art. 7, provides for telegraphic or telephonic communication, but the ease of the latter would require telegraphic confirmation within 24 hours. Appendix IV, No. 4.

In the present section it has been thought wise to allow the use of "any means of communication," if the request goes through authorized official channels, and meets the test as to content established by paragraph (3).

The bipartite treaties exhibit infinite variety as to provisions governing the channel of communication for requests for provisional arrest.

In line with Article 8 of Extradition Act, 1870,¹ the British treaties generally provide that when provisional arrest is requested, the person claimed may be apprehended under a warrant issued by any police magistrate, justice of the peace, or other competent authority of either country. Nothing is said in these treaties as to the way in which the requesting State is to communicate its request, but in practice this is done by diplomatic or consular officer upon telegraphic instructions.² The formula used in many United States treaties is similar, providing that complaint on oath be presented to a judge or authorized magistrate,³ leaving it to the requesting State to choose the person who shall make such presentation,⁴ or to the competent magistrate⁵ or to the competent magistrate in conformity to statutes in force.⁶ It is not strange that in the treaty between the United States and Great Britain nothing is said as to machinery of extradition, except that in each case it shall be carried out in accordance with the law of the requested State.⁷

The Draft Convention approved by the International Law Association in 1928, provides for communication by any channels permitting of verification. Appendix IV, No. 5.

The International Penal and Prison Association (Draft Convention of 1931, Art. 26, Appendix IV, No. 6), would allow any form of communication which leaves traces in writing, but would require that, when an application is sent by telephone or wireless telegraph, the receiving authority must ascertain by independent inquiry that it is authentic.

¹ Appendix VI, No. 8.

² Piggott, *Extradition* (1910), p. 85 and Appendix II.

A Memorandum of the British Home Office of July, 1922, is instructive:

"3. Application for action to be taken for the extradition of a fugitive criminal must be addressed by the prosecutor or Chief Officer of the police concerned in the case to the Secretary of State for the Home Department, who will communicate through proper diplomatic channels, with authority of place where accused is believed to be.

"4. The police in this country may communicate direct with the police of foreign countries for the purpose of giving or obtaining information, but under no circumstances should direct application be made by them for the arrest of a fugitive.

"5. Where apprehension of the accused is a matter of urgency His Majesty's representative in the country where he is may be instructed by the Secretary of State by telegram to apply for the provisional arrest in anticipation of the claim for extradition. Where a treaty provides for the provisional arrest of a fugitive in a foreign country, it usually fixes a period (varying from 14 to 60 days) from the date of arrest within which formal claim for extradition must be made.

"6. . . . In a case of urgency the evidence to support the claim for extradition may be sent later.

"7. Police officers may by arranging in special cases be sent out to help the foreign police in tracing the accused or in supporting the claim for extradition after."

³ Conforming to the provision in the United States statute, Appendix VI, No. 15.

⁴ See, for example, treaties with Spain, Aug. 7, 1882, 2 Malloy, *Treaties, etc.*, 1676; Russia, March 28, 1887, 2 *ibid.* 1527; Norway, June 7, 1893, 2 *ibid.* 1300; Serbia, Oct. 25, 1901, 2 *ibid.* 1622; Honduras, Jan. 15, 1909, 3 *ibid.* 2685; Venezuela, Jan. 19, 1922, 3 *ibid.* 2870.

⁵ Treaties with Costa Rica, Nov. 10, 1922, 3 Malloy, *Treaties, etc.*, 2548; Latvia, Appendix I, No. 14; Poland, Appendix I, No. 57.

⁶ Treaties with Estonia, Appendix I, No. 15; Finland, Appendix I, No. 23; Bulgaria, Appendix I, No. 24; Lithuania, Appendix I, No. 26; Czechoslovakia, Appendix I, No. 31.

⁷ Art. 8, Appendix V, No. 1.

A number of other treaties embody the same provision.¹ These practices conform to the language of the present section, which is also in effect similar to treaties which direct that communication shall be had from "competent authorities" "to competent authorities."² Treaties which provide for communication from a "tribunal or competent authorities to competent authorities,"³ go somewhat further.

There are treaties which simply declare that requests for provisional arrest shall go through diplomatic or consular channels,⁴ and others which only say that they shall be directed to Ministers of Foreign Affairs.⁵ We find directions in the treaties that communication shall move from Ministry of Justice to Ministry of Justice,⁶ or from judicial authorities to judicial authorities,⁷ or from a court or examining judge to corresponding authorities,⁸ or even between competent authorities or public prosecutors.⁹ In a group of treaties between neighboring States an enumeration is made of local officers who may communicate with each other on the subject of provisional arrest.¹⁰

The Rio de Janeiro Draft of 1912, Article 14,¹¹ and the Montevideo Convention of 1933, Article 10,¹² though making provision for provisional arrest, have nothing to say as to the channel of communication of a request. The Pan American Convention of 1902, Article 8,¹³ the South American Convention of 1911,¹⁴ and the Central American Convention of 1934¹⁵ each states

¹ See (references are to Appendix I): Switzerland-Uruguay, No. 19; Belgium-Estonia, No. 41; Belgium-Latvia, No. 42; Liberia-Monaco, No. 47; Albania-Greece, No. 49; Belgium-Czechoslovakia, No. 53; Belgium-Finland, No. 58; United States-Germany, No. 70.

² Bulgaria-Rumania, No. 22; Hungary-Rumania, No. 26; France-San Marino, No. 43; Albania-Greece, No. 49; Hungary-Latvia, No. 64.

³ Treaties between Czechoslovakia and Rumania, Appendix I, No. 36; Estonia, Appendix I, No. 37; Latvia, Appendix I, No. 38, and Bulgaria, Appendix I, No. 39; also Bulgaria-Greece, Appendix I, No. 62.

⁴ France-Latvia, Appendix I, No. 29; France-Poland, Appendix I, No. 32; Turkey-Bulgaria, Appendix I, No. 65.

⁵ United States-Italy, June 11, 1884, 1 Malloy, *Treaties, etc.*, 9852; Germany-Greece, Appendix I, No. 1; Austria-Hungary-Greece, Appendix I, No. 1; France-San Marino, Appendix I, No. 43.

In three Belgian treaties it is directed that request be made of Minister of Foreign Affairs, with the added proviso that, if request is made of a judicial or executive authority, action upon it shall be optional: Estonia, Appendix I, No. 41; Latvia, Appendix I, No. 42; Finland, Appendix I, No. 58.

⁶ Hungary-Yugoslavia, Appendix I, No. 61; judicial authorities and consular agents to Ministry of Justice or competent judicial authority (Italy-Czechoslovakia, Appendix I, No. 12); competent authorities or diplomatic and consular agents to Minister of Justice (Albania-Yugoslavia, Appendix I, No. 43).

⁷ Austria-Belgium, Appendix I, No. 90.

⁸ Latvia-Estonia, Appendix I, No. 4; Lithuania-Estonia, Appendix I, No. 5; Norway-Latvia, Appendix I, No. 55; Spain-Latvia, Appendix I, No. 71. Public prosecutor's department or examining magistrate to competent authorities (Norway-Estonia, Appendix I, No. 76).

⁹ Norway-Finland, Appendix I, No. 35; Austria-Estonia, Appendix I, No. 45; Austria-Finland, Appendix I, No. 59. Note the explicit provision against this in Great Britain, Memorandum of the Home Office, in footnote 26, *supra*.

¹⁰ Finland-Sweden, Appendix I, No. 17; Denmark-Finland, Appendix I, No. 18; Finland-Latvia, Appendix I, No. 21; Estonia-Finland, Appendix I, No. 33; Denmark-Estonia, Appendix I, No. 77; Denmark-Latvia, Appendix I, No. 79; Sweden-Estonia, Appendix I, No. 80.

¹¹ Appendix IV, No. 3.

¹² *Ibid.*, III, No. 6.

¹³ *Ibid.*, No. 3.

¹⁴ *Ibid.*, No. 4.

¹⁵ *Ibid.*, No. 7.

that the request may go to the Minister of Foreign Affairs of the requested State, but each has an alternative provision—the first provides that it may go also to the proper authority in the requested State, the second that, in urgent cases, it may be made by the judicial authority of the requesting State, and may be granted by the police authorities or local court of the requested State, and the third that it may be made through a diplomatic or consular agent seemingly directly to a court. Travers would have such request go through the diplomatic channel or directly from the head of one tribunal to the head of the other tribunal.¹ The International Law Association Draft of 1928,² and the Draft of the International Penal and Prison Association of 1931,³ would provide broadly for request from competent authority in one country to competent authority in the other country.

It seems clear that the municipal law of the requesting State should determine the person who is to act for it in making request for provisional arrest, and that the municipal law of the requested State should determine how and to whom that request is to be presented, and the way in which the agent of the requesting State is to establish his authority to act for his government. Therefore the language of the present paragraph seems correct in theory, convenient in practice, and to be supported by provisions in a large number of conventions and treaties.

A considerable number of agreements—and quite surprisingly not always between countries in close proximity to each other—allow provisional arrest to be effected upon mere publication, in the official police bulletin of the apprehending State, of a notice that the person apprehended is wanted in another State.⁴ Such a provision, however, does not seem adapted to a universal convention on extradition.

A number of statutes provide for an arrest of any person, without any request by a foreign State, when the requisition for his extradition is reasonably expected. The offer for extradition of such person follows his arrest and the State concerned is given reasonable time to present a requisition for his extradition.⁵ This is a perfectly proper practice for a State to establish

¹ Appendix IV, No. 4.

² *Ibid.*, No. 5.

³ *Ibid.*, No. 6.

⁴ (References are to Appendix I): Czechoslovakia-Rumania, No. 36; Estonia-Czechoslovakia, No. 37; Latvia-Czechoslovakia, No. 38; Bulgaria-Czechoslovakia, No. 39; Bulgaria-Greece, No. 62; Spain-Latvia, No. 74; Sweden-Estonia, No. 80.

⁵ Costa Rica, Penal Code, Arts. 234 and 236; Czechoslovakia, Penal Code, par. 39; Finland, Extradition Law, Feb. 11, 1922, Art. 18; Iraq, Extradition Law, 1923, Arts. 11, 12 and 13; Italy, Penal Code, Art. 13, and Criminal Procedure Code, Art. 661; Liechtenstein, Penal Code, par. 39; Norway, Extradition Law, June 13, 1908, par. 20; Sweden, Extradition Law, June 4, 1913, Ch. II, §25.

The provision of Swedish law is typical:

"Anyone, who in a foreign State is being sought for a crime which under this law may give rise to extradition, may be arrested here in the Kingdom without a special requisition in the matter being at hand. A report on the arrest shall immediately be submitted to the Minister of Foreign Affairs.

"If the Minister of Foreign Affairs finds that there are obstacles to the extradition of the person arrested, he shall issue an order concerning his release. If it is found that there are no obstacles the foreign State shall be informed of the arrest and in connection therewith a certain period shall be fixed in accordance with the provisions of Section 24 within which requisition for the extradition of the person arrested shall be made." (§24 deals with provisional arrest.)

by municipal law, but would not find a proper place in a multipartite convention.

(c) The request for provincial apprehension and detention shall contain the name and a description for the purpose of identification of the person whose apprehension and detention are sought, a statement of the act or acts for which it is intended to prosecute or punish such person, and the punishment or correctional measures which may be or which have been imposed for such act or acts by the law of the requesting State, and a statement of the existence of a warrant or other document constituting the first step in the prosecution of such person, or of a judgment of conviction against such person; it may also be accompanied by a further request for the provisional seizure and detention of property.

COMMENT

A number of extradition treaties in terms call only for a statement in the request for provisional arrest that a warrant of arrest for the person claimed has been issued,¹ while other treaties provide in the alternative for a statement of the existence of a warrant of arrest, an indictment or a sentence.² Several add the requirement of information concerning the offense³ and also description of the person claimed.⁴ A few also provide that information shall be given as to the law applicable to the offense charged.⁵

The Pan American Convention of 1902,⁶ the Bustamante Code of 1928,⁷ the Central American Convention of 1934,⁸ the Field Draft Code of 1876⁹ and the Rio de Janeiro Draft of 1912¹⁰ say nothing as to information which shall go with the request for provisional arrest. The South American Convention of 1911,¹¹ the Montevideo Convention of 1933,¹² and the International Law Association Draft of 1928¹³ require information that an order of

¹ See (references are to Appendix I): Bulgaria-Rumania, No. 22; Hungary-Rumania, No. 27; France-Latvia, No. 29; France-Poland, No. 32; France-San Marino, No. 43; Greece-Albania, No. 49; Bulgaria-Turkey, No. 65.

² United States-Japan, April 29, 1886, 1 Malloy, *Treaties, etc.*, 1025; United States-Mexico, Feb. 22, 1889, 1 *ibid.* 1184; United States-Guatemala, Feb. 27, 1903, 1 *ibid.*, 878; Germany-Greece, Appendix I, No. 2; Austria-Hungary-Greece, *ibid.* No. 1; Italy-Czechoslovakia, *ibid.* No. 12; Belgium-Estonia, *ibid.* No. 47; Belgium-Latvia, *ibid.* No. 42; Albania-Yugoslavia, *ibid.* No. 44; Belgium-Finland, *ibid.* No. 58; Hungary-Yugoslavia, *ibid.* No. 61; Norway-Estonia, *ibid.* No. 76.

³ United States-Colombia, May 7, 1888, 1 Malloy, *Treaties, etc.*, 323; United States-Argentina, Sept. 26, 1896, 1 *ibid.* 25; Six treaties, listed in Appendix I, made by Czechoslovakia with nations as follows, Rumania, No. 36, Estonia, No. 37, Latvia, No. 38, Bulgaria, No. 39, Spain, No. 50, France, No. 60; Greece-Bulgaria, *ibid.*, No. 62; Spain-Latvia, *ibid.*, No. 74.

⁴ See (references are to Appendix I): Denmark-Finland, No. 18; Finland-Latvia, No. 21; Austria-Norway, No. 34; Norway-Finland, No. 35; Austria-Estonia, No. 45; Norway-Latvia, No. 55; Austria-Finland, No. 59; Austria-Sweden, No. 72; Denmark-Estonia, No. 77; Denmark-Latvia, No. 79; Sweden-Estonia, No. 80.

⁵ Colombia-Chile, Appendix I, No. 2; United States-Lithuania, Appendix I, No. 26.

⁶ Art. 8, Appendix III, No. 3.

⁷ Art. 366, Appendix III, No. 5.

⁸ Art. 7, Appendix III, No. 7.

⁹ Art. 217, Appendix IV, No. 1.

¹⁰ Art. 14, Appendix IV, No. 3.

¹¹ Art. 9, Appendix III, No. 4.

¹² Art. 10, Appendix III, No. 6.

¹³ Art. 11, Appendix IV, No. 5.

arrest has issued. Travers' Draft of 1928¹ and the Draft of the International Penal and Prison Association of 1931² require substantially what is required by the present paragraph.

It seems reasonable to require the transmission of all of the information called for in this paragraph. It is not difficult to transmit it by whatever means of communication is chosen. All of this information should be in the hands of the government of the requesting State before a request for arrest is made, and it is fair that the authority of the requested State, who is requested to act, should have this information before him.

The last clause of this paragraph with regard to property is to be found only in the Draft of the International Penal and Prison Association of 1931.³ However, if property is to be asked for under Article 24 (?) of this Convention, it seems reasonable that provisional seizure of it may be asked when request is made for provisional arrest.

ARTICLE 16. PROVISIONAL ARREST

A State which has received a request for the provisional apprehension and detention of a person, made in conformity with the provisions of Article 15, shall endeavor to apprehend such person and if such person is apprehended it shall detain him until the receipt of a requisition, provided that a requisition is received within a reasonable time; it shall also endeavor to seize and detain the property to which the request may have referred, and which appears to fall within the categories specified in Article 24 (?) of this Convention.

COMMENT

This article places a duty upon the requested State to make the provisional arrest, if request is properly made, as provided in Article 15. This seems reasonable and desirable, though provisions in existing bipartite treaties,⁴ and multipartite conventions⁵ and drafts⁶ are sometimes couched in peremptory and sometimes a permissive language.

Treaties and statutes generally state a definite time within which the

¹ Art. 7, Appendix IV, No. 4.

² Art. 27, Appendix IV, No. 6.

³ *Ibid.*

⁴ For example, a duty to arrest is imposed by the treaties between Germany and Turkey, Art. 9, Appendix V, No. 3, and Belgium and Poland, Art. 10, Appendix V, No. 6; while permissive language is used in the treaties between Brazil and Italy, Art. 10, Appendix V, No. 4, and Colombia and Panama, Art. 13, Appendix V, No. 7.

⁵ Duty is imposed in South American Convention of 1911, Art. 9, Appendix III, No. 4; Montevideo Convention of 1933, Art. 10, Appendix III, No. 6; Central American Convention of 1934, Art. 7, Appendix III, No. 7, and apparently by the Bustamante Code, Art. 366, Appendix III, No. 5, while permissive language is used in the Pan American Convention of 1902, Art. 8, Appendix III, No. 3.

⁶ The following drafts make arrest permissive: Field's Code of 1876, Art. 217, Appendix IV, No. 1; Rio de Janeiro Draft of 1912, Art. 14, Appendix IV, No. 3; International Law Association Draft of 1928, Art. 11, Appendix IV, No. 5. Travers would make arrest compulsory if request is communicated through diplomatic or consular channels, Art. 7, Appendix IV, No. 4. The Draft of the International Penal and Prison Association, Art. 26, to Art. 28, provides that provisional arrest "may be requested" as there provided, seeming to imply that if so requested the arrest should be made, Appendix IV, No. 6.

requisition must be received, and after which, the requisition not having been received, the person claimed may be set at liberty. The period generally runs from date of arrest, but sometimes from the time when notice of arrest is received by the requested State, and occasionally from the time when the notice is forwarded by the requesting State.¹ Colombia and Panama provide for detention under provisional arrest for "thirty days over and above the time allowed for distance."²

Hungary, Yugoslavia and Switzerland by statute fix different periods for detention under provisional arrest depending upon whether the requesting State is an immediate neighbor, is a European State, or is located outside of Europe.³ France, Italy, Norway, Latvia and Lithuania differentiate as to the length of detention according to whether the requesting State is or is not a European State.⁴ The statutes of Costa Rica, Panama, Iraq and Siam lay down a single period applicable to all countries.⁵ Japan⁶ and Ecuador⁷ provide by statute that detention shall be for a "reasonable time" but not to exceed two and three months respectively. The Mexican law⁸ provides for detention for a "reasonable time" to be determined by the Executive, but not to exceed three months. In Venezuela⁹ the length of detention is left to

¹ No attempt will be made to list all of the treaties, examples only will be given. The numerical references are to Appendix I:

From date of arrest: three months, United States-Poland, No. 57; *two months*, United States-Lithuania, No. 26; Greece-Albania, No. 49; *45 days*, Albania-Yugoslavia, No. 44; *six weeks*, Austria-Norway, No. 34; *forty days*, United States-Netherlands, Jan. 18, 1904, 2 Malloy, *Treaties, etc.*, 1271; *five weeks*, France-Poland, No. 32; *one month*, United States-Germany, No. 70, Central American Convention of 1934, Art. 7, Appendix III, No. 7; *thirty days*, Great Britain-Lithuania, No. 46, Lithuania-Estonia, No. 5; *four weeks*, Denmark-Latvia, No. 79; *three weeks*, Belgium-Finland, No. 58; *twenty-one days*, France-San Marino, No. 43.

From date of receipt by requesting State of notice of arrest: forty-five days, Hungary-Latvia, No. 64; *six weeks*, Norway-Latvia, No. 55; *one month*, Austria-Sweden, No. 72; *thirty days*, Austria-Finland, No. 59; *four weeks*, Sweden-Estonia, No. 80; *fifteen days*, Greece-Bulgaria, No. 62.

From date of forwarding notice of arrest: fifteen days, Czechoslovakia with Bulgaria, No. 39, Latvia, No. 38, and Estonia, No. 37. ² Appendix IV, No. 7.

³ HUNGARY: (a) One month if requesting State is neighbor of Hungary, (b) six weeks for other European countries, (c) three months for countries outside of Europe (Law XXXIII of 1896, Ch. XXIV); JUGOSLAVIA: (a) Twenty days if requesting State is a bordering country, (b) five weeks for another European country, (c) ten weeks for a country on another continent (Code of Criminal Procedure of 1929, Ch. XXVI, Art. 491); SWITZERLAND: (a) Twenty days if requesting State is a bordering country, (b) thirty days if another European country, (c) three months if a country on another continent (Law of Jan. 22, 1892, Arts. 19-20, Appendix VI, No. 13).

⁴ FRANCE: If requesting State is in Europe, twenty days to one month, if outside of Europe, three months (Law of 10 March 1927, Art. 19, Appendix VI, No. 6); ITALY: If requesting State is a European country, sixty days; if not, ninety days (Penal Code, Arts. 663, 5, 71, Appendix VI, No. 10); LATVIA (Code of Criminal Procedure (1926) Art. 865); LITHUANIA (Penal Code, Ch. XII, Art. 852 (19)); NORWAY: If requesting State is a European country, six weeks, if not, three months (Law of June 13, 1908, Arts. 19-20).

⁵ "Two months:" Costa Rica, Penal Code, *Cap. II, De la Extradición*, Art. 232-33, 238; Iraq, Extradition of Offenders Law of 1923, sees. 11-12; Siam, Extradition Act, B.E. 2472, 15 Dec. Art. 10. "Sixty days:" Panama, *Ley 44 de 1930 de 22 de Noviembre sobre extradición* — *La Asamblea Nacional de Procedimientos Penales*, Tit. XXXIV, Cap. I, Art. 610-13.

⁶ Imperial Ordinance, No. 42, Aug. 10, 1895, Arts. 9-10, Appendix VI, No. 11.

⁷ *El Congreso de la República del Ecuador Decreto; La Seguinte Ley de Extranjería, Extradición y Naturalización, Cap. VI, De la Extradición.*

⁸ Law of May 19, 1897, Arts. 13-14.

⁹ *Código de Enjuiciamiento Criminal*, Bk. III, Ch. III, Sec. V, Art. 392.

the discretion of the Executive. The recent German law puts the discretion in the judiciary.¹ In Great Britain under section 9 of Extradition Act 1870,² discretion seems to rest in the court on the subject, and this is also true in the United States,³ unless the situation is controlled by treaty.

In the multipartite conventions we have these provisions as to the length of detention without formal requisition: discretionary with requested State up to maximum of three months from time of arrest;⁴ period to be governed by distance involved;⁵ two months from arrest;⁶ two months from notification to requesting State;⁷ one month from arrest.⁸ In the drafts and projects for multipartite action, we find these provisions: One month from arrest;⁹ discretionary with requested State up to two months [from time of arrest];¹⁰ fifteen days from receipt of request;¹¹ discretionary with requested State to set the period in each case;¹² fourteen days from arrest.¹³

Undoubtedly in bipartite treaties and in multipartite conventions between groups of States, when periods for provisional detention have been set, these periods are intended to conform to what the parties think is reasonable as between the States involved. In a convention which shall be open to all States, one of three courses must be followed in providing a rule to govern provisional detention: (1) to set three definite periods to apply, respectively, as to those who are immediate neighbors, as to those who are relatively close to each other, and as to those who are widely separated; (2) to establish a sliding scale based upon relative distances; (3) to require that in each case the provisional detention shall only be of reasonable duration. The first alternative would lead to a rigid grouping of States, which would result in considerable inequality as to those States classed as relatively close and those classed as widely separated. Neither the first nor the second alternative takes into account other factors besides geographical location of States; but other factors, such as the size of a State or its political structure may be of the first importance. Though the United States adjoins Canada, it may be reasonable for a longer period of provisional detention to be allowed in Canada with regard to an offense committed in Texas, since all of the data for a requisition must be gathered in Texas, be communicated to the Federal Government at Washington, and transmitted by that Government to the Government in Canada, than would be allowed in France as to an offense committed in Belgium.

¹ Article 10, Appendix VI, No. 7.

² Appendix VI, No. 8; Piggott, *Extradition* (1910), p. 94.

³ Appendix VI, No. 15; Moore, *Extradition* (1891) I, §§270 to 275, pp. 400 to 406.

⁴ Pan American Convention of 1902, Art. 8, Appendix III, No. 3.

⁵ South American Convention of 1911, Art. 9, Appendix III, No. 4.

⁶ Bustamante Code, Art. 366, Appendix III, No. 5.

⁷ Montevideo Convention of 1933, Art. 10, Appendix III, No. 6.

⁸ Central American Convention of 1934, Art. 7, Appendix III, No. 7.

⁹ Field's Code, Art. 217, Appendix IV, No. 1.

¹⁰ Rio de Janeiro Draft of 1912, Art. 14, Appendix IV, No. 3.

¹¹ Travers' Draft, Art. 7, Appendix IV, No. 4.

¹² International Law Association Draft, Art. 11, Appendix IV, No. 5.

¹³ International Penal and Prison Association Draft, Art. 29, Appendix IV, No. 6.

The elastic test of reasonableness has been accepted as the most desirable, and incorporated in this article. This test will be applied by the requested State, subject to the right of another interested State to make diplomatic representations, and in conformity with any safeguard which the requested State may establish by its municipal law to control the discretion of the executive and judicial branches of its government.

No provision is made in this article for notice by the requested State to the requesting State that a provisional arrest has been made, though a few treaties impose such a duty.¹ When the request for provisional arrest is made by a diplomatic or consular officer of the requesting State resident in the requested State, it is reasonable to suppose that he will follow the proceedings. If the "authorized agent" of the requesting State (see Article 15, paragraph (2)) who makes the request is not within the requested State, it would seem but reasonable that the government of the requesting State should notify a diplomatic or consular agent resident in the requested State to follow the proceedings, so that the requisition and supporting documents may be prepared and transmitted within a reasonable time.

It has not seemed desirable to attempt to deal with the subject of bail in this Convention in connection with provisional arrest. The present article places upon the requested State the duty to "endeavor to apprehend such person" and to "detain him until the receipt of a requisition." It seems best to leave to the municipal law of each State to determine whether enlargement upon bail is a safe means of detention under any circumstances, and, if so, the circumstances which shall justify such action. See the discussion of bail in comment on Article 14.

If the detention of property is properly asked for, before the receipt of a formal request, as is declared in the last clause of Article 15, paragraph (3), then it is proper in the present article to impose a duty to "endeavor to seize and detain the property to which the request may have referred, and which appears to fall within the categories specified in Article 24 of this Convention."

ARTICLE 17. HEARING

(1) After the receipt of a requisition and after the detention of the person claimed and before reaching a final determination as to the extradition of the person claimed, a requested State shall hold a judicial hearing.

¹ *Notice of date of arrest to be given* (reference numbers are to Appendix I): Germany-Czechoslovakia, No. 11; Norway-Finland, No. 35; Hungary-Yugoslavia, No. 61; France-Czechoslovakia, No. 60.

Notice of date and place of arrest: Bulgaria-Greece, No. 62.

Notice of date of arrest and place of detention: Rumania-Czechoslovakia, No. 36; Estonia-Czechoslovakia, No. 37; Latvia-Czechoslovakia, No. 38; Bulgaria-Czechoslovakia, No. 39; Spain-Czechoslovakia, No. 51; Bulgaria-Greece, No. 62; Spain-Latvia, No. 74. This last named treaty also calls upon the requesting State to confirm by telegram the receipt of such notice within eight days of its receipt.

COMMENT

Broadly, types of proceedings for extradition in the requested State fall into two classes—the executive and the judicial.

The executive method of dealing with extradition developed in France, where, at least from the beginning of the 19th century, a requisition received by the Minister of Foreign Affairs was transmitted by him to the Minister of Justice, who decided whether the requisition should be honored, and advised the Emperor or the President, who in turn had the final authority to grant or withhold extradition. It was not required that, for the purpose of these decisions, the person claimed should have any sort of hearing.¹ In 1875 the French Minister of Justice provided for examination of the person claimed by a *Procureur de la République*, but as an aid to executive action only.² Though France has now abandoned it, as we shall see shortly, the executive method seems to prevail at present in Spain,³ Cuba,⁴ Ecuador,⁵ Panama,⁶ Portugal and Egypt.⁷ This appears to be true also of Latvia,

¹ Billot, *Traité de l'Extradition* (1874), pp. 185 to 188; also pp. 415 to 421 for text of *Circulaire du Ministre de la Justice du 5 Avril, 1841*.

² Travers, *Droit Penal International* (1922), V, §§2370 to 2372, pp. 158 to 163.

³ Article 147 of *Instruction for the Administration and Dispatch of the Business of the Ministry of State*:

Request for the extradition of criminals and deserters, made by other Powers, shall be examined by the Division of Legal Affairs and if they are found to be in conformity with the stipulations of the treaties or the terms set forth in the Law of Criminal Procedure the request shall be acceded to, communication to that effect being made to the diplomatic representative who had presented it, and to the Ministry of the Interior shall be sent the communication requesting the pursuit and apprehension of the presumed criminal.

⁴ Cuba also has no special law providing for extradition requested of Cuba. This is, however, how Cuban procedural practice is described in an official despatch from the Ministry of Foreign Affairs to the Secretary of the United States Embassy:

The Executive decides of his own accord whether to accede to these requests from foreign countries, and this is done by the Executive in the absence of legislative provision regulating the matter, which are furnished by the Executive, on the ground that they are diplomatic problems, the logical and natural consequence being that the Government may cause the preventive detention of the person claimed.

⁵ The Extradition Law of Ecuador of October 8, 1921, has only one article (No. 51) providing for the extradition procedure, which reads:

Upon the presentation of the request to the Ministry of Foreign Affairs, the latter will determine whether it is in conformity with the law and whether extradition may properly be granted or not. If the request is judged to be well-founded, the Executive will grant extradition by means of a decree, which will be communicated to the Ministry of the Interior and police [now Ministry of Government and Social Provision] for its execution.

⁶ Though the Panama Extradition Law of November 22, 1930, prescribes an executive determination, it is somewhat more liberal as it provides (Article 9) for the right of the person claimed to propose objections to his extradition:

He may claim that the extradition is contrary to the law, or that he is not the person being sought, or that the requesting state has no right to request his extradition. The person is given ten days to prove his objections. The Executive Power [art. 11] will decide upon the merits of the objections in the same way in which he determines the request for extradition.

⁷ We have practically no material on extradition procedure in Portugal and Egypt, except the following remarks in official communications of their respective Ministers of Foreign Affairs to the State Department of the United States:

Extradition is granted by the Ministry of Interior, which, in general, requests the

Estonia and Lithuania, such investigation as is made in those countries being conducted only if the Minister of Justice requests it and for his benefit;¹ and the provision of the law of Siam regulating the extradition procedure is not dissimilar.²

Belgium early developed a system for handling applications for extradition, which requires that before extradition each case be submitted to judicial consideration, without making the judicial determination binding either for or against extradition. This system was established in Belgium by the Law of October 1, 1833, which embodied the Project of 1830 and was modified by the Act of March 18, 1874—now in force in Belgium. The procedure prescribed by this Law is briefly as follows: The Minister of Justice either refuses extradition on his own accord when the case is clear on the face of the documents, or transmits the requisition to the *Chambre de Council du Tribunal de Première Instance*, which issues a warrant for arrest, questions the person and sends his *dossier* through the *procureur general* to the *Chambre des Mises en accusation de la Cour d'Appel*, which fixes a public hearing, unless it is waived by the person claimed, and assigns an *avocat* to assist the person claimed. *L'avis motive* of these hearings comes to the Minister of Justice, who makes the final decision and presents it to the King for a decree.³

The Dutch system is very similar except that the procedure is somewhat simplified, and a judicial determination that the person claimed is a Dutch national results in his discharge.⁴ Austria-Hungary operated under the Belgian system.⁵ The same is true in Mexico,⁶ in Japan,⁷ in Peru,⁸ and in Poland.⁹

The Anglo-American system of dealing with an application for extradition is briefly described as follows:

opinion of the Ministry of Justice regarding the circumstances under which extradition is asked. [Portugal.]

The requests for extradition are transmitted to the Ministry of Justice which takes charge of examining them from the judicial point of view. In accordance with the opinion of that Ministry the Ministry of Foreign Affairs acts upon the request, assuring itself that they do not give rise to difficulties of a political nature. [Egypt.]

¹ These countries inherited Laws of Criminal Procedure of the Russian Code of 1914, by which extradition is left to executive discretion, though a quasi-judicial investigation may be asked for by the Minister of Justice. In Article 852 it is provided (sections 16 and 18):

Before deciding upon the question of extradition the Minister of Justice is entitled:

1. [Provides for a request for additional documents:] 2. To charge the prosecuting attorney of the District Court, in the respective district in which the claimed person is residing, with the gathering of information required for the decision on the question of extradition. The court investigator upon request of the prosecuting attorney makes proper investigation in conformity with this statute and in particular with articles 403-412, as regards the interrogation of the accused person.

² Art. 8 of the Act B. E. 2772 provides that the requisition "shall be transmitted to the Ministry of the Interior in order that the case may be brought before the court" unless "The Royal Siamese Government decides otherwise."

³ Billot, *Traité de l'Extradition* (1874), pp. 189 to 193.

⁴ Law of August 13, 1849, modified by Law of April 6, 1875.

⁵ Austro-Hungarian Criminal Code of 1873, Art. 59; Violet, *La Procédure d'Extradition* (1898), p. 82.

⁶ Extradition Law of May 17, 1897.

⁸ *Ibid.*, October 23, 1888, Art. 12.

⁷ *Ibid.*, August 10, 1895, Appendix VI, No. 11.

⁹ Code of Criminal Procedure, Arts. 646 to 649.

Extradition of persons cannot be granted without judicial authorization; a favorable sentence of the court [*i.e.*, favorable to the person claimed] results in an immediate discharge of the person arrested. But, an unfavorable decision does not bind the executive authority to grant extradition.¹

In the Jay Treaty between the United States and Great Britain, which provided for extradition, there was no provision for judicial examination, nor was this required in the United States by any applicable statute. By order of President John Adams, Jonathan Robbins was surrendered to Great Britain under this treaty. This aroused bitter criticism. However, John Marshall, later Chief Justice, declared the action valid, though stating that Congress could undoubtedly confide to others than the Executive the determination of questions under extradition treaties.²

The Webster-Ashburton Treaty of 1842 between Great Britain and the United States,³ and the British-French Extradition Treaty of 1843,⁴ expressly provided that in Great Britain and the United States respectively a person could only be handed over after a judicial inquiry. In the United States-French Extradition Treaty of 1843,⁵ a provision for a judicial hearing in the United States is not expressly incorporated, but it was implicit in the provision that surrender should only be made when the commission of the crime was so established as would be necessary for committing one for trial for the same act if done in the requested State.⁶ The British laws for giving effect to its treaties with the United States and France, mentioned above, expressly provided for a judicial determination in support of extradition,⁷ as did the first statute in the United States dealing with extradition procedure.⁸ The British practice already established was carried into Extradition Act 1870,⁹ and remains the law of Great Britain today; the same is true under the present laws of the United States.¹⁰ The British Dominions and Mandated Territory have adopted the British rule of practice which requires a favorable judicial determination as a prerequisite to extradition.¹¹

¹ Maurice Violet, *La Procédure d'Extradition* (1898), p. 83.

² Moore, *Extradition* (1891), §360, pp. 550 and 551, citing: Bec's Adm. Rep. p. 266 *et seq.*; W. B. Lawrence, 14 *Albany L. Jour.* 89-90; Wharton's *State Trials*, 392 *et seq.*; 1 Hall's *Jour. of Jur.* 13 *et seq.*; J. Wheaton, Appendix, p. 19; *United States Gazette*, 1800.

³ 1 Malloy, *Treaties, Conventions, etc.* (1910), p. 650.

⁴ 30 *British State and Foreign Papers*, 194.

⁵ 1 Malloy, *Treaties, Conventions, etc.* (1910), p. 526.

⁶ *Matter of Metzger*, 5 N. Y. Legal Observer, 83, 5 Howard (U. S.) 176.

⁷ 6 and 7 Vict. c. 76; 6 and 7 Vict. c. 75.

⁸ Act of Aug. 12, 1848. The duty to surrender after favorable judicial determination was at first held merely administrative, but after 1871 it was held to be discretionary. Moore, *Extradition* (1891), secs. 361 to 364, pp. 551 to 556; *In re Stupp*, 12 Blatchford's Reports, 501.

⁹ 33 and 34 Vict. c. 52, sec. 7 to 9, Appendix VI, No. 8. *In re Castioni* [1891], 1 Queens Bench Reports, at pp. 163 and 164; *Rex v. Governor of Brixton Prison, ex parte Perry* [1924] Kings Bench Reports at p. 460; *In re Arton* [1896], 1 Queens Bench Reports, at p. 115; *Rex v. Governor of Holloway Prison, ex parte Siletti* (1902), 72 Law Journal Kings Bench 935.

¹⁰ Criminal Code and Criminal Procedure, sec. 651; Appendix VI, No. 15.

¹¹ Canadian Extradition Act, Revised Statutes 1927, secs. 10 to 18, Appendix VI, No. 4; India, Extradition Act, Nov. 4, 1903, secs. 5-6; Australia, Extradition Act., Oct. 21, 1903, Art. 5; New Zealand, Extradition Acts 1908 and 1924; Transjordan, Extradition Law, 1927, secs. 9-12; Union of South Africa, Extradition Law, 1877.

Iraq also is in this group.¹ Other States taking the same position are Argentina,² Brazil,³ Chile,⁴ Costa Rica,⁵ Greece,⁶ Haiti,⁷ Luxemburg,⁸ Rumania,⁹ Turkey,¹⁰ Uruguay,¹¹ and Yugoslavia.¹²

In 1927 France abandoned the executive system of dealing with requests for extradition, which for upwards of a century had been known as the French system, and adopted the Anglo-American system, providing for a judicial hearing and a judicial determination, which determination is final if opposed to extradition, but which determination is not conclusive upon the Executive, if in favor of extradition.¹³ A change in the French law had been strongly urged for years by French legal scholars.¹⁴

In Italy,¹⁵ Norway,¹⁶ Sweden,¹⁷ and Finland¹⁸ an admission by the person apprehended that he is the person claimed, and his consent to extradition, dispenses with a judicial investigation; in the absence of such admission and consent he is entitled, as under the Anglo-American system, to a judicial hearing, and cannot be extradited if the court decides in his favor, while, if the court decides that extradition is permissible, the decision as to extradition rests in the discretion of the Executive. By the Swiss Law,¹⁹ if the person apprehended consents to extradition, or raises no objections based upon the extradition law, a treaty or a declaration of reciprocity, the Federal Council deals with the situation; otherwise his case goes before the Federal Tribunal, which decides whether or not there are grounds for extradition as in the Anglo-American practice.

The German Extradition Law of 1929²⁰ makes determination as to extradition wholly judicial, for by that law not only is a judicial decision against extradition final in its effect, but such decision in favor of extradition is equally final, and not subject to the exercise of executive discretion.

It is apparent that the purely executive method of passing upon requests for extradition does not provide for that public and impartial determination which the situation deserves, and which has been increasingly demanded. On this point the change in the French law is significant. Though the Belgian system requires a judicial investigation, it allows the Executive to

¹ Extradition Law of 1923, secs. 11-15.

² *Ibid.*, Aug. 25, 1885, Arts. 16-23, Appendix VI, No. 1.

³ Law No. 2416, of June 28, 1911, Arts. 9, 10, Appendix VI, No. 3.

⁴ Code of Criminal Procedure, Art. 703, Appendix VI, No. 5.

⁵ Penal Code, c. II, Art. 236.

⁶ Law of Feb. 7, 1904, Arts. 5-6, Appendix VI, No. 9.

⁷ Law of Nov. 21, 1912, Arts. 16-26.

⁸ Law of March 13, 1870, Art. 2.

⁹ While there appears to be no statutory provision, this classification of Rumania is based upon a communication from the Rumanian Ministry of Foreign Affairs to the United States Department of State.

¹⁰ Penal Code, Art. 9, Appendix VI, No. 14.

¹¹ Penal Code, Arts. 10 to 12.

¹² Criminal Code of 1929, Arts. 489 to 499.

¹³ Extradition Law of March 10, 1927, Arts. 11 to 18, Appendix VI, No. 6.

¹⁴ Billot, *Traité de l'Extradition* (1874), p. 206; Violet, *La Procédure d'Extradition* (1898), p. 126.

¹⁵ Code of Criminal Procedure of 1913, Arts. 661 and 662, Appendix VI, No. 10.

¹⁶ Extradition Law of June 13, 1908, Arts. 16-20.

¹⁷ *Ibid.*, Jan. 14, 1913, Arts. 15 to 19, Appendix VI, No. 12.

¹⁸ *Ibid.*, Feb. 11, 1922, Arts. 14-16.

¹⁹ *Ibid.*, Jan. 22, 1892, Arts. 22 to 24, Appendix VI, No. 13.

²⁰ Arts. 8, 28, 29 (2), 30, Appendix VI, No. 7.

extradite one who has been held by the court legally non-extraditable. The Anglo-American system, now also the French system, which requires a judicial hearing, the judicial determination against extradition being final, while a determination that extradition may properly be made under existing treaties and statutes still leaves the Executive vested with discretion in the matter of surrender, has been given effect in the paragraph (1) of the present article, and in Article 18. It provides proper safeguards against arbitrary action, while at the same time leaving such discretion in the Executive as is wise when States are dealing with each other and political considerations may be involved.

(2) At this hearing, a judicial authority of the requested State shall determine, upon an examination of the requisition and the documents submitted in accordance with Articles 12 and 13 of this Convention:

(a) Whether the requisition and documents submitted meet the requirements of paragraphs (2) and (3) of Article 12 [and no further evidence of guilt of the person claimed shall be required];

(b) Whether the law of the requesting State conforms to the condition set by paragraph (a) of Article 2 of this Convention, with respect to the penalty for the act or acts for which extradition is sought.

COMMENT

The purpose of this paragraph is to restrict the judicial authorities of the requested State to the documents, required by Article 12 of the Convention, in their determination (1) that the documents themselves are sufficient in form and content; (2) that by the law of the requesting State the act or acts alleged as the basis of the requisition carry the penalty required by Article 2, paragraph (a) of this Convention; and (3) that by issuance of the warrant of arrest, or by pronouncement of judgment of conviction sufficient grounds for trial, or after trial for punishment of the person claimed, have been found by the requesting State to justify extradition, which shall be held sufficient also by the requested State. This restriction of inquiry to the documents on the matter of probable guilt eliminates the rule of the *prima facie* case.

1.

It is thought that no one will quarrel with the purpose of this paragraph first stated above, that the sufficiency in form and content of the documents required by Article 12 of this Convention shall be determined from the documents themselves. It is to be borne in mind that by the terms of Article 13, paragraph (b) "Before or after apprehension of the person claimed the requested State may invite the requesting State to present supplementary documents in support of, or in amplification of its requisition." Article 12 requires that the requisition shall state "the act or acts for which it is intended to prosecute or punish the person claimed." To meet this require-

ment the requisition should set out with reasonable fulness the time, place and manner of doing the act or acts, by the person claimed, and it would be defective if it did not do so.¹ The decision as to the sufficiency of this statement should be made from the instrument itself.

2.

The requirement in Article 12, paragraph (3) (b), that the requisition be accompanied by "an authenticated copy or statement of the law of the requesting State under which it is intended to prosecute or to punish the person claimed," conforms to provisions in a large majority of the treaties to which the United States and Great Britain are not parties. (See Comment to that paragraph.) It is introduced into this Convention to prevent the necessity of proving as a fact the law of a foreign State, which otherwise the requested State would be entitled to require,² substituting, as a formal part of the requesting State's papers, the authenticated copy or statement of the applicable law. With this copy or statement before it, the judicial authority of the requested State shall determine from the documents whether the alleged act or acts carry the penalty which is necessary under Article 2, paragraph (1) of this Convention.³

3.

Before considering the Anglo-American rule as to the establishment of a *prima facie* case by the requesting State, one should understand that this rule does not properly apply to a request for extradition of a convicted person who is wanted in order that he may serve the sentence already imposed. This was made clear in the two first treaties negotiated by Great Britain, which provided for the extradition of convicted persons as well as persons accused, in these words:

Provided, also that in the case of a person accused, the surrender shall be made only when the commission of the crime shall be so established, as that the laws of the country where the fugitive or person so accused shall be found would justify his apprehension and commitment for trial, if the crime had been there committed; and that in the case of a person convicted, the surrender shall be made only on the production of an authenticated copy of his conviction, and on proof of his identity.⁴

¹ "In the present case it is only necessary to point out the defects in the proceedings in order to show the reasons which prevented the executive from ordering the surrender in the case. The first is, it does not appear at what time the crime was committed; which, of itself, is fatal under the fifth article of the Convention." Mr. Calhoun, Secretary of State, to French Legation, Dec. 4, 1844; referring to treaty of Nov. 9, 1843, with France (Mss.). Moore, *Extradition* (1891), I, p. 524, note 3.

² Travers, *Droit Pénal International* (1922), IV, sec. 2146 II; Manley O. Hudson, "The Factor Case and Double Criminality in Extradition," 28 *American Journal of International Law* (1934), 274, 281 and 282.

³ The difficulties inherent in the question what is sufficient evidence of foreign law in an extradition proceeding are shown if one compares *Ex parte Worms* (1876), 22 *Lower Canada, Jurist* 109; *Re Decring* (1915), 24 *Dominion Law Reports*; *Re Wagner* (1928), 4 *Dominion Law Reports*, 615; and *Re Clark* (1929), 3 *Dominion Law Reports*, 737.

⁴ Treaty between Great Britain and Prussia of March 5, 1864, Article I, *Report from the Select Committee [of the House of Commons] on Extradition* (1868), p. 129. To same effect is the treaty with Denmark, April 15, 1862, *ibid.*, p. 123.

The British Extradition Law 1870 maintains the same distinction, and only requires, as to a person alleged to have been convicted, that such evidence be produced as would, according to the law of England, prove that the prisoner was convicted of such crime.¹ The Act also provides as to proper authentication of sentences of conviction.²

The treaty of the United States with Sweden and Norway of 1860 made the same distinction as to evidence required, when one is accused of a crime and when he has been convicted of a crime, which is made in the British treaties noted above.³ Some United States treaties have ignored this distinction, and, while providing for extradition of accused and convicted persons, have included only a general provision for evidence of criminality such as would justify his apprehension and committal for trial in the requested State,⁴ but our modern treaty drafting is more accurate on this point, as appears in Article 9 of our treaty of 1932 with Great Britain;⁵ and the United States Extradition Law provides that the judge, if he deems the evidence sufficient "to sustain the charge under the provisions of the proper treaty or convention," shall certify the same to the Secretary of State.⁶

It is to be borne in mind that a conviction *par contumace* is not a conviction in the sense in which that term is used in the above discussion. It has no greater effect than an indictment. The person involved is entitled to a trial on the merits when jurisdiction of his person is obtained by the State which pronounced the conviction *par contumace*, and in a requested State he is dealt with as one accused of an offense.⁷

The different practices of nations, with regard to evidence of guilt of the person claimed which is required to support extradition, results from the difference of emphasis which is placed by them, on the one hand, upon the importance of international cooperation in the suppression of crime, and, on the other hand, upon the protection of the individual against oppression. Billot said sixty years ago:⁸

Toute demande d'extradition met en présence deux intérêts distincts et opposés: L'intérêt de la justice répressive, qui veut que les nations se prêtent un mutuel concours pour la poursuite des malfaiteurs fugitifs; l'intérêt du fugitif, qui ne doit pas, sans de graves motifs, être soustrait aux garanties des lois du pays de refuge.

¹ Article 10, Appendix VI, No. 8. See Piggott, *Extradition* (1910), p. 128.

² Articles 14 and 15.

³ Moore, *Extradition* (1891), I, sec. 337, p. 517.

⁴ E.g., Treaty with Belgium of May 1, 1874, Moore, *Extradition* (1891), II, 1081.

⁵ "The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to." Appendix V, No. 1.

⁶ Revised Statutes of 1878, sec. 5270, Appendix VI, No. 15.

⁷ *Re Coppin* (1866), Law Reports, 2 Chancery Appeals, 47; British Extradition Act 1870, Art. 26, Appendix VI, No. 8; Moore, *Extradition* (1891), I, sec. 102, pp. 131 to 134.

⁸ *Traité de l'Extradition* (1874), p. 202.

An English writer more briefly portrays the dilemma in the following fashion, letting us see at the same time the emphasis laid by British tradition upon protection of the individual against oppression:¹

It would be a pity that criminals should be harbored amongst us, but it would be a still greater subject of regret were the guarantees of personal liberty endangered.²

The Treaty of Amiens of 1802 contained the first multipartite extradition convention, and the second international agreement on extradition to which Great Britain was a party. It dealt with murder, forgery and fraudulent bankruptcy. In it the British hand is certainly evident in the proviso that accused persons shall be delivered up "only when the evidence of the criminality shall be so authenticated (*constatée*) as that the laws of the country where the person so accused shall be found would justify his apprehension and committal for trial if the offense had been there committed."³

The Jay Treaty between the United States and Great Britain of November 19, 1794, contained an article on extradition with a proviso that surrender shall only be made "on such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the offense had there been committed."⁴ It is said that in 1795, in negotiations looking to an extradition arrangement with Spain, the United States representative declined any provision short of that embodying the *prima facie* case.⁵ The Webster-Ashburton Treaty of 1842 between the United States and Great Britain contained the same provision on the *prima facie* case⁶ which had appeared in the Jay Treaty. Every subsequent extradition treaty to which the United States has been a party, except one with Uruguay,⁷ has contained such a provision, at least as far as the treaty has had application to action in the United States.

Great Britain's treaty with France in 1843⁸ contained a provision substantially similar to that quoted in the preceding paragraph from the Webster-Ashburton Treaty. The French found this most unsatisfactory in operation, because they not only had to introduce evidence of guilt beyond the warrant of arrest, but the duly authenticated warrant of arrest, and the transcripts of evidence taken before their examining tribunals, were difficult to put in evidence under English rules, and the transcripts of evidence were

¹ *Extradition Treaties* (1866), 1 Law Journal 175.

² See, for brief discussion; J. A. Roux, "L'Entr'aide des Etats dans la Lutte contre la Criminalité" 136 *Recueil des Cours* (1931), (*Académie de droit international*), 81, at 123-129; Prévost-Paradol, "De L'Extradition des Accusés entre la France et l'Angleterre," 61 *Revue des Deux Mondes* (1866), 1012, at 1015-1018; I Fauchille, *Traité de Droit International Public* (1922), pt. I, pp. 1037-1038.

³ Appendix III, No. 1.

⁴ Art. 27, I Malloy, *Treaties, etc.*, 605.

⁵ Moore, *Extradition* (1891), I sec. 77, p. 89.

⁶ Art. 10, I Malloy, *Treaties, etc.*, 655.

⁷ II *Ibid.*, 1825. Professor Hyde believes that the exception was due to an oversight. Hyde, "Notes on the Extradition Treaties of the United States", 8 *American Journal of International Law* (1914), 487.

⁸ Art. 1, 31 *British and Foreign State Papers*, 195.

likely also to be thrown out as hearsay.¹ An elaborate treaty was drafted, signed and ratified between Great Britain and France in 1852, in which Great Britain gave up the requirement of a *prima facie* case, but Parliament would not enact the necessary law to give it effect.² France denounced the treaty of 1843 in 1865.³

The difficulty found in complying with the British rule of the *prima facie* case was partially met by British statute in 1866 which provided not only for the authentication and introduction of warrants of arrest but also of transcripts of evidence.⁴

Mr. Neate, as a member, presented a Draft Report to the Select Committee of the House of Commons, which investigated the whole subject of extradition in 1868, in which he unsuccessfully urged the abandonment of the doctrine of the *prima facie* case in these strong terms:⁵

14. The next question is, what is the evidence we are entitled to require before giving up a criminal? and this is the question upon which the greatest amount of practical difficulty has arisen.

15. The chief cause of this difficulty has been the difference in the rules of evidence and procedure prevailing in different countries, more especially as regards us, the difference that exists in this respect between England on one side, and the rest of Europe on the other.

16. With so large a majority against us, we should be well assured of the grounds on which we rest.

17. It is laid down as a principle by Sir G. Lewis, in his valuable treatise on this subject, "that when two civilized states agree to act together upon a system of extradition, each assumes that the criminal code of the other is founded upon rational principles of jurisprudence, such as are generally recognized in civilised countries, and administered in an impartial and humane spirit by a body of competent functionaries."

18. If this be so, in treating upon this matter with other countries, we have no right to insist upon imposing upon them our own rules of evidence and procedure, however convinced we may be of their superiority.

19. Perhaps we rely too much upon our own judgment and our own practice; but it is, at any rate, no part of our duty to assist the French or any other country in obtaining better securities, in the nature of a

¹ The English indictment and the French *acte d'accusation* differ radically. The former is drawn up by an independent prosecutor, the latter by one in constant communication with the committing magistrate. Further, the *acte* is a narrative, related sometimes in the words of the witness and sometimes in the words of the prosecutor; the indictment is a formal instrument drawn up under oath. See Westlake, "Extradition Treaties", *National Assoc. for promotion of Social Science Transactions*, Oct. 1866, p. 151.

See "Extradition Treaties" 1 *Law Journal* (1866), 175. "A French View of the Extradition Treaty with France," 10 *Solicitors Journal and Reporter* (1866), 252; "Extradition Treaties" 1 *Law Journal* (1866), 428; Prévost-Paradol, "*De l'Extradition des Accusés entre la France et l'Angleterre*," 61 *Revue des Deux Mondes* (1866), 1012; Bernard, *Traité Théorique et Pratique de l'Extradition* (1890), II, p. 397 *et. seq.*

² 41 British and Foreign State Papers, 28; *Report from Select Committee [of House of Commons] on Extradition* (1868), pp. 6 to 8.

³ Bernard, *L'Extradition* (1890), II, 360.

⁴ 29 & 30 Vict. c. 121. See *Report from Select Committee [of House of Commons] on Extradition* (1868), par. 126, p. 8, and pars. 752 to 821, pp. 40 to 42.

⁵ *Report from Select Committee [of House of Commons] on Extradition* (1868), pars. 14 to 21, p. IX.

law of Habeas Corpus, than those which they now possess; and not only is it no part of our duty to do so, but we should be doing a great wrong to our own countrymen, if for any such purpose, or upon any such pretences, we subjected their lives and properties to the dangers which the absence of any treaties of extradition would inevitably give rise to.

20. Any attempt to inquire into the nature of the evidence, or the manner in which it has been taken, is contrary to those principles, and can only embark us in endless controversy, in which we should find the greater portion of the civilised world all on one side against us. The only safe ground to rest upon, and that to which we must ultimately come, is, that the only evidence that we should either ask or give in cases of extradition should be as to the regularity of the warrant, and the identity of the criminal.

21. Then, and then only, will the law of extradition be upon that footing upon which the obligations of friendly neighborhood require it to be placed, when the criminal process of one country shall be allowed to take effect in another, subject only to conditions the same in kind, if not in degree, which are now required to give effect in Surrey to the warrant of a justice of Middlesex.

Notwithstanding this plea, Extradition Act 1870, Article 10,¹ perpetuated in Great Britain the rule of the *prima facie* case in this language:

In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorizing the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of the act)² would according to the laws of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.³

The corresponding United States statute, after providing that the person claimed shall be brought before a judicial officer "to the end that the evidence of criminality may be heard and considered," proceeds:⁴

If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, . . . to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, . . .

¹ Appendix VI, No. 8.

² See Arts. 14 and 15 as to use of foreign warrants and depositions as evidence.

³ The meaning of the clause "such evidence . . . as would, according to the law of England justify committal for trial . . . if the crime . . . had been committed in England" depends upon the Indictable Offences Act of 1848 (11 & 12 Vict. c. 42) which reads:

"And be it enacted, That when all the evidence offered upon the Part of the Prosecution against the accused Party shall have been heard, if the Justice or Justices of the Peace then present shall be of opinion that it is not sufficient to put such accused Party upon his Trial for an indictable offence, such Justice or Justices shall forthwith order such accused Party, if in Custody, to be discharged as to the Information then under Inquiry; but if, in the Opinion of such Justice or Justices, such Evidence is sufficient to put the accused Party upon his Trial for an indictable offence, or if the evidence given raise a strong or probable Presumption of the Guilt of such accused Party, then such Justice or Justices shall, by his or their warrant, commit him. . . ."

⁴ Revised Statutes of 1678, Sec. 5270, Appendix VI, No. 15.

With very few exceptions,¹ treaties, to which neither the United States nor Great Britain is a party, either expressly negative the requirement of any proof of guilt beyond the warrant of arrest,² or contain no provision on the subject.³ Latin American countries have accepted treaty provisions requiring *prima facie* evidence of culpability when negotiating with the United States and Great Britain, but, as shown in the last preceding footnote, will often be found making treaties containing no such requirement.⁴ The first Central American Extradition Convention of 1907, apparently through United States influence, contained in Article 2, the rule of the *prima facie* case,⁵ which is still to be found in the Central American Convention of 1934.⁶ The Bustamante Code, Article 365, requires accompanying the requisition:

A sentence of conviction or a warrant or order of arrest or a document of equal force, or one which obliges the interested party to appear periodically before the criminal court, together with such parts of the record in the case as furnish proof or at least some reasonable evidence of the guilt of the person in question.⁷

Civil Law States generally accept a warrant of arrest, which states the nature of the act charged,⁸ as sufficient evidence of guilt on the part of the person claimed to justify extradition.⁹

¹ The following treaties contain provisions similar to those in Anglo-American treaties: Venezuela-Cuba (1910), Art. 1, 1 *American Journal of International Law* (1907), Supp., p. 169; Egypt-Palestine (1922), Art. 7, 36 *League of Nations Treaty Series*, 933; Greece-Albania Art. 14, Appendix I, No. 49.

² (References are to Appendix I): Finland-Sweden, Art. 7, No. 17; Denmark-Finland, Art. 9, No. 18; Finland-Latvia, Art. 8, No. 21; Finland-Estonia, Art. 8, No. 33; Portugal-Czechoslovakia, Art. 6, No. 52; Finland-Austria, Art. 7, No. 59; Latvia-Hungary, Art. 8, No. 64; Spain-Bulgaria, Art. 6, No. 73; Spain-Latvia, Art. 4, No. 74; Denmark-Estonia, Art. 9, No. 77; Latvia-Sweden, Art. 8, No. 78; Estonia-Sweden, Art. 8, No. 80; Lithuania-Czechoslovakia, Art. 6, No. 83.

³ (References are to Appendix I): Mexico-Guatemala, 1894, 1 *Am. J. Int. L.* (1906), Supp. 284; Austria-Hungary-Greece, No. 1; Argentine-Swiss Confederation, 1906, 6 *Am. J. Int. L.* (1912), Supp. 219; Germany-Greece, No. 2; Spain-Greece, 1910, 5 *Am. J. Int. L.* (1911), Supp. 219; Austria-Hungary-Serbia, 1911, 7 *Am. J. Int. L.* (1913), Supp. 17; Salvador-Mexico 1912, 7 *Am. J. Int. L.* (1913), Supp. 133; Poland-Free City of Danzig 1921, Warsaw agreement, P. 2, Sec. 1, Ch. 2; Estonia-Lithuania No. 5; Estonia-Latvia No. 4; Latvia-Lithuania No. 6; Germany-Czechoslovakia No. 11; Italy-Czechoslovakia No. 12; Switzerland-Uruguay No. 19; Bulgaria-Serbs, Croats and Slovenes No. 16; France-Latvia No. 29; Hungary-Rumania No. 27; Bulgaria-Rumania No. 22; Brazil-Paraguay No. 8; Rumania-Czechoslovakia No. 36; Finland-Norway No. 35; Austria-Norway No. 34; France-Poland No. 32; Albania-Serbs, Croats and Slovenes No. 44; France-San Marino No. 43; Belgium-Paraguay No. 40; Bulgaria-Turkey No. 65; Belgium-Latvia No. 42; Bulgaria-Czechoslovakia No. 39; Czechoslovakia-Latvia No. 38; Estonia-Czechoslovakia No. 37; Spain-Czechoslovakia No. 51; Hungary-Serbs, Croats and Slovenes No. 61; France-Czechoslovakia No. 60; Italy-Finland No. 66; Bulgaria-Greece No. 62; Norway-Estonia No. 76; Austria-Sweden No. 72; Latvia-Denmark No. 79; Latvia-Netherlands No. 68.

⁴ See Puente, "Principles of International Extradition in Latin America," 28 *Michigan Law Review* (1930), 665.

⁵ 2 *American Journal of International Law* (1908), Supp., p. 243.

⁶ Art. 2, Appendix III, No. 7.

⁷ Appendix III, No. 5.

⁸ In France, as early as 1841, in the *Circulaire* of the Minister of Justice it was made clear that request for extradition must be based upon an *arrêt* or a "*mandat d'arrêt*"; a "*mandat d'amener*" would not do, because it did not contain a description of the act, being usually issued before the full nature of the act is known. Billot, *Traité de l'Extradition* (1874), p. 415.

⁹ See, for example, Argentine, Extradition Law No. 1612, Arts. 12 and 18, Appendix VI,

The development of the doctrine of the *prima facie* case in Great Britain and the United States in extradition proceedings seems to rest partly on the suspicion of inadequacy of proceedings under other systems of law, and partly upon the feeling that one who is within the State is entitled to the protection of the State's system of criminal procedure, as well when he is accused of a crime abroad, as when he is accused of a crime within the requested State.¹

Full acceptance of the first ground would lead to refusal to extradite at all. However, States have come to see clearly the need of concerted action in the suppression of crime (See Introductory Comment), which has led to a great extension of the practice of extradition. Undoubtedly greater mutual understanding of and faith in each other's judicial processes have developed. It is believed that States should now be willing to accept each other's warrants of arrests as evidence that, upon examination in the requesting State, sufficient evidence of guilt has been adduced to justify a criminal trial.

The second ground suggested above for the rule as to *prima facie* cases assumes that extradition is essentially the same as a proceeding to commit for trial in the requested State, and this idea is probably strengthened by the usual requirement that the acts for which extradition is sought must also be of a kind to be punishable in the requested State. Ordinarily, however, the *very act* for which extradition is sought is not punishable in the requested State, and all that the requested State wants to know is that the charge against the person claimed is so relatively serious as to call for concerted

No. 1; Belgium, Extradition Law of 1874 and subsequent modifications, Appendix VI, No. 2; Brazil, Extradition Law of 1911, Appendix VI, No. 3; Colombia, Judicial Code, Bk. III, Tit. 10, Ch. VIII; Cuba, Penal Code, secs. 822-843; Ecuador, Law Concerning Aliens, Extradition & Naturalization, c. VI, Arts. 37-61; France, Extradition Law of 1927, Arts. 9 and 16, Appendix VI, No. 6; Germany, Extradition Law of 1929, Appendix VI, No. 7; Hungary, Ch. XXIV of Law XXXIII of 1896; Luxembourg, Extradition Law of 1870; Netherlands, Extradition Act of 1875; Panama, Law 44 of the National Assembly of 1930; Peru, Extradition Law of 1888; Poland, Penal Code, secs. 642-650; Salvador, Code of Civil Court Procedure, secs. 27-29, Penal Code, secs. 41-43; Switzerland, Extradition Law of 1892, Appendix VI, No. 13; Venezuela, Criminal Code, Bk. III, c. III, sec. 5, Arts. 389-393. Cf. Japanese Extradition Law of 1895, Art. 18, Appendix VI, No. 11; The Italian Penal Code, Art. 667, reads, in part (Appendix VI, No. 10):

"The Section ascertains whether the conditions established in Article 13 of the Penal Code and in the international treaty concerned are present. Should there be no convention or should the convention not otherwise stipulate, it also ascertains whether the acts and documents submitted give sufficient evidence of guilt or whether the sentence already pronounced has been verified."

Proof of *prima facie* case is not necessary between Italy and Switzerland, but is necessary by treaty between Italy and Great Britain. *Annual Digest of Public International Law Cases*, 1919-1922, p. 260.

¹ Note in 1 *Law Journal* (1866), 175; Moore, *Extradition* (1891), I, sec. 338, p. 518; Note in 31 *Michigan Law Review* 544 (1933).

See the criticisms of the Anglo-American position in Billot, *Traité de l'Extradition* (1874), pp. 202 to 212; Bernard, *Traité Théorique et Pratique de l'Extradition* (1890), pp. 362 to 380; Fiori, *Traité de Droit Pénal International et de l'Extradition* (1880), II, pp. 649 to 650; Travers, *L'entraide Repressive Internationale et la Loi Française du 11 Mars 1927* (1928), sec. 261; St. Aubin, *L'Extradition et le Droit Extraditionnel* (1913), pp. 187 to 241; Brocher, "*Etude sur les conflits de Legislation en Matière de Droit Pénal*" (Chap. III - De l'Extradition) (1874), 7 *Rev. de Droit Int. et. Leg. Comp.* pp. 180 and 181; Prévost-Parodol, "*De l'Extradition Des Accusés entre la France et l'Angleterre*" (1866), 61 *Revue Des Deux Mondes*, p. 1026.

repressive action; the act of extradition cannot in any proper sense be the equivalent of commitment for trial, for the sovereignty which is to be vindicated and the law which is to be enforced as a consequence of extradition are those of the requesting State.

Extradition is an international act, based upon faith in the judicial processes of the requesting State, and in aid of those processes. It would seem that all that the requested State should require as presumptive evidence of guilt sufficient to justify submitting a person claimed to the further judicial processes in the requesting State is that formal evidence of probable guilt, which the formal warrant of arrest for criminal prosecution constitutes under any enlightened system of law. It is true that this warrant of arrest may have been, and probably has been, issued without an examination of the person claimed, and that in the extradition proceedings such examination is possible, since an arrest must have been made in the requested State before such proceedings can go forward. But this failure of the requesting State to examine is due to the absence of the person claimed. His return for trial may, in case of innocence, be a hardship, but that does not seem a reason why the requested State should insist upon substituting its preliminary criminal procedure, often quite different in character from that of the requesting State. The acceptance of the warrant of arrest issued in the requesting State as sufficient evidence on the point of probable guilt, obviates also the danger of a varying standard which often enters when further evidence of probable guilt is required.¹

It is to be borne in mind, of course, that the doctrine of the *prima facie* case has nothing to do with proof of identity of the person claimed, of the extraditable character of the acts alleged to have been committed, of the place of committal of the acts alleged, of the political or military character of the offense charged, or of acquisition of immunity through lapse of time. It has to do only with the requirement or non-requirement by the requested State of evidence, beyond the formal warrant of arrest, *that the person claimed did the act charged in the warrant of arrest*, and for which act it is desired to put him on trial in the requesting State through the coöperation of the requested State in extraditing him.

(3) At this hearing, a judicial authority of the requested State shall determine, upon an examination of the requisition, the documents submitted by the requesting State, and the evidence offered by the requesting State, or by the requested State, or by the person detained, any issues presented as to:

¹ Cf. *Re Ross*, (1869), 2 Bond's Reports 252, 261; *Ex parte Kaine* (1853), 3 Blatchford's Reports, 1 *Re Heinrich* (1867), 5 Blatchford's Reports 444; *Re Risch* (1888), 36 Federal Reports 546; *Benson v. McMahon* (1888), 127 United States Reports 457. Moore, *Extradition* (1891), I, secs. 337 to 346, pp. 516 to 528.

The administration of the rule of the *prima facie* case under the treaty between the United States and Greece, Art. 1 (Appendix I, No. 81) produced very doubtful results in the *Insull* case. See Professor Hyde's comment in 28 *American Journal of International Law* 307 (1934); Note in 31 *Michigan Law Review* 544 (1933).

- (a) The identity of the person detained with the person claimed;
- (b) The place of commission of the alleged act or acts, for the purpose of applying Article 3 of this Convention;
- (c) Whether the extradition of the person claimed is sought for a political or military offense, or for the purpose of prosecuting or punishing the person claimed for a political or military offense (see Articles 5 and 6);
- (d) Whether the person claimed has become immune through lapse of time by the law of the requesting State, or would have become immune through lapse of time by the law of the requested State if the act had been committed there (see Article 4);
- (e) Whether the person claimed has been prosecuted for the same act or acts for which extradition is sought, and has been acquitted or convicted; and, in case of such conviction in the requesting State, whether he has served the sentence imposed (see Article 9).

COMMENT

In this part of the present article are dealt with questions which do not go to the guilt or innocence of the person claimed, but questions the answers to which may place upon the requested State the duty, or vest it with the right to refuse extradition, irrespective of the guilt of the individual involved. These questions are not to be determined alone from the documents required by Article 12 of this Convention, but with regard to them evidence may be introduced by the requesting State, the requested State or the person detained.

(a)

Article 12, paragraph (2) (a), of this Convention requires that the requisition shall contain "a description of the person claimed for the purpose of identification." (See Comment on that paragraph.) Identification is, then, part of the requesting State's case, with regard to which that State may introduce evidence in addition to that contained in the requisition, and as to which the person detained may introduce evidence in rebuttal. Statutes frequently make express provision for inquiry on this question of identity, as, for instance, in the French Law of 1927, Article 11,¹ the Italian Code of Criminal Procedure, Article 664,² German Law of 1929, Article 15.³ Though the United States⁴ and British statutes⁵ do not expressly provide for decision as to identity, it is well established that this question is one for the court's decision in extradition proceedings.⁶

¹ Appendix VI, No. 6.

² *Ibid.*, 10.

³ *Ibid.*, 7.

⁴ *Ibid.*, 15.

⁵ *Ibid.*, 8.

⁶ *In re Parisot* (1889), 5 Times Law Reports 344; *In re Meunier* [1894], 2 Queens Bench Reports, 415; *In re Siletti* [1902], 7 Law Journal Kings Bench, 935; Clarke, *Extradition* (4th ed., 1903), p. 251; *Glucksman v. Henkel* (1910), 221 U. S. 508; *Ex parte La Mantia* (1913), 206 Fed. Rep. 330; *In re Lincoln* (1915), 228 Fed. Rep. 70; *Bagley v. Starwich* (1925), 8 F. (2d), 42; *United States v. Mathues* (1929), 36 F. (2d), 565; Moore, *Extradition* (1891), I, §342, p. 524.

(b)

Under Article 3 of this Convention the place of commission of the acts, alleged as a basis for extradition, is as much part of the case of the requesting State, as is the place of commission of the criminal act within the jurisdiction of one of the States of the United States a part of its case when it initiates a criminal prosecution. It appears, then, that the person claimed should be allowed to offer evidence that the acts alleged were not committed in such a place as to make the actor extraditable under this Convention, and that the judicial authorities should then decide upon all the evidence, documentary and oral, whether extradition is justifiable under this Convention. The burden of proof should be on the requesting State, once evidence has been introduced by the person claimed, as has been held to be true as to identity (see above) and as to the political or military character of the acts charged (see below). Authority has not been found on this point, as it is not one on which a dispute is likely to arise.

(c)

If the issue is raised, it is the duty of the judicial authorities to pass upon the evidence of the political character of the act or acts charged,¹ and the same must equally be true if evidence is introduced that the act or acts charged are military in character. It is also held that the burden of proof is on the requesting State when the issue of political offense is raised.² This also must be equally true when the issue is of military offense.

(d)

The person apprehended in extradition proceedings may be shown to be the person claimed, and the acts of which he is accused may be shown to be extraditable, but the right of the requesting State to the extradition of the person in question may be defeated by lapse of time, as provided in Article 4 of this Convention. Questions of fact involved in this issue, such as the time when the act or acts were done, the presence or absence of the person claimed in the requesting State since the commission, so far as these facts have a bearing on the tolling of the statute of limitations, and the law of the requesting State with regard to limitation of criminal actions, should be decided upon the documents and by any evidence introduced by the requesting State, the requested State, or the person claimed, as here provided. The law of the requested State, as to immunity through lapse of time, will be

¹ *In re Ezeta* (1894), 62 Fed. Rep. 972; Hyde, *International Law* (1922), I. §318, p. 577; *In re Castioni* [1891], 1 Queens Bench Reports, 149; *In re Meunier* [1894], 2 Queens Bench Reports, 415.

² *In re Ezeta*, *supra* Hyde, *ibid.*; Julian W. Mack, 3 *Proceedings American Society of International Law* (1909), pp. 144 and 153 to 155. Cf. Lora L. Deere, "Political Offenses in the Law and Practice of Extradition," 27 *Amer. J. of Int. L.* (1933), 247 at 259, where she asserts that the burden of proof in Swiss law is on the person claimed.

decided by the judicial authority under the terms of paragraph (4) of this article.

Since lapse of time, by the terms of Article 4 of this Convention, gives immunity in the case of a person and an offense otherwise extraditable, the burden of proof should be on the requested State or on the person claimed, whichever raised the issue.¹

(e)

The rule *non bis in idem* is laid down in Article 9 of this Convention to the extent that the requested State may make it the ground for a declination of extradition. If this issue is raised, oral evidence, as well as the documents in the case, should be considered by the judicial authority in determining whether the requested State is under a duty to extradite the person claimed, or may refuse to do so.

Here, as in the case of lapse of time dealt with just above, we have established identity and an extraditable act, but a claim is interposed that extradition is excused because of previous acquittal or conviction for the same offense. Here also the burden of proof would seem properly to be on the requested State or the person claimed, whichever raised the issue.

(4) At the hearing a judicial authority of the requested State shall determine the law of the requested State applicable to any issue which is presented.

COMMENT

While foreign law must be put in evidence by the party to a judicial proceeding who would rely upon it, a court takes judicial notice of the law of its own State. The present paragraph merely states this rule of practice for completeness.

(5) At this hearing, if one or more of the reservations in Schedule A have been signed by the requested State, a judicial authority of the requested State shall determine, upon an examination of the requisition, the documents submitted by the requesting State, and the evidence offered by the requesting State, or by the requested State or by the person detained, any of the following issues which may be presented:

(a) In case Reservation Number Two has been signed by the requested State, whether the extradition of the person claimed is sought for a fiscal offense, or for the purpose of prosecuting or punishing the person claimed for a fiscal offense;

(b) In case Reservation Number Three or Reservation Number Four has been signed by the requested State, whether the person claimed is a national of the requested State.

¹ Wigmore, *Evidence* (1923), V, §2538, p. 550.

COMMENT

This part of the present article resembles paragraph (3) in that questions are here dealt with which do not go to whether the person claimed did or did not do the acts claimed and whether these acts are subject to certain punishment in the requested State, but questions are dealt with here the answers to which may place upon the requested State the duty, or vest it with the right to refuse extradition, irrespective of the guilt of the person claimed. These questions are not to be determined alone from the documents required by Article 12 of this Convention, but with regard to them evidence may be introduced by the requesting State, the requested State or the person detained.

(a)

The comment on paragraph (3) (c) of this article is applicable to the present paragraph, since Reservation Number Two as to fiscal offenses is couched in the same language as Articles 5 and 6, dealing with political and military offenses.

(b)

If the issue of nationality of the person claimed is raised under Reservations Number Three and Four, and evidence is introduced on both sides, the burden of proof is probably upon the requested State, or the person claimed, whichever raised the issue, that the person claimed is excepted from the general operation of the treaty by the personal exemption created by these reservations in question.¹

[(5) At this hearing, if one or more of the reservations in Schedule A have been signed by the requested State, a judicial authority of the requested State shall determine, upon an examination of the requisition, the documents submitted by the requesting State, and the evidence offered by the requesting State, the requested State or by the person detained, any of the following issues which may be presented:]

(c) In case Reservation Number Five has been signed by the requested State, whether the requesting State has made out a *prima facie* case of guilt, as defined in that reservation;

(d) In case Reservation Number Six has been signed by the requested State, whether the person claimed is a national of the requested State, and whether the requesting State has made out a *prima facie* case of guilt, as defined in that reservation.

¹ *In re Guerin* (1889), 60 Law Times Reports, 538, where the person claimed sought exemption from the operation of the Franco-British treaty by force of a provision in the treaty against nationals, the court said (p. 540): "The onus lies on any person claiming exemption to prove that he comes within the exemption."

In the case of *Erbens*, requested by the United States from Sweden, it appeared that he was a natural-born Swedish national. He admitted that he had voted in Wisconsin, but denied his naturalization. The Swedish Government required proof of his naturalization. Moore, *Extradition* (1891), I, §137, p. 169.

COMMENT

(c) and (d)

The doctrine of the *prima facie* case is discussed in comment on paragraph (2) (a) of this article. No further discussion at this point appears necessary. The provisions of the present article, here under consideration, are believed to state the practice where the doctrine of the *prima facie* case now prevails.¹

As to proof of nationality under paragraph (d), see comment on paragraph (b) above.

ARTICLE 18. EFFECT OF JUDICIAL DETERMINATION

(a) As the result of a final determination by the judicial authority of the requested State of the matters set out in Article 17 of this Convention, in the manner there prescribed, it shall declare either that the requested State is authorized, or that it is not authorized [by this Convention] to extradite the person claimed, and to deliver the property asked for.

(b) Such declaration that the requested State is not authorized [by this Convention] to extradite the person claimed shall be conclusive and the person claimed shall be set at liberty, and property seized shall be returned.

(c) Upon such declaration that the requested State is authorized [by this Convention] to extradite the person claimed, the requested State shall extradite such person and deliver the property seized or shall hold such person and property for executive action, as the law of the requested State may provide.

COMMENT

This article attempts to state the Anglo-American practice adopted by France in 1929, and adhered to by a number of other States.² The considerable group of States which agrees with Belgium in first requiring a judicial investigation, and in then making the judicial determination only advisory in effect,³ should not find it difficult to take the step, necessary for adherence to the present article, of making *conclusive* a judicial determination *against* extradition, provided for in paragraph (b).

If a State desires to make the judicial determination *in favor of* extradition conclusive so that the judicial authority is empowered to order extradition,⁴ this may be done under the terms of paragraph (c) of the present article. However, paragraph (c) also countenances the holding of the person claimed for executive action after extradition has been found permissible. This conforms to the practice of most States (including the United States, Great

¹ The person claimed has been held entitled to introduce evidence and to call witnesses when the requesting State is attempting to make out a *prima facie* case against him, in extradition proceedings. Moore, *Extradition* (1891), I, §346, pp. 526 to 528; Hyde, *International Law* (1922), I, §336, pp. 600 and 601; United States Law of Aug. 3, 1882, sec. 3 (Appendix VI, No. 15); Clarke, *Extradition* (1903), pp. 248 to 254; Byron and Chalmers, *Extradition* (1903), pp. 40 to 42.

² See comment on Article 17, paragraph (1).

³ *Id.*

⁴ See comment on Article 17, paragraph (1) as to the German law.

Britain and France) by whose laws a judicial determination is provided for in extradition cases.¹

The Montevideo Convention provides that, "Once extradition has been refused, application may not again be made for the same alleged act."² This is one of the articles which the United States, by its reservations, did not accept,³ for the practice in the United States has been to allow re-arrest on a new warrant after discharge.⁴ It is believed that this is a matter which can be left to municipal law.

ARTICLE 19. LANGUAGE TO BE USED AND TRANSLATIONS

In so far as the requisition and other documents referred to in Article 12 and 13 of this Convention and written evidence to be offered in the extradition proceedings are not in an official language of the requested State, the requesting State shall communicate to the requested State translations of the same into an official language of the requested State.

COMMENT

Of the multipartite conventions, drafts and projects only two deal with the language to be used in the documents.

The Montevideo Convention of 1933, Article 5,⁵ after providing that the requisition shall go through diplomatic or consular channels, or shall be communicated directly by one government to another says:

The following documents, in the language of the country to which the request for extradition is directed, shall accompany every such request. . . .

It is curious that the provision as to use of the language of the requested State was not extended to apply to the requisition itself. This is undoubtedly due to the practice of framing requisitions in the language of the States to which they are addressed.

Travers in his draft, Article 6,⁶ after describing the proper content of requisitions and stating that these may always be completed or corrected by further documents, says: "*elles [les demandes] seront, ainsi que toutes pièces annexes, assorties d'une traduction.*"

A few of the bipartite treaties deal with the subject of translation. The treaty between Sweden and Czechoslovakia of 1931, Article 20,⁷ provides:

The documents produced in cases coming under the present convention shall be drawn up in the official language of the State applied to or be accompanied by a translation into that language certified correct by an official or sworn translator of the State applied to or by a similar translator of the applicant State whose competence shall be attested by a diplomatic or consular agent either of the applicant State or the State applied to.

¹ See comment on Article 17, paragraph (1). ² Art. 12, Appendix III, No. 6. ³ *Id.*

⁴ Moore, *Extradition* (1891), I, §§305 to 307, pp. 457 to 461. ⁵ Appendix III, No. 6.

⁶ *Ibid.*, IV, No. 4. ⁷ *Ibid.*, I, No. 88.

The treaty between Germany and Turkey of 1930 has a provision similar to that just set out both as to the requirement of translations, and as to the method of certifying such translations correct.¹ The treaty between Austria and Latvia of 1932 requires that documents produced shall be in French, "or accompanied by a certified translation in that language."² In the Austrian-Belgian treaty of 1932 it is said that documents "shall be worded either in German or in French, or be accompanied by a translation in one of those languages."³ The Belgian-Polish treaty of 1931 has the following provision (Article 9):

To the documents mentioned in the present article must be attached certified true translations in the official language of the applicant State, if the documents are not drawn up in that language. This provision shall also apply to any other correspondence concerning extradition.

In the same article it is said that Polish is the official language of Poland, and French of Belgium.⁴

If the subject of translation of documents is not dealt with by a treaty or convention between the parties, it is obviously covered by procedural rules and practices in the requested State. This is well stated in the following Opinion of the Attorney General of the United States:

I have the honor to acknowledge the receipt of your communication of the 20th instant, inclosing translation of a note to you from the Mexican minister, stating that the United States commissioner at El Paso, Tex., from whom the Governor of the State of Chihuahua asked the extradition of Demetrio Cortes and his accomplices, returned the papers in the case on account of their not being translated. You ask my opinion as to "whether the commissioner should formally reject and return the papers to the country seeking extradition because they, or some part of them have not been translated."

By article 1 of the treaty with Mexico of December 11, 1861, it is provided:

"That this [the delivery of a person charged with crime] shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed."

The act of Congress conferring jurisdiction upon the commissioner or other examining officer says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

The Supreme Court of the United States in the case of *In re Luis Oteiza y Cortes* (136 U. S., 337), quotes with approval the language of

¹ Art. 23, Appendix I, No. 75.

² Art. 17, Appendix I, No. 92. The same is true of the treaty between Finland and the Netherlands of 1933, Art. 9, see Appendix V, No. 8. ³ Art. 18, Appendix I, No. 90.

⁴ Appendix V, No. 6. The treaty between France and Czechoslovakia, Art. 7 (Appendix V, No. 5) also provides for the documents to be in the language of the *requesting* State, putting responsibility for translation on the requested State.

Judge Wallace in 21 Blatch., 300. When referring to United States commissioners sitting in cases of extradition, he said:

"He is made the judge of the weight and effect of the evidence, and this court can not review his action, when there was sufficient competent evidence before him to authorize him to decide the merits of the case."

In order to the intelligent exercise of his judgment, the mind of the commissioner must be informed as to the facts of the case before him. He can be judicially informed only by the evidence which may be laid before him, in language and terms which are intelligible to him. If the evidence adduced is couched in signs, symbols, or language which the commissioner does not understand, it must be translated into terms which are intelligible.

It is objected on behalf of the Mexican Government that the treaty under which this extradition was asked makes no provision for the translation by that Government of such writings. But it should be remembered that while the treaty does secure to the parties to it the mutual right of extradition, yet the proceedings for the exercise of such right must of necessity accord with the rules prescribed and the forms observed in the tribunals of that jurisdiction to which recourse may be had. In Mexico the proceedings would be governed by the laws and forms which are in force there, and so, when the application is made to the judicial tribunals of this country, a like rule should be applied.

In every jurisdiction the person invoking its aid must present his case in accordance with its rules. He is the *actor*, the plaintiff, the petitioner, and must present his case both in its *allegata* and *probata* fully and intelligibly. If the testimony of an expert is needed to furnish the translation of the documents offered in evidence, the party offering the evidence must produce with it the translation.

I am of opinion that the commissioner should have declined to proceed with the inquiry upon which he was engaged until the proper translations were produced before him, but he should have so advised the Mexican Government and made a liberal allowance of time to enable that Government to produce such translations before returning the papers.¹

Sometime earlier a judge of the Circuit Court of the United States had said:²

The parties seeking the extradition of the fugitive should be required by the Commissioner to furnish an accurate translation of every document offered in evidence which is in a foreign language, accompanied by an affidavit of the translator, made before him or some other United States Commissioner, or a Judge of the United States, that the same is correct.

It seems wise to make provision in this Convention for the communication of translations of documents by the requesting State to the requested State, as is done in the present article, when the documents themselves are not in the official language of the requested State. However, it does not seem necessary to write into this article rules for the verification of such transla-

¹ 21 Opinions of the Attorney General (1896), 428.

² *In re Henrich* (1867), 5 Blatchford's Circuit Court Reports.

tions, which can better be left to be determined by the statutes or the practice of the requested State.

ARTICLE 20. ARRANGEMENT FOR EXTRADITION

(a) A requested State shall promptly communicate to the requesting State its final decision upon the requisition.

(b) After its final decision to extradite a person claimed, the requested State shall effect the extradition of such person at a time and place to be agreed upon and without unreasonable delay, and shall permit and facilitate the transportation of such person from its territory.

(c) If the requesting State does not accept custody of the person claimed and remove him from the territory of the requested State within a reasonable time after opportunity therefor has been afforded by the requested State, the requested State may set such person at liberty, and may refuse to take him into custody again for the same act or acts.

COMMENT

The first two paragraphs of this article are closely related. To be sure, if the final decision, communicated by the requested State to the requesting State under paragraph (a), is that extradition is not granted, paragraph (b) does not come into play. If, however, the decision which is communicated is that extradition is granted, then the requested State through its Foreign Office will make arrangements with the diplomatic representative of the requesting State for delivery of the person claimed. This should be done "without unreasonable delay." Ordinarily delivery of the person claimed is made at the frontier or at a harbor, and the requesting State is not under the necessity of transporting the person extradited across the territory of the requested State. Nevertheless, such delivery may be made at an interior point of the requested State, when the duty imposed by the last clause of paragraph (b) would be both obvious and important, *i.e.*, the duty not only to permit transportation of the extradited person from its territory, but to see that its law is such as not to interfere with such transportation. Paragraph (c) is of course intended to prevent abuse of the extradition process by the requesting State in leaving or holding the person claimed in custody in the requested State after the requesting State is at liberty to take him over and to transport him to its own territory for prosecution or punishment.

(a)

Provision for communication by the requested State to the requesting State of its final decision upon the requisition is not often included expressly in treaties or conventions.¹ However, in many instances notice is referred

¹ Such notice is expressly provided for in the Extradition Laws of Argentina, Art. 23, Appendix VI, No. 1, and of Switzerland, Art. 22, Appendix VI, No. 13.

to,¹ or is implicit in the necessity for making arrangements for transfer of custody of the person claimed where extradition is granted.² It seems reasonable to require of the requested State the communication called for in paragraph (a) of the present article, whether the final decision is for or against extradition.

(b)

Treaties and conventions as well as statutes are often silent with regard to the actual arrangements for extradition, except for such limitation upon the requesting State as is embodied in paragraph (c) of this article. Some bipartite treaties, taking into account the situation of the contracting parties, make specific provision for surrender of the person claimed at frontier or port.³ The South American Convention of 1889, and the Rio de Janeiro Draft of 1912 impose respectively the duty upon the requested State to deliver at "the frontier," or at "the port which is most convenient for transportation,"⁴ or at "the most convenient place on its frontier," or at "the most convenient port of embarkation."⁵ The model draft prepared by the International Penal and Prison Commission, provides that the person claimed shall be taken over by the requesting State at a time and place to be agreed upon.⁶ This latter provision seems most suitable for a multipartite convention, and has been here adopted. It should certainly be the duty of the requested State, as here expressed, to effect the extradition "without unreasonable delay."

Field in his International Code would have guaranteed to the agent of the requesting State to receive the person claimed "the same protection, in the execution of his duties, within the jurisdiction of the nation making the surrender, as is given by its laws to its own officers in the exercise of similar functions."⁷ It would be going too far to attempt to incorporate in a multipartite convention a provision giving to an agent of a requesting State the standing and authority of a peace officer in the requested State. The South American Convention of 1889 declares:⁸

The soliciting State will be able in any case to appoint one or more police agents, but their intervention will be subjected to the agents or authorities of the notified territory or the one through which transit occurs.

¹ *E.g.*, Montevideo Convention of 1933, Art. 11, Appendix III, No. 6; Central American Convention of 1934, Art. 9, Appendix III, No. 7; French Extradition Law of 1927, Art. 18, Appendix VI, No. 6.

² *E.g.*, Rio de Janeiro Draft of 1912, Arts. 18 and 23, Appendix IV, No. 3; Draft of International Penal and Prison Association of 1931, Arts. 35 to 37, Appendix IV, No. 6; Brazilian Extradition Law, Art. 11, Appendix VI, No. 3; Canadian Extradition Law, Arts. 25, 26 and 28, Appendix VI, No. 4; British Extradition Law 1870, Art. 12, Appendix VI, No. 8; treaty between Brazil and Italy, Art. XII, Appendix V, No. 4.

³ Belgium-Poland, Art. 12, Appendix V, No. 6; Colombia-Panama, Art. 16, Appendix V, No. 7; Finland-Netherlands, Art. 13, Appendix V, No. 8.

⁴ Art. 40, Appendix III, No. 2.

⁵ Art. 18, Appendix IV, No. 3.

⁶ Art. 35, Appendix IV, No. 6.

⁷ Art. 234, Appendix IV, No. 1.

⁸ Art. 40, Appendix III, No. 2.

The last clause of paragraph (b) of the present article seems to express what would be generally recognized as the duty of the requested State, and at the same time adequately protects the interests of the requesting State. Certainly the requested State should "permit" the transportation of the person claimed from its territory when a decision to extradite has been reached. It should also "facilitate" such transportation in the sense of seeing that no legal impediment is interposed, and that it may conveniently be carried out.

(c)

Multipartite conventions¹ and drafts,² bipartite treaties,³ and statutes⁴ frequently deal with the subject-matter of paragraph (c) of the present article. Frequently a specific time-limit for action by the requesting State is laid down, but in a multipartite convention it seems better to express merely the duty to act within a reasonable time. The language used in a good many instruments is mandatory in character, directing that the person claimed be set at liberty if the requesting State does not act within the time set. It has seemed better to leave this in the discretion of the requested State.⁵ If such discretion has been exercised and the person claimed set at liberty, it would seem that the requesting State should have no right to demand his re-arrest and extradition, and that ordinarily such person would not be re-arrested,⁶ but in such a Convention as this it appears sufficient to declare that the requested State "may refuse to take him into custody again for the same act or acts."

ARTICLE 21. REIMBURSEMENT OF REQUESTED STATE

A requesting State shall reimburse the requested State for special expenses occasioned by the extradition proceedings up to the time of the surrender of the person claimed to an agent of the requesting State.

COMMENT

As Judge Moore pointed out, the payment of expenses incurred in extradition proceedings is often an important consideration, especially where the

¹ South American Convention of 1911, Art. 14, Appendix III, No. 4; Bustamante Code of 1928, Art. 367, Appendix III, No. 5; Montevideo Convention of 1933, Art. 11 Appendix III, No. 6; Central American Convention of 1934, Art. 9, Appendix III, No. 7.

² Field's Code of 1876, Art. 235, Appendix IV, No. 1; Rio de Janeiro Draft of 1912, Art. 23, Appendix IV, No. 3; Draft of International Penal and Prison Association of 1931, Art. 36, Appendix IV, No. 6.

³ Brazil-Italy, Art. 12, Appendix V, No. 4; Finland-Netherlands, Art. 13, Appendix V, No. 8.

⁴ Brazil, Art. 11, Appendix VI, No. 3; Canada, Art. 28, Appendix VI, No. 4; France, Art. 18, Appendix VI, No. 6; Great Britain, Art. 12, Appendix VI, No. 8; Japan, Art. 21, Appendix VI, No. 11; Switzerland, Art. 28, Appendix VI, No. 13.

⁵ See, for example, the provisions in the British (Appendix VI, No. 8, Art. 12) and Canadian Laws (Appendix VI, No. 4, Art. 28), the Swiss Law (Appendix VI, No. 13, Art. 28), the Central American Convention of 1934 (Appendix III, No. 7, Art. 9), the Draft of the International Penal and Prison Commission (Appendix IV, No. 6, Art. 36).

⁶ See, for example, the provision in the French Law, Art. 18, Appendix VI, No. 6.

laws of the State of refuge provide for a judicial investigation.¹ According to Judge Moore, in practice the expenses are generally defrayed by the requesting State and this is the rule uniformly adopted in the treaties of the United States, although it is contended that, in principle, they should be borne by the requested State.²

The opposite position is taken by Billot, who thinks that, in principle, the requesting State should bear the expenses because surrender is granted in the first place in the requesting State's interests. In practice, however, the reimbursement creates so many inconveniences that, as a rule, expenses are borne by the requested State—at least in countries like France or Belgium where surrender does not involve extraordinary expenditures incidental to judicial investigation, like in England and in the United States.³

Travers takes the position that, as a rule, expenses should be borne by the requesting State.⁴

Treaty provisions as to reimbursement of expenses vary:

(1) Some treaties—mostly those to which the United States is a party—provide, without any qualification or limitation, that all expenses of the extradition shall be borne by the requesting State.⁵ It may be noted that in the latest United States treaties,⁶ the terse sentences used in earlier treaties have been replaced with more elaborate provisions.

(2) Disregarding variations in the phraseology used, the overwhelming majority of bilateral treaties listed in Appendix I provide, in substance, that each party shall bear (or shall not request the reimbursement of) the costs of extradition incurred on its own territory.⁷

¹ Moore, *Extradition* (1891), I, §394, p. 598.

² *Ibid.*, §395, p. 599.

³ Billot, *Traité de l'Extradition* (1874), p. 288 ff.

⁴ *L'Entr'aide Répressive Internationale* (1928), §590, pp. 319–20.

⁵ (References are to Appendix I): The treaties of the United States with (unless otherwise indicated the provision is contained in Art. 9): Siam, No. 7; Venezuela, No. 13; Latvia, No. 14; Estonia, No. 15; Finland, No. 23; Bulgaria, No. 24; Lithuania, No. 26; Czechoslovakia, No. 31; Poland, Art. 13, No. 57; Germany, Art. 11, No. 70; Austria, No. 71; Greece, No. 84; Colombia-Chile, Art. 14, No. 3; Liberia-Monaco, Art. 9, No. 48; Italy-Venezuela, Art. 13, No. 67. To the same effect see the following multipartite treaties (references are to Appendix III): Treaty of Amiens, Art. 20, No. 1; Pan American Convention of 1902, Art. 12, No. 3 (excepts compensation to public functionaries receiving a fixed salary); Caracas Convention of 1911, Art. 15, No. 4; Bustamante Code, Art. 372, No. 5 (excepts compensation to public functionaries receiving a fixed salary); Central American Convention of 1934, Art. 11, No. 7. See also the Canadian Extradition Act, §38, Appendix VI, No. 4.

⁶ United States-Germany, Art. 11, Appendix I, No. 70; United States-Austria, Art. 9, Appendix I, No. 71; United States-Greece, Art. 9, Appendix I, No. 84.

⁷ (References are to Appendix I): Austria-Hungary-Greece, Art. 12, No. 1; Germany-Greece, Art. 12, No. 2; Estonia-Latvia, Art. 17, No. 4; Estonia-Lithuania, Art. 17, No. 5; Latvia-Lithuania, Art. 17, No. 6; Brazil-Paraguay, Art. 7, No. 8; Italy-Yugoslavia, Art. 14, No. 10; Germany-Czechoslovakia, Art. 22, No. 11; Italy-Czechoslovakia, Art. 14, No. 12; Bulgaria-Yugoslavia, Art. 13, No. 16; Finland-Sweden, Art. 16, No. 17; Finland-Denmark, Art. 18, No. 18; Switzerland-Uruguay, Art. 17, No. 19; Great Britain-Latvia, Art. 16, No. 20; Finland-Latvia, Art. 17, No. 21; Bulgaria-Rumania, Art. 16, No. 22; Great Britain-Finland, Art. 16, No. 25; Hungary-Rumania, Art. 11, No. 27; Great Britain-Czechoslovakia, Art. 16, No. 28; France-Latvia, Art. 14, No. 29; Great Britain-Estonia, Art. 15, No. 30; France-Poland, Art. 13, No. 32; Estonia-Finland, Art. 17, No. 33; Austria-Norway, Art. 16, No. 34; Finland-Norway, Art. 17, No. 35; Rumania-Czechoslovakia, Art. 19, No. 36; Estonia-Czechoslovakia, Art. 20, No. 37; Latvia-Czechoslovakia, Art. 20, No. 38; Bulgaria-Czechoslovakia, Art. 20, No. 39; Belgium-Paraguay, Art. 17, No. 40; Belgium-Estonia, Art.

A number of these treaties—mostly those to which Czechoslovakia is a party—, while providing that each State shall bear the expenses incurred on its territory, excepts from this rule special expenses incurred by the requested State, such as the fees of witnesses, fees paid for expert legal opinion, etc., and imposes the duty on the requesting State to reimburse such expenses to the requested State.¹

It is believed that, while the requesting State should not be charged with any part of the salaries of judicial and other officers who in the requested State participate in extradition proceedings, which would have been paid if such proceedings had not been instituted, the requesting State should bear the special expenses occasioned by the extradition proceedings, such as witness fees, jail board, transportation, and the like. This conforms to the practice of a substantial body of States.

ARTICLE 22. TRANSIT THROUGH TERRITORY OF THIRD STATE

If a State to which extradition of a person has been granted desires to transport the extradited person through the territory of another State or on a vessel having the national character of another State for the purpose of bringing him to its own territory, it shall notify such other State and the latter shall permit and facilitate such transportation. The State to which

10, No. 41; Belgium-Latvia, Art. 10, No. 42; France-San Marino, Art. 11, No. 43; Albania-Yugoslavia, Art. 13, No. 44; Austria-Estonia, Art. 17, No. 45; Great Britain-Lithuania, Art. 16, No. 46; Great Britain-Albania, Art. 16, No. 47; Albania-Greece, Art. 20, No. 49; Greece-Czechoslovakia, Art. 20, No. 50; Spain-Czechoslovakia, Art. 20, No. 51; Portugal-Czechoslovakia, Art. 20, No. 52; Belgium-Czechoslovakia, Art. 20, No. 53; Colombia-Panama, Art. 17, No. 54; Latvia-Norway, Art. 16, No. 55; Belgium-Lithuania, Art. 10, No. 56; Belgium-Finland, Art. 11, No. 58; Austria-Finland, Art. 17, No. 59; France-Czechoslovakia, Art. 24, No. 60; Hungary-Yugoslavia, Art. 20, No. 61; Bulgaria-Greece, Art. 16, No. 62; Colombia-Nicaragua, Art. 19, No. 63; Latvia-Hungary, Art. 17, No. 64; Bulgaria-Turkey, Art. 15, No. 65; Finland-Italy, Art. 16, No. 66; Latvia-Netherlands, Art. 15, No. 68; Turkey-Czechoslovakia, Art. 17, No. 69; Austria-Sweden, Art. 17, No. 72; Bulgaria-Spain, Art. 20, No. 73; Latvia-Spain, Art. 20, No. 74; Germany-Turkey, Art. 22, No. 75; Estonia-Norway, Art. 16, No. 76; Estonia-Denmark, Art. 18, No. 77; Latvia-Sweden, Art. 17, No. 78; Latvia-Denmark, Art. 17, No. 79; Estonia-Sweden, Art. 17, No. 80; Poland-Sweden, Art. 23, No. 81; Italy-Panama, Art. 16, No. 82; Lithuania-Czechoslovakia, Art. 20, No. 83; Belgium-Poland, Art. 21, No. 85; Netherlands-Czechoslovakia, Art. 20, No. 86; Italy-Brazil, Art. 15, No. 87; Sweden-Czechoslovakia, Art. 21, No. 88; Denmark-Czechoslovakia, Art. 20, No. 89; Austria-Belgium, Art. 19, No. 90; Iraq-Turkey, Art. 16, No. 91; Austria-Latvia, Art. 16, No. 92; Great Britain-Iraq, Art. 17, No. 93; Finland-Netherlands, Art. 19, No. 95.

See to the same effect the Montevideo Convention of 1889, Art. 42, Appendix III, No. 2; Montevideo Convention of 1933, Art. 16, Appendix III, No. 6; and the following draft conventions (references are to Appendix IV): Rio de Janeiro Draft of 1912, Art. 20, No. 3; Travers' *Project*, Art. 14, No. 14; International Law Association, Art. 16, No. 5; International Penal and Prison Commission, Art. 39, No. 6, provides that the requested State shall inform the requesting State of the costs with a view to possible recovery from the surrendered person.

¹ (References are to Appendix I): Rumania-Czechoslovakia, Art. 19, No. 36; Estonia-Czechoslovakia, Art. 20, No. 37; Latvia-Czechoslovakia, Art. 20, No. 38; Bulgaria-Czechoslovakia, Art. 20, No. 39; Greece-Czechoslovakia, Art. 20, No. 50; Spain-Czechoslovakia, Art. 20, No. 51; Portugal-Czechoslovakia, Art. 20, No. 52; Belgium-Czechoslovakia, Art. 20, No. 53; France-Czechoslovakia, Art. 24, No. 60; Hungary-Yugoslavia, Art. 20, No. 61; Bulgaria-Spain, Art. 20, No. 73; Latvia-Spain, Art. 20, No. 74; Poland-Sweden, Art. 23, No. 81; Lithuania-Czechoslovakia, Art. 20, No. 83; Belgium-Poland, Art. 21, No. 85; Netherlands-Czechoslovakia, Art. 20, No. 86; Sweden-Czechoslovakia, Art. 21, No. 88; Denmark-Czechoslovakia, Art. 20, No. 89.

the person has been extradited shall reimburse the State through whose territory or on whose vessel such person is transported for all expenses incurred by the latter in connection with such transportation.

COMMENT

This article makes provision for cases of extradition when the requesting and requested States have no common borders, and where, to make extradition effective, it is necessary to transport the extradited person through the territory or on a vessel of a third State. There is considerable difference of opinion as to the transit State's relationship to the extradition process, and as to the conditions upon which permission for transportation is to be granted. Beauchet took the position that there is no duty upon a State to permit transportation through its territory, but that if it is prepared to give permission for such transportation, it should not examine the legality of the extradition involved, except in so far as to refuse its aid to extradition for political offenses.¹ He asserts that the nationality of the extradited person should not be considered by the State authorizing his transportation through its territory, as the extradited person will be benefited by such authorization, even if he is a national of the authorizing State, for such authorization tends to shorten his travelling and to secure a fair trial at the place where the offense was committed.²

Violet asserts that the necessity of concerted action by States for the suppression of crime, which imposes a duty to extradite, equally imposes a duty to aid the State which asks to transport an extradited person through its territory, but he points out that the State of transit is not granting extradition, and so has no reason to demand that it be furnished with the same documents which a requested State may require. His view is that the State of transit has a duty to see that the extradited person is not subjected to violence, and to make sure that it itself is not made a party to a violation of international law, as, he asserts, would happen in the case if one were extradited for a political or military offense, or if the extradited person were a national of its own or of the requested State.³

Billot⁴ and Fiore⁵ hold that the State of transit should retain complete liberty of action in each case, and should have before it all of the factors necessary for it to appreciate exactly the act with which it is associating itself.

Finally, there is the view, strongly presented by Travers, which assimilates authorization of transportation to extradition itself.⁶ According to this view, the only difference between transportation and extradition is that

¹ Beauchet, *Traité de l'Extradition* (1899), p. 395.

² *Ibid.*, p. 395; see also, Bernard, *Traité Théorique et Pratique de l'Extradition* (1890), pp. 468-470.

³ Violet, *La procédure d'Extradition* (1898), p. 237.

⁴ Billot, *Traité de l'Extradition* (1874), p. 278.

⁵ Fiore, *Traité de droit pénal international et de l'extradition* (1880), p. 665.

⁶ Travers, *Le Droit Pénal International* (1922), V, pp. 449-463.

the State of transit is granting extradition of a person who is not yet found within its territory, authorizing by the same act both his entry into its territory and his exit under the status of an extradited person. Therefore the transit may be authorized only when conditions are present which would justify extradition of such person by the State of transit. Travers carries out his view to the point of defining authorization of transportation as "*extradition en transit*", which term is never used by the authors referred to above. It is not surprising, therefore, that Travers' *Projet*¹ stipulates authorization of transit only in the cases where extradition itself or, as he says, "*extradition ordinaire*" would have been granted.

The authors, whose views have just been considered, have all written having in mind extradition under bipartite treaties. State A in making an extradition treaty with State B may want carefully to circumscribe its duty to allow transportation over its territory of a person extradited by State C to State B, because State A may have no extradition agreement with State C, and may not wish to commit itself in advance to approval of the practices which may be agreed upon between B and C. Such consideration does not enter into the situation envisaged by a multipartite convention where standards for extradition are laid down for all, and where, therefore, transit will be sought for a person extradited under the same rules as would govern the State of transit if it were the requested State. Once the extradition has been granted on the basic conditions upon which all the States, parties to this Convention, have agreed, there is no reason for the State of transit to make any inquiry as to the legality of the granted extradition, as to the nature of the offense, or as to the national status of the person. It seems that the State of transit should be satisfied with any document indicating that the extradition has actually taken place. Its municipal law should regulate the conduct of the extradited person through its territory or on its vessel, and determine the manner of coöperation between the agents of the extraditing State in whose custody the person is placed, and its own agents supervising the transportation.

This point of view is supported by all multipartite conventions on extradition which include provision on transit. The Pan American Convention, 1902,² South American Convention, 1911,³ Bustamante Code, 1928,⁴ and Montevideo Convention, 1933,⁵ stipulate for presentation of an original or an authenticated copy of the decree of extradition as the only requirement for transit.⁶ Only one multipartite draft has a provision on transit—the Rio de Janeiro Draft, 1912,⁷ which is essentially similar to those in the above multipartite conventions, with the exception that punishability of the offense

¹ Art. 11, Appendix IV, No. 4.

² Art. 11, Appendix III, No. 3.

³ Art. 19, Appendix III, No. 4.

⁴ Art. 375, Appendix III, No. 5.

⁵ Art. 18, Appendix III, No. 6.

⁶ It is noteworthy, however that the United States in ratifying the Montevideo Convention has made, among others, a reservation to Art. 18.

⁷ Art. 19, Appendix IV, No. 3.

under the law of the State of transit is required, and transit of nationals is rendered optional.

Two projects, planned primarily as models for bipartite treaties, that of Travers,¹ and the Russian Model Treaty approved by the Council of Peoples Commissars in 1923,² regard authorization of transit as an act of extradition, and set forth requirements which are the same as those necessary for the original extradition. This treatment undoubtedly is due to the purpose of both projects.

The great majority of bipartite treaties which appear in the *League of Nations Treaty Series* and which have provisions on transit,³ make transit subject to the same or practically the same conditions as those which govern extradition, the main requirement being that the extradited person is not a national of the State of transit.⁴ Some treaties stipulate with regard to transit that certain conditions must exist to justify authorization. In some,⁵ the conditions are that the extradited person is not a national of the State of transit, that he has not been prosecuted for the same crime in the requested State, and that extradition is not granted for a political offense. One treaty⁶ includes a provision that the statute of limitation has not run. Two Italian treaties⁷ prohibit transit only when the extradited person is a national of the State of transit, or when extradition is granted for a political, military or press offense. Two other treaties⁸ prohibit transit of nationals and persons extradited for political offenses. One treaty⁹ limits restrictions as to nationality and previous prosecution only. Another treaty,¹⁰ dis-

¹ Art. 11, Appendix IV, No. 4.

² See S. Mokrinsky, "Juridical nature of Extradition and Model Treaty of the U. S. S. R.," 6 (12), *Sovietskoye Pravo* (1924), p. 63.

³ There are 23 treaties which do not include such provisions.

⁴ (References are to Appendix I): Albania-Greece, Art. 20, No. 49; Austria-Norway, Art. 15, No. 34; Austria-Estonia, Art. 14, No. 45; Austria-Finland, Art. 13, No. 59; Austria-Sweden, Art. 14, No. 72; Austria-Belgium, Art. 12, No. 90; Austria-Latvia, Art. 13, No. 92; Brazil-Switzerland, Art. 15, No. 94; Bulgaria-Yugoslavia, Art. 12, No. 16; Bulgaria-Rumania, Art. 15, No. 22; Bulgaria-Greece, Art. 14, No. 62; Bulgaria-Turkey, Art. 14, No. 65; Bulgaria-Spain, Art. 15, No. 73; Germany-Czechoslovakia, Art. 13, No. 11; Rumania-Czechoslovakia, Art. 13, No. 36; Estonia-Czechoslovakia, Art. 14, No. 37; Latvia-Czechoslovakia, Art. 14, No. 38; Bulgaria-Czechoslovakia, Art. 14, No. 39; Spain-Czechoslovakia, Art. 13, No. 51; Portugal-Czechoslovakia, Art. 13, No. 52; Belgium-Czechoslovakia, Art. 12, No. 53; Greece-Czechoslovakia, Art. 14, No. 50; France-Czechoslovakia, Appendix V, No. 5, Art. 16; Turkey-Czechoslovakia, Art. 12, No. 69; Denmark-Czechoslovakia, Art. 14, No. 89; Lithuania-Czechoslovakia, Art. 14, No. 83; Sweden-Czechoslovakia, Art. 16, No. 88; Colombia-Chile, Art. 10, No. 3; Finland-Italy, Art. 12, No. 66; Finland-Netherlands, Art. 17, No. 95; France-Poland, Art. 14, No. 32; Iraq-Turkey, Art. 15, No. 91; Latvia-Lithuania, Art. 13, No. 6; Latvia-Netherlands, Art. 14, No. 68; Latvia-Hungary, Art. 14, No. 64; Latvia-Spain, Art. 15, No. 74; Liberia-Monaco, Art. 14, No. 48; Poland-Sweden, Art. 17, No. 81; Estonia-Lithuania, Art. 13, No. 5; Estonia-Latvia, Art. 13, No. 4; Estonia-Netherlands, Art. 14, No. 96; Hungary-Rumania, Art. 11, No. 27; Italy-Panama, Art. 15, No. 82; Italy-Venezuela, Art. 15, No. 67; Italy-Brazil, Art. 14, No. 87; Switzerland-Uruguay, Art. 16, No. 19.

⁵ Germany-Greece, Art. 14, Appendix I, No. 2; Netherlands-Czechoslovakia, Art. 13, Appendix I, No. 86.

⁶ Austria-Hungary-Greece, Art. 14, Appendix I, No. 1.

⁷ Italy-Yugoslavia, Art. 13, Appendix I, No. 10; Italy-Czechoslovakia, Art. 13, Appendix I, No. 12.

⁸ Albania-Yugoslavia, Art. 12, Appendix I, No. 44; Latvia-Norway, Art. 15, Appendix I, No. 55.

⁹ France-San Marino, Art. 12, Appendix I, No. 43.

¹⁰ France-Latvia, Art. 15, Appendix I, No. 29.

regarding nationality, stipulates non-transit of political offenders and persons previously prosecuted for the same offense. Finally, there are a number of treaties¹ stipulating only that transportation shall not be permitted of nationals of the State of transit.

There is no uniformity in the statutory provisions regulating the transit of extradited persons, though the general tendency is towards liberation of transit from unnecessary formalities. Only five States have in their respective statutes restrictions which assimilate authorization of transit to an act of extradition: Argentina,² Ecuador,³ Germany,⁴ Luxemburg,⁵ and Switzerland.⁶ The Belgian law⁷ stipulates that the offense for which the person is extradited must be extraditable under that law, shall be not political, and that prosecution or punishment for it is not affected by the statute of limitations. The French law⁸ requires reciprocity and excludes political and military offenses. The Netherlands statute⁹ stipulates that the offense shall be one of those mentioned in its treaty with the extraditing State. The Japanese law¹⁰ authorizes transit when it is provided for by treaty with the extraditing State, or is based upon reciprocity. Similar provision is found in the Greek law,¹¹ which leaves the matter of transit entirely to treaties. The laws of Finland,¹² Paraguay,¹³ and Peru¹⁴ have only the requirement that the extradited person shall not be a national of the State of transit. The laws of Estonia,¹⁵ Latvia,¹⁶ and Lithuania¹⁷ provide that transit shall be granted when the extradited person is not to be tried before a special tribunal. The law of Panama¹⁸ does not subject transit to any conditions.

As pointed out above, in a Multipartite Convention as distinguished from a Bipartite Treaty, it seems reasonable to provide that transportation of any extradited person shall be permitted and facilitated by any party to this Convention over its territory or on any vessel having its national character. The fact that such person is a national of the State of transit is no reason for its objection to his extradition by the requested State, or to his prosecution or punishment by the requesting State, and so should be no reason for its preventing his extradition being made effective so that he may be prosecuted or punished. This Convention incorporates the policy of permitting extradition for political or military offenses, though a State by Reservation may bind itself not to grant extradition in such cases. A State may not itself approve of extradition for political or military offenses, but if it signs and

¹ (References are to Appendix I): Estonia-Denmark, Art. 17, No. 77; Estonia-Finland, Art. 14, No. 33; Estonia-Sweden, Art. 14, No. 80; Finland-Denmark, Art. 17, No. 18; Finland-Latvia, Art. 14, No. 21; Finland-Norway, Art. 16, No. 35; Finland-Sweden, Art. 13, No. 17; Latvia-Denmark, Art. 16, No. 79; Latvia-Sweden, Art. 14, No. 78.

² Art. 38, Appendix VI, No. 1.

⁴ Art. 33, Appendix VI, No. 7.

⁶ Art. 32, Appendix VI, No. 13.

⁸ Art. 28, Appendix VI, No. 6.

¹⁰ Art. 23, Appendix VI, No. 11.

¹² Law of Feb. 11, 1922, Art. 22.

¹⁴ Law of Oct. 23, 1888, Art. 11.

¹⁶ Code of Criminal Procedure, Art. 869.

¹⁸ Law No. 44, Nov. 22, 1930, Art. 15.

³ Law October 8, 1921, Art. 59.

⁵ Law March 13, 1870, Art. 3.

⁷ Art. 4, Appendix VI, No. 2.

⁹ Law April 6, 1875, Art. 20.

¹¹ Art. 8, Appendix VI, No. 9.

¹³ Code of Penal Procedure, XXXIV, C.I., Art. 614.

¹⁵ Code of Criminal Procedure, Art. 852.

¹⁷ Penal Code, Art. 852.

ratifies this Convention, it makes itself party to a policy of allowing a choice to other signatories on this subject, and so should not be heard to insist that it will not permit a political or military refugee to be transported through its territory. It is true that there may be occasions when transportation of a national, or of a political or military refugee through the territory of a State might threaten violence because of a strong public opinion. It is believed that this situation can be taken care of as the result of the requirement for notice of a desire to transport an extradited person through the territory of a State, for under the circumstances suggested the notified State would request that another route be arranged and this would naturally be done.

There are found no provisions in the Multipartite Conventions as to the expenses involved in the transportation of the extradited person through the territory of a third State. All treaties providing for transit stipulate that expenses connected with the transit shall be borne by the State to which the person is extradited. This seems a reasonable provision, as the State of transit, not taking any active part in extradition, should not be obliged to share any expense resulting from it.

PART V. LIMITATIONS UPON THE REQUESTING STATE

ARTICLE 23. TRIAL PUNISHMENT AND SURRENDER OF EXTRADITED PERSON

(1) A State to which a person has been extradited shall not, without the consent of the State which extradited such person:

(a) Prosecute or punish such person for any act committed prior to his extradition, other than that for which he was extradited;

(b) Surrender such person to another State for prosecution or punishment.

COMMENT

Paragraph (1) of this article imposes a twofold limitation upon the requesting State's freedom of action: First, the requesting State, having obtained the extradition of the person sought may not, without the consent of the surrendering State, either try or punish such person for any act committed prior to his extradition, other than that on which the request was based. This limitation does not apply to acts committed by such a person after his surrender. Second, such person may not, without the consent of the surrendering State, be re-extradited to a third State.

The limitation placed upon the requesting State that it may try and punish an extradited person only for the act for which extradition is obtained, is recognized in the international law of extradition as the doctrine of specialty.¹ Many national extradition statutes condition extradition on a

¹ See Moore, *Extradition* (1891), I, §§148-177, pp. 194-259, and authorities there cited; Billot, *Traité de l'Extradition* (1874), pp. 308-317, 341-346. See also the Resolutions of Oxford (*Institut de Droit International*), Art. 22, Appendix IV, No. 2, declaring that a government which obtains extradition for a specific act is bound, in the absence of a treaty to the contrary, not to allow the surrendered person to be tried or punished except for that act.

guarantee (by treaty or municipal law of the requesting State) that the surrendered person will not be tried for any other act than that for which he was extradited.¹ The rule on this point, enunciated in the text, is generally accepted as implied, when it is not stated,² and is scrupulously observed in practice even in the absence of any treaty.³ Existing treaty-law amply supports the provision contained in paragraph (f) (a) of this article, as is shown by the conventions, drafts and bipartite treaties in the appendices.⁴ Although the phraseology varies widely, the universal practice is to provide that the surrendered person may not be tried or punished for an offense committed prior to extradition, other than that for which he is extradited. Moreover, the *majority* of treaties provide expressly that the person surrendered may be tried or punished for another offense if the surrendering State consents thereto.⁵

A number of treaties provide that the surrendering State may not refuse its consent if the offense, other than that for which extradition was granted, would be extraditable under the treaty.⁶ The number of treaties (13) containing such a proviso is small, and those treaties affect a comparatively narrow circle of nations (to eight out of these 13 treaties Czechoslovakia is a party). The inclusion of such a proviso in this article does not appear advisable. It seems preferable to leave it to the discretion of the surrendering State to grant or withhold its consent, rather than to impose on it an absolute duty. It may reasonably be assumed that the surrendering State, guided by a spirit of international coöperation in the repression of crime, will not withhold its consent if the offense would be extraditable under this Convention. The surrendering State would have little interest in impeding the

¹ *E.g.* (references are to Appendix VI): Canada, §33, No. 4; France, Art. 7, No. 6; Germany, Art. 6, No. 7; Great Britain, §3 (2), No. 8; Italy, Code of Criminal Procedure, Art. 661, No. 10; Switzerland, Art. 7, No. 13.

² *United States v. Raucher* (1889), 119 U. S. 407.

³ Thus the German Supreme Court allowed an appeal from the conviction for the unlawful export of horses when the person was surrendered, without a treaty, by Czechoslovakia for larceny and theft. *Reichsgericht* decision of April 4, 1921. *Entscheidungen des Reichsgerichts in Strafsachen*, 55, 284; *Annual Digest of Public International Law Cases*, 1919-1922, p. 259, Case 182.

⁴ Appendices III, IV, V.

⁵ The following treaties do not provide for trial and punishment with the consent of the surrendering State for offenses other than that for which extradition is granted (references are to Appendix I): The treaties of the United States with: Siam, No. 7; Venezuela, No. 13; Latvia, No. 14; Estonia, No. 15; Finland, No. 23; Bulgaria, No. 24; Lithuania, No. 26; Czechoslovakia, No. 31; Poland, No. 57 — (It should be noted, however, that consent of the surrendering State is provided for in the treaties of the United States with Germany, Art. 5, No. 70; and with Austria, Art. 4, No. 71); the treaties of Great Britain with: Latvia, No. 20; Finland, No. 25; Czechoslovakia, No. 26; Estonia, No. 30; Lithuania, No. 46; Albania, No. 47; Iraq, No. 93; Brazil-Paraguay, No. 8; Latvia-Denmark, No. 79. See also the South American Convention of 1911, Appendix III, No. 4; Field's Code, Appendix IV, No. 1; International Law Association Draft, Appendix IV, No. 5; International Penal and Prison Commission Draft, Appendix IV, No. 6; the extradition statutes of Canada, Appendix VI, No. 4, and of Great Britain, Appendix VI, No. 8.

⁶ (References are to Appendix I): Finland-Latvia, Art. 8, No. 21; Rumania-Czechoslovakia, Art. 12, No. 36; Estonia-Czechoslovakia, Art. 13, No. 36; Latvia-Czechoslovakia, Art. 13, No. 38; Bulgaria-Czechoslovakia, Art. 13, No. 39; Greece-Czechoslovakia, Art. 13, No. 50; Spain-Czechoslovakia, Art. 14, No. 51; Portugal-Czechoslovakia, Art. 14, No. 52; Hungary-Yugoslavia, Art. 6, No. 61; Bulgaria-Greece, Art. 13, No. 62; Bulgaria-Spain, Art. 14, No. 73; Latvia-Spain, Art. 14, No. 74; Denmark-Czechoslovakia, Art. 12, No. 89.

course of justice by insisting on another extradition proceeding with all the time and expense involved.

Another exception to the limitation imposed on the requesting State is contained in a proviso to a number of the treaties that the person surrendered may be tried or punished for an offense other than that for which he was extradited, if he freely and voluntarily consents thereto, or if he himself requests to be brought to trial for such other offense.¹ A few treaties put the proviso in the form that the consent of the surrendering State is not necessary if the surrendered person thus agrees to be tried for an offense other than that for which he was extradited,² although, in some cases, a notice to the surrendering State is required.³

The inclusion of such a provision in this article was deemed inadvisable for several reasons. First, this Convention seeks to regulate the reciprocal rights and duties of States in their relations with each other, and it does not seem appropriate to cause the exercise of such a right or the observance of such a duty to depend upon the will of an individual. Second, the practical working of such a provision is open to question. The rule of speciality was designed to safeguard the interests of the individuals concerned, as well as those of the requested State, by limiting trial and punishment to the particular act or acts for which extradition was granted. While a person is being detained by a State by reason of extradition, it is difficult to be sure that he really acts freely and voluntarily in consenting to be tried for a different crime from that stated in the requisition. It can hardly be asserted that such a proviso would generally be desired in a multipartite convention in view of the fact that the great majority of treaties and draft conventions and a number of the national extradition statutes do not recognize the surrendered persons' consent as an exception to the rule of specialty.⁴

¹ (References are to Appendix I): Finland-Sweden, Art. 6, No. 17; Finland-Denmark, Art. 8, No. 18; Switzerland-Uruguay, Art. 6, No. 19; France-Poland, Art. 5, No. 32; Austria-Norway, Art. 6, No. 34; Finland-Norway, Art. 6, No. 35; Belgium-Paraguay, Art. 4, No. 40; Belgium-Estonia, Art. 5, No. 41; France-San Marino, Art. 3, No. 43; Liberia-Monaco, Art. 4, No. 48; Belgium-Czechoslovakia, Art. 13, No. 53; Belgium-Lithuania, Art. 5, No. 56; Belgium-Finland, Art. 5, No. 58; Bulgaria-Turkey, Art. 12, No. 65; Turkey-Czechoslovakia, Art. 16, No. 69; Austria-Sweden, Art. 7, No. 72; Estonia-Denmark, Art. 8, No. 77; Estonia-Sweden, Art. 7, No. 80; Belgium-Poland, Art. 13, No. 85; Belgium-Austria, Art. 10, No. 89; Iraq-Turkey, Art. 13, No. 91. Similar provisions can be found in some of the national extradition statutes, see *e.g.*, Sweden, Art. 11, Appendix VI, No. 12; Switzerland, Art. 7, Appendix VI, No. 13. The only exception to the rule of speciality provided for in the Montevideo Convention of 1934, is the express consent of the surrendered person, Art. 17 (a), Appendix III, No. 6.

² (References are to Appendix I): Switzerland-Uruguay, Art. 6, No. 19; Bulgaria-Rumania, Art. 5, No. 22; Hungary-Rumania, Art. 4, No. 27; Liberia-Monaco, Art. 4, No. 48; Colombia-Panama, Art. 9, No. 54; Colombia-Nicaragua, Art. 11, No. 63; Bulgaria-Turkey, Art. 12, No. 65; Austria-Belgium, Art. 10, No. 90; Iraq-Turkey, Art. 13, No. 91. To the same effect see the Central American Convention of 1934, Art. 10, Appendix III, No. 7; the extradition statutes of Sweden, Art. 11, Appendix VI, No. 12; Switzerland, Art. 7, Appendix VI, No. 13. But *cf.* Turkey-Czechoslovakia, Art. 15, Appendix I, No. 66, which requires the consent of the surrendering State in spite of the agreement of the extradited person.

³ *E.g.*, Iraq-Turkey, Art. 13, Appendix I, No. 91; also in several of the treaties enumerated in footnote 8.

⁴ No such provision is contained in any of the treaties of the United States or Great Brit-

The limitation provided for in paragraph 1 (b) of this article is also very generally accepted and is supported by existing treaty and statute law, although a fairly large number of treaties, draft conventions and several statutes do not contain provision prohibiting re-extradition without the consent of the surrendering State.¹ The tendency is, however, decidedly toward the inclusion of such a provision as shown especially by the fact that since 1920 the number of treaties failing to provide for this contingency steadily decreased. With this additional safeguard to the interests of the requested State and of the individual concerned, there should be less reluctance to extradite fugitives from justice, and thus this provision should further the general purpose of this Convention. It may be pointed out that, in most of the treaties, re-extradition and the rule of specialty are dealt with together, and are usually made subject to the same conditions and exceptions. Therefore, what has been said of the exceptions to the rule of specialty (consent of the surrendering State, consent of the surren-

ain. See (references are to Appendix I) the treaties of the United States with: Siam, No. 7; Venezuela, No. 13; Latvia, No. 14; Estonia, No. 15; Finland, No. 23; Bulgaria, No. 24; Lithuania, No. 26; Czechoslovakia, No. 31; Poland, No. 57; Germany, No. 70; Austria, No. 71; Greece, No. 84; the treaties of Great Britain with: Latvia, No. 20; Finland, No. 25; Czechoslovakia, No. 28; Estonia, No. 30; Lithuania, No. 46; Albania, No. 47; Iraq, No. 93; also the following bipartite treaties: Germany-Greece, No. 2; Chile-Colombia, No. 3; Greece-Austria-Hungary, No. 1; Estonia-Latvia, No. 4; Estonia-Lithuania, No. 5; Latvia-Lithuania, No. 6; Brazil-Paraguay, No. 8; Italy-Yugoslavia, No. 10; Italy-Czechoslovakia, No. 12; Finland-Latvia, No. 21; Germany-Czechoslovakia, No. 24; France-Latvia, No. 29; Estonia-Finland, No. 33; Rumania-Czechoslovakia, No. 36; Estonia-Czechoslovakia, No. 37; Latvia-Czechoslovakia, No. 38; Bulgaria-Czechoslovakia, No. 39; Belgium-Latvia, No. 42; Austria-Estonia, No. 45; Albania-Greece, No. 49; Greece-Czechoslovakia, No. 50; Spain-Czechoslovakia, No. 51; Portugal-Czechoslovakia, No. 52; Latvia-Norway, No. 55; Austria-Finland, No. 59; France-Czechoslovakia, No. 60; Hungary-Yugoslavia, No. 61; Bulgaria-Greece, No. 62; Latvia-Hungary, No. 64; Finland-Italy, No. 66; Italy-Venezuela, No. 67; Latvia-Netherlands, No. 68; Bulgaria-Spain, No. 69; Latvia-Spain, No. 74; Germany-Turkey, No. 75; Estonia-Norway, No. 76; Latvia-Sweden, No. 77; Latvia-Denmark, No. 79; Poland-Sweden, No. 81; Italy-Panama, No. 82; Lithuania-Czechoslovakia, No. 83; Netherlands-Czechoslovakia, No. 86; Italy-Brazil, No. 87; Sweden-Czechoslovakia, No. 88; Denmark-Czechoslovakia, No. 89; Austria-Latvia, No. 92; Finland-Netherlands, No. 95. See to the same effect the Caracas Convention, Appendix III, No. 4; the following draft conventions (references are to Appendix IV): Field's Code, No. 1; Oxford Resolutions, No. 2; International Law Association, No. 5; International Penal and Prison Commission, No. 6; the following extradition statutes (references are to Appendix VI): Canada, No. 4; France, No. 6; Germany, No. 7; Great Britain, No. 8; Italy, No. 10. It may be noted that Traver's *Projet*, Art. 12, Appendix IV, No. 4, expressly excludes consent of the surrendered person as an exception to the rule of specialty.

¹ *E.g.* (references are to Appendix I): the treaties of the United States with: Siam, No. 7; Venezuela, No. 13; Latvia, No. 14; Estonia, No. 15; Finland, No. 23; Bulgaria, No. 24; Lithuania, No. 26; Czechoslovakia, No. 31; Austria, No. 71; Greece, No. 84; (but there is provision for re-extradition with the consent of the surrendering State in the treaty with Germany, Art. 5, No. 70); the treaties of Great Britain with: Latvia, No. 20; Finland, No. 25; Czechoslovakia, No. 28; Estonia, No. 30; Lithuania, No. 46; Albania, No. 47; Iraq, No. 93; Greece-Austria-Hungary, No. 1; Brazil-Paraguay, No. 8; Italy-Yugoslavia, No. 10; Italy-Czechoslovakia, No. 12; Bulgaria-Yugoslavia, No. 16; France-San Marino, No. 43; Albania-Yugoslavia, No. 44; Albania-Greece, No. 49; Italy-Venezuela, No. 67; Italy-Panama, No. 81; See to the same effect the Bustamante Code, Appendix III, No. 5; the Montevideo Convention of 1933, Appendix III, No. 6; Field's Code, Appendix IV, No. 1; The Draft of the International Law Association, Appendix IV, No. 5; also the following statutes (references are to Appendix VI): Canada, No. 4; Great Britain, No. 8; Italy, No. 10.

dered person) is equally applicable to the exception to the rule against re-extradition.

[(1) A State to which a person has been extradited shall not, without the consent of the State which extradited such person:]

(c) Prosecute such person before a court specially constituted for the trial, or to which special powers are granted for the trial.

COMMENT

The purpose of this paragraph is to prevent the subjection of the extradited person to a trial before a special court called only for that occasion, or before a court granted special powers for that occasion, and whose judgment may be affected by political considerations, or by conditions of public hysteria, thus denying to the prosecuted person the ordinary guarantees of a judicial hearing. However, there may be situations when no ordinary court would have jurisdiction over the extradited person, because of special conditions in a certain area, and the State which has granted extradition may be satisfied that substantial justice will be done in a special tribunal which has been set up.

This paragraph is drafted so that trial of an extradited person is not absolutely prohibited in the situation here contemplated, but to the requested State is reserved the right to prevent a political or sensational trial of the extradited person, which would undermine the main purpose of extradition as an international aid to the administration of justice.

A similar article is found in the Montevideo Convention: ¹

The surrendering State shall not be obliged to grant extradition: . . .
(d) when the accused must appear before any extraordinary tribunal or court of the demanding State (tribunal o joggade de excepcion de costado requeriente). Military courts will not be considered as such tribunals.²

There is a rather large number of bipartite treaties which either prohibit extradition when the extradited person is to be prosecuted before a special court, or which impose a duty on the requesting State not to submit the extradited person to trial by such a court.³

The provision restricting prosecution of the extradited person to the courts which normally have jurisdiction over the crimes for which the extradition has been granted is not totally strange to the statutory law on

¹ Art. 3, Appendix III, No. 6.

² The United States in ratifying this Convention made reservation to this article.

³ (References are to Appendix I): Finland-Sweden, Art. 6, No. 17; Denmark-Finland, Art. 8, No. 18; Switzerland-Uruguay, Art. 7, No. 19; Estonia-Finland, Art. 7, No. 33; Belgium-Paraguay, Art. 6, No. 40; Austria-Estonia, Art. 6, No. 45; Latvia-Norway, Art. 1, No. 55; Austria-Finland, Art. 6, No. 59; Latvia-Hungary, Art. 7, No. 64; Estonia-Norway, Art. 1, No. 76; Denmark-Estonia, Art. 8, No. 77; Latvia-Spain, Art. 3 (h), No. 74; Latvia-Sweden, Art. 7(3), No. 78; Poland-Sweden, Art. 10, No. 81; Brazil-Italy, Art. 6, No. 87, and Appendix V, No. 4; Austria-Latvia, Art. 6, No. 92; Brazil-Switzerland, Art. 3-d, No. 94; Finland-Netherlands, Art. 7, No. 95.

extradition, being found in the statutes of the following States: Estonia,¹ Finland,² Latvia,³ Lithuania,⁴ Sweden⁵ and Switzerland.⁶

(2) Paragraph (1) of this article shall not apply, if the person who was extradited voluntarily remains within the territory of the State to which he was extradited for a period of thirty days, or voluntarily returns thereto.

COMMENT

Paragraph (2) of this article provides for an exception to the two-fold limitation imposed by paragraph (1) upon the requesting State. The rule of specialty and the prohibition against re-extradition without the surrendering State's consent do not apply if the extradited person, after being set at liberty, voluntarily remains for more than thirty days within the territory of the State to which he was extradited, or if, having left that State, he subsequently returns thereto of his own free will. The exception provided in this paragraph is very generally recognized in extradition, and its inclusion is amply supported by existing treaty and statute law. A provision of similar import is contained in the great majority of treaties, draft-conventions and statutes.⁷ The period provided for in paragraph (2)—thirty days—is the same as provided for in the majority of treaties (they provide either for thirty days or one month), although some treaties provide for different periods, ranging from 48 hours to three months,⁸ and a few treaties do not specify any time limit.⁹

¹ Code of Criminal Procedure, Art. 859(9).

² The Law of Feb. 11, 1922, Art. 9(3).

⁴ Code of Criminal Procedure, Art. 854.

⁶ Art. 9, Appendix VI, No. 13.

³ Penal Code, Art. 852(8).

⁵ Art. 11(3), Appendix VI, No. 12.

⁷ The exception is not provided for in the following treaties (references are to Appendix I): the treaties of the United States with Siam, No. 7; Venezuela, No. 13; Latvia, No. 14; Estonia, No. 15; Finland, No. 23; Bulgaria, No. 24; Lithuania, No. 26; Czechoslovakia, No. 31; (but in the treaties with Poland, Art. 4, No. 57, Germany, Art. 5, No. 70, Austria, Art. 4, No. 71, and Greece, No. 84, there is such a proviso); Germany-Greece, No. 2; Greece-Austria-Hungary, No. 1; Italy-Yugoslavia, No. 10; Italy-Czechoslovakia, No. 12; France-Latvia, No. 27; Albania-Greece, No. 49; Finland-Italy, No. 66; Italy-Panama, No. 81. See also the Montevideo Convention of 1933, Appendix III, No. 6; Field's Code, Appendix IV, No. 1; the Oxford Resolutions of the *Institut de Droit International*, Appendix IV, No. 2; Italy, Code of Criminal Procedure, Appendix VI, No. 10.

⁸ *Forty-eight hours* in the following treaties (references are to Appendix I): Estonia-Czechoslovakia, Art. 13, No. 37; Latvia-Czechoslovakia, Art. 13, No. 38; Greece-Czechoslovakia, Art. 13, No. 50; Bulgaria-Greece, Art. 13, No. 62. Travers' Draft, Art. 13, Appendix IV, No. 4, provides for *five days*. The following three treaties provide for *one week* (references are to Appendix I): Spain-Czechoslovakia, Art. 14, No. 51; Portugal-Czechoslovakia, Art. 14, No. 52; Latvia-Spain, Art. 14, No. 74. The draft of the International Penal and Prison Commission, Art. 15, Appendix IV, No. 6, provides for *fourteen days*. The treaty between Denmark and Czechoslovakia, Art. 12, Appendix I, No. 89, provides for *four weeks*. The following treaties provide for *three months* (references are to Appendix I): Chile-Colombia, Art. 7, No. 3; Switzerland-Uruguay, Art. 6, No. 19; Liberia-Monaco, Art. 4, No. 48; United States-Poland, Art. 4, No. 57. Three months are also provided in the Bustamante Code, Art. 377, Appendix III, No. 5; and in the extradition statutes of Argentina, Art. 6, Appendix VI, No. 1; Switzerland, Art. 7, Appendix VI, No. 13.

⁹ See the treaties of Great Britain with (references are to Appendix I): Latvia, No. 20; Finland, No. 25; Czechoslovakia, No. 28; Estonia, No. 30; Lithuania, No. 45; Albania, No. 47; Iraq, No. 93; Iraq-Turkey, No. 91. See also the draft of the International Law Association, Appendix IV, No. 5; and the extradition statutes of Canada, Appendix VI, No. 4; Great Britain, Appendix VI, No. 8.

The exception provided for in paragraph (2) seems to balance equitably the interests of the extraditing State in seeing that the person extradited is not tried for any act other than that for which he was extradited, and the interests of the State to which extradition is granted in regaining its freedom of action, after the extradited person has voluntarily remained in or returned to its territory.

PART VI. PROPERTY

ARTICLE 24. DELIVERY AND RETURN OF PROPERTY REQUESTED

(1) When a person claimed is extradited, a requested State shall deliver to the requesting State the following categories of property, if requested and if such delivery will not work an injustice to any other person and will not interfere with the administration of justice by the requested State:

(a) Property which appears to have been acquired by the person claimed or by an accomplice of such person by means of the act for which the extradition is made;

(b) Property which may serve as evidence in the prosecution of the person claimed.

COMMENT

This paragraph provides only for delivery of property with an extradited person. There are conventions, treaties and statutes which countenance delivery when an accused person cannot be extradited because he has died or escaped.¹ These provisions seem to belong rather in a convention on judicial assistance than on extradition, and have therefore been omitted here.

Treaties and conventions frequently do not condition delivery of property upon a request by the requesting State,² but such a request seems a reasonable condition of a *duty* to deliver, and provision is made in this Convention for such request to accompany a requisition,³ and for detention of property to be requested in connection with a request for provisional arrest.⁴ In a good many international agreements and statutes only objects found in the possession of the person claimed are to be delivered,⁵ but this seems too

¹ Montevideo Convention of 1933, Art. 15, Appendix III, No. 6; Travers' Draft of 1928, Art. 10, Appendix IV, No. 4; Draft of International Penal and Prison Commission of 1931, Art. 19, Appendix IV, No. 6; German-Turkish treaty, Art. 16, Appendix V, No. 3; Brazilian-Italian treaty, Art. 13, Appendix V, No. 4; French-Czechoslovakian treaty, Art. 22, Appendix V, No. 5; Belgian-Polish treaty, Art. 11, Appendix V, No. 6; Colombian-Panama treaty, Art. 15, Appendix V, No. 7; French statute of 1927, Art. 29, Appendix VI, No. 6.

² See, for example, the multipartite conventions in Appendix III, the United States-British treaty, Art. 12, Appendix V, No. 1; German-Turkish treaty, Art. 14, Appendix V, No. 3. But French-Czechoslovakian treaty, Art. 22, Appendix V, No. 5, and Belgian-Polish treaty, Art. 11, Appendix V, No. 6, call for a request.

³ Article 12.

⁴ Article 15.

⁵ Pan American Convention of 1902, Art. 10, Appendix III, No. 3; South American Convention of 1911, Art. 12, Appendix III, No. 4; Bustamante Code of 1928, Art. 370, Appendix III, No. 5; Montevideo Convention of 1933, Art. 15, Appendix III, No. 6; Central American Convention of 1934, Art. 12, Appendix III, No. 7; United States-Austrian treaty, Art. 10, Appendix V, No. 2; Brazilian-Italian treaty, Art. 13, Appendix V, No. 4; Canadian statute, Art. 27, Appendix VI, No. 4.

narrow as he may have bailed or sold property which he has stolen, or objects important as evidence in his prosecution may be in the hands of others. This Convention has therefore been drafted to conform to provisions which do not require that the property affected shall be in the possession of the extradited person.¹

The categories of property described in subparagraphs (a) and (b) are those which are important to the requesting State and which are generally covered in conventions, treaties and statutes.²

By the terms of a large number of conventions, treaties and statutes the rights of third persons in property seized are expressly preserved, or are to be examined and protected.³ This object is attained in the present article by imposing the duty to deliver property only "if such delivery will not work an injustice to any other person." It may also be important to retain property for use in proceedings in the requested State, which property is desired by the requesting State. In such case the requested State seems to have the better right, so far as delivery would interfere with the administration of justice there, and this the present article recognizes.⁴

(2) The requested State may make delivery of such property subject to the condition that it be returned to the requested State:

(a) When, the property having been delivered in accordance with paragraph (1) (a) of this article, the person claimed is not put on trial, or is acquitted, or such property is proved not to have been acquired by means of the act for which extradition is made;

¹ South American Convention of 1889, Art. 39, Appendix III, No. 2; Travers' Draft, Art. 10, Appendix IV, No. 3; Draft of International Law Association, Art. 15, Appendix IV, No. 5; Draft of International Penal and Prison Association, Art. 19, Appendix IV, No. 6; United States-British treaty, Art. 12, Appendix V, No. 1; French-Czechoslovakian treaty, Art. 22, Appendix V, No. 5; Belgian-Polish treaty, Art. 11, Appendix V, No. 6; Belgian law, Art. 5, Appendix VI, No. 2; Swiss law, Art. 27, Appendix VI, No. 13.

² See the references in the footnotes above, and, generally, the multipartite conventions and drafts, treaties and statutes in Appendices III, IV, V and VI.

³ South American Convention of 1889, Art. 39, Appendix III, No. 2; Pan American Convention of 1902, Art. 10, Appendix III, No. 3; South American Convention of 1911, Art. 12, Appendix III, No. 4; Bustamante Code of 1928, Art. 370, Appendix III, No. 5; Central American Convention of 1934, Art. 12, Appendix III, No. 7; United States-Austrian treaty, Art. 10, Appendix V, No. 2; German-Turkish treaty, Art. 15, Appendix V, No. 3; Brazilian-Italian treaty, Art. 13, Appendix V, No. 4; French-Czechoslovakian treaty, Art. 22, Appendix V, No. 5; Belgian-Polish treaty, Art. 11, Appendix V, No. 6; Finnish-Netherlands treaty, Art. 10, Appendix V, No. 8; Belgian law, Art. 5, Appendix VI, No. 2; Canadian law, Art. 27, Appendix VI, No. 4; French law, Art. 29, Appendix VI, No. 6; Swedish law, Art. 26, Appendix VI, No. 12; Swiss law, Art. 27, Appendix VI, No. 13.

⁴ South American Convention of 1911, Art. 12, provides for delivery of property "as far as this is practicable and in conformity with the laws of the respective nations." Appendix III, No. 4. The Bustamante Code of 1928, Art. 370, is similar. Appendix III, No. 5. The Central American Convention of 1934, Art. 12, provides for delivery of property "upon the order of competent authority." Appendix III, No. 7. By the United States-British treaty, Art. 12, delivery of property is to be made "in so far as this may be permitted by the law of the High Contracting Party granting the extradition," while the United States-Austrian treaty says such delivery is to be made "so far as practicable" according to the law of the parties. Appendix V, Nos. 1 and 2. The German-Turkish treaty (Art. 14) provides for delivery of property if "the competent authorities have no objection." Appendix V, No. 3, and the Finnish-Netherlands treaty (Art. 10) says: "if the competent authority of the State applied to so orders." Appendix V, No. 8.

(b) When, the property having been delivered in accordance with paragraph (1) (b) of this article, it is no longer required for the purpose for which delivered.

COMMENT

Some treaties provide for return of property when the interests of third persons are involved.¹ A provision is found in treaties for the return of property if demanded by the State which delivered it.² We also find provision for its return if a proper stipulation is made at the time of delivery.³ A few extradition statutes provide for the return of property to its owner, at the conclusion of the proceedings against the person extradited.⁴ The second paragraph of the present article is drawn to permit the delivering State to make delivery upon conditions there set forth. It may stipulate that property, delivered because of its evidentiary value, shall be returned when no longer required for that purpose; and that property, delivered because it appears to have been acquired by means of the extraditable act in question, shall be returned if this be disproved at the ensuing trial, or if the extradited person be not put on trial or be acquitted. By such stipulations the requested State can adequately protect the interests which third parties within its territory may claim in the property.

PART VII. GENERAL PROVISIONS

ARTICLE 25. RESERVATIONS IN SCHEDULE A AND DECLARATION IN SCHEDULE B

A State may make one or more of the Reservations set forth in Schedule A, and no others, and/or the Declaration set forth in Schedule B, at the time of its signature, or ratification of this Convention, and any Reservation or Declaration so made shall be effective between the State making it and all other parties to this Convention in their relations *inter se*.

COMMENT

The purpose of this article and of the schedules here referred to is to open to signatories of this Convention alternative courses on certain points, as to which there is difference of practices and of national policies. This subject is referred to in the Introductory Comment.

¹ French-Czechoslovakian treaty, Art. 22, Appendix V, No. 5, and Belgian-Polish treaty, Art. 11, Appendix V, No. 6.

² Brazilian-Italian treaty, Art. 13, Appendix V, No. 4.

³ German-Turkish treaty, Art. 15, Appendix V, No. 3.

⁴ Netherlands, Act of April 6, 1875, Art. 12; Panama, No. 44, Nov. 22, 1930, Art. 15; Peru, Extradition Law, Oct. 23, 1884, Art. 10; Estonia, Latvia and Lithuania, which adopted the Russian Penal Code of 1914, Art. 852 (n).

**ARTICLE 26. DECLARATION AS TO APPLICATION OF
CONVENTION TO CERTAIN TERRITORIES**

(a) At the time of its signature or ratification of this Convention, a State may declare that, in accepting the present Convention, it does not assume any obligation in respect of all or any of its colonies, protectorates and overseas territories, or territories under its suzerainty or mandate, and that the present Convention shall not apply to any territories named in such declaration.

(b) A State, which has made such declaration, may thereafter notify the Secretary-General of the League of Nations that it desires that the Convention shall apply to all or any of its territories, which have been made the subject of a declaration under the preceding paragraph, and the Convention shall thereafter apply to all territories named in such notice.

COMMENT

The text of this article follows closely that of Article 26 of the Convention for Limiting Manufacture and Regulating Distribution of Narcotic Drugs, 1931.¹ Provisions having similar effect are found in Article 49 of the Convention on Traffic in Opium and Drugs, 1925,² and in Article 24 of the Convention on the Suppression of Counterfeiting Currency, 1929.³

Subsequent accession to the United States-British Extradition Treaty of 1932 by the British Government, on behalf of the Dominions is envisaged in Article 14.⁴ The Finnish-Netherlands Extradition Treaty of 1933,⁵ Articles 20 and 21, provides for subsequent exchange of notes extending the application of the treaty to the Netherlands Indies, Surinam and Curaçao.

ARTICLE 27. OTHER EXTRADITION AGREEMENTS

Nothing in this Convention shall affect the provisions of any agreement in force between any of the parties concerning extradition for acts for which extradition is not required by this Convention; nor shall this Convention preclude any of the parties from entering into such an agreement.

COMMENT

Such a provision seems desirable, which recognizes the validity of existing or subsequent extradition agreements between parties to the Convention, which do not conflict with its requirements. The Bustamante Code⁶ provides for special agreements between adjoining States, and the Montevideo Convention⁷ preserves in force existing agreements between signatory

¹ 12 *League of Nations Journal*, p. 1794.

² 4 Hudson, *International Legislation* (1931), p. 1612.

³ *Ibid.*, p. 2703.

⁴ Appendix V, No. 1. See also the British treaties with Latvia, Arts. 17 and 19, Appendix I, No. 20, with Finland, Arts. 17 and 19, Appendix I, No. 25, and with Albania, Arts. 17 and 19, Appendix I, No. 47.

⁵ Appendix V, No. 8.

⁶ Art. 363, Appendix III, No. 5.

⁷ Art. 21, Appendix III, No. 6.

States. The Draft of Rio de Janeiro¹ would leave in force existing treaties not contrary to the Draft provisions, or which afford greater facilities for extradition.

ARTICLE 28. SETTLEMENT OF DISPUTE

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

COMMENT

This identic final article is included in the draft conventions on *Extradition*, *Jurisdiction with respect to Crime*, and the *Law of Treaties*. Articles of similar import were included in draft conventions previously published by the Research in International Law in 1929 and 1932.²

The remarkable growth of international legislation during the period since 1919 has provided a new content for current international law.³ Simultaneously, recent years have seen a remarkable development of law concerning the pacific settlement of disputes.⁴ Progress in the one field has been related to progress in the other, by the inclusion in multipartite treaties and conventions of standard articles for dealing with differences as to the interpretation and application of their provisions. This practice has now been followed, quite generally, for more than a decade. The precise text of such articles has not been standardized, owing to the frequent changes in the law concerning pacific settlement. For example, Article 13 of the Statute on Freedom of Transit annexed to the convention of April 20, 1921, provides:⁵

Any dispute which may arise as to the interpretation or application of this statute, which is not settled directly between the parties themselves, shall be brought before the Permanent Court of International Justice, unless under a special agreement or a general arbitration pro-

¹ Art. 24, Appendix IV, No. 3.

² See the special supplements to the *American Journal of International Law*, Vol. 23 (1929), and Vol. 26 (1932).

³ See Hudson, *International Legislation* (1931), Vol. I, p. xviii ff.

⁴ See Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931).

⁵ 1 Hudson, *International Legislation* (1931), p. 631:

vision, steps are taken for the settlement of the dispute by arbitration or some other means.

Article 8 of the Slavery Convention, opened for signature at Geneva on September 25, 1926, provides:¹

The High Contracting Parties agree that disputes arising between them relating to the interpretation or application of this Convention shall, if they can not be settled by direct negotiation, be referred for decision to the Permanent Court of International Justice. In case either or both of the States Parties to such a dispute should not be parties to the Protocol of December 16th, 1920, relating to the Permanent Court of International Justice, the dispute shall be referred, at the choice of the Parties and in accordance with the constitutional procedure of each State, either to the Permanent Court of International Justice or to a court of arbitration constituted in accordance with the Convention of October 18th, 1907, for the Pacific Settlement of International Disputes, or to some other court of arbitration.

Article 8 of the Convention for the Abolition of Import and Export Prohibitions and Restrictions, of November 8, 1927, provides:²

If a dispute arises between two or more High Contracting Parties as to the interpretation or application of the provisions of the present Convention—with the exception of Articles 4, 5 and 6, and of the provisions of the Protocol relating to these articles—and if such dispute cannot be settled either directly between the parties or by the employment of any other means of reaching agreement, the parties to the dispute may, provided they all so agree, before resorting to any arbitral or judicial procedure, submit the dispute with a view to an amicable settlement to such technical body as the Council of the League of Nations or the parties concerned may appoint. This body will give an advisory opinion after hearing the parties and, if necessary, effecting a meeting between them.

The advisory opinion given by the said body will not be binding upon the parties to the dispute unless it is accepted by all of them, and the parties, if they all so agree, may either after resort to such procedure, or in lieu thereof, have recourse to any arbitral or judicial procedure which they may select, including reference to the Permanent Court of International Justice as regards any matters which are within the competence of the Court under its Statute.

If a dispute of a legal nature arises as to the interpretation or application of the provisions of the present Convention—with the exception of Articles 4, 5 and 6, and of the provisions of the Protocol relating to these articles—the parties shall, at the request of any of them, refer the matter to the decision of the Permanent Court of International Justice or of an arbitral tribunal selected by them, whether or not there has previously been recourse to the procedure laid down in the first paragraph.

In the event of any difference of opinion as to whether a dispute is of a legal nature or not, the question shall be referred for decision to the Permanent Court of International Justice or to the arbitral tribunal selected by the parties.

¹ 3 Hudson, *International Legislation* (1931), p. 2010.

² 3 *Ibid.*, p. 2160.

The procedure before the body referred to in the first paragraph above or the opinion given by it will in no case involve the suspension of the measures to which the dispute refers; the same will apply in the event of proceedings being taken before the Permanent Court of International Justice—unless the Court decides otherwise under Article 41 of its Statute—or before the arbitral tribunal selected by the parties.

Nothing in the present Convention shall be construed as prejudicing the rights and obligations derived by the High Contracting Parties from the engagements into which they have entered with reference to the jurisdiction of the Permanent Court of International Justice, or from any bilateral conciliation or arbitration conventions between them.

Article 21 of the Convention on Certain Questions relating to the Conflict of Nationality Laws, of April 12, 1930, provides:¹

If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present Convention and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement, in accordance with the constitutional procedure of each of the parties to the dispute. In the absence of agreement on the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice, if all the parties to the dispute are parties to the Convention of the 16th December, 1920, relating to the Statute of the Court, and if any of the parties to the dispute is not a party to the Protocol of the 16th December, 1920, the dispute shall be referred to an arbitral tribunal constituted in accordance with the Hague Convention of the 18th October, 1907, for the Pacific Settlement of International Conflicts.

Some improvement on the texts quoted was made in Article 25 of the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, opened for signature at Geneva, July 13, 1931, in that more specific provision was made for the court's exercise of jurisdiction on the application of any party to the dispute; that article reads as follows:²

If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present Convention and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the Parties providing for the settlement of international disputes.

In case there is no such agreement in force between the Parties, the dispute shall be referred to arbitration or judicial settlement. In the absence of agreement on the choice of another tribunal, the dispute shall, at the request of any one of the Parties, be referred to the Permanent Court of International Justice, if all the Parties to the dispute are Parties to the Protocol of December 16th, 1920, relating to the Stat-

¹ 24 *American Journal of International Law* (1930), Supp. p. 192.

² *League of Nations Official Journal*, 1931, p. 1794.

ute of that Court, and, if any of the parties to the dispute is not a party to the Protocol of December 16th, 1920, to an arbitral tribunal constituted in accordance with the Hague Convention of October 18th, 1907, for the Pacific Settlement of International Disputes.

Some latitude is left by the proposed article for determining when a dispute relates to "the interpretation or application of the present Convention." If two parties to the Convention are clearly giving different interpretations to its provisions, and if any difference between them has consequently been formulated, the text would apply. If a party objects to an application of the provisions of the Convention by another party, and if the latter persists in such application despite the objection, the text would apply. See Judgment No. 2 of the Permanent Court of International Justice.¹ The expression "cannot be satisfactorily settled by diplomacy" would seem to be equivalent to the expression "cannot be settled by negotiation," which was constructed by the Permanent Court of International Justice in its Judgment No. 2, *supra*.

The expression "applicable agreements in force between the parties to the dispute" is intended to take account of the extensions of the law of pacific settlement in recent years, as well as of any future extensions. Many States are bound by treaties, conventions, and agreements, to follow a carefully outlined procedure for the settlement of disputes with other States. The number of bipartite treaties of conciliation and arbitration, in force, is very large. Those concluded in the first decade after the World War are reproduced in Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931); and many others have now been published in the *League of Nations Treaty Series*. The United States of America has recently concluded treaties of conciliation and arbitration with a large number of States, chiefly European States. The multipartite treaties, conventions, and agreements are perhaps more important, however. On January 1, 1935, 42 States or members of the League of Nations were bound by the "Optional Clause" providing for the compulsory jurisdiction of the Permanent Court of International Justice, in accordance with Article 36 of the Statute, though on varying terms of acceptance.² Moreover, the General Act for the Pacific Settlement of International Disputes of September 26, 1928, has now been adhered to, in whole or in part, by some twenty States. A General Treaty of Inter-American Arbitration, signed at Washington, January 5, 1929, has been brought into force by several American States; and it is supplemented by a Protocol of Progressive Arbitration. A General Convention on Inter-American Conciliation, also signed at Washington, January 5, 1929, has been brought into force by various American States. These more recent Inter-American instruments supplement the Treaty to Avoid or Prevent Conflicts between the American States, the so-called "Gondra Treaty,"

¹ *Publications of the Court*, Series A, No. 2, p. 11.

² For a list of these States, see Hudson, *The Permanent Court of International Justice* (1934), p. 629.

signed at Santiago, May 3, 1923, and in force for a large number of American States. All of these instruments, bipartite and multipartite, are reënforced, also, by the provision in Article 2 of the Treaty for the Renunciation of War, signed at Paris, August 27, 1928, by which more than sixty States have agreed "that the settlement of solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

With so many treaties in force, the question may arise as to the need for continuing this standard article in multipartite instruments. For the relations of many States it is unnecessary, and the first paragraph may add nothing to their existing obligations; but it is possible that some States which are parties to a particular convention may not be parties to any "applicable agreement" providing for the settlement of international disputes, and in their relations with other parties the second paragraph of this article may serve a useful purpose.

The provision in the second paragraph of this article for a reference of disputes "to arbitration or judicial settlement" is not intended to draw any substantive distinction between the two methods of settlement. *Arbitration* is not essentially different from *adjudication*.¹ In the absence of any previous agreement on a tribunal, the parties to a dispute should be free, in the first instance, to choose the tribunal to which the dispute shall be referred. Failing such choice, however, the present article provides for the Permanent Court of International Justice as the competent tribunal. On January 1, 1935, 49 States had signed and ratified the Protocol of Signature of December 16, 1920, and six additional States and signed it without having ratified. If the Permanent Court of International Justice is thus competent, the reference of the dispute need not be by special agreement *ad hoc*; it may be effected by the unilateral application of any party to the dispute.

This article omits a provision which has frequently found place in international conventions during recent years, requiring States which are not parties to the Protocol of Signature of December 16, 1920, merely to refer the dispute to a tribunal constituted in accordance with the provisions of the Convention for the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907. The omission seems to be justified by the following considerations: (1) The omitted provision is illusory; it seems to create an effective obligation, though it is merely an agreement to agree. (2) The very wide support of the Permanent Court of International Justice and the extensive jurisdiction conferred upon it, make possible a more binding obligation for States which take part in international legislation. Sixty members of the League of Nations (on January 1, 1935) and Brazil, which is not a member of the League of Nations, are now maintaining the Permanent Court of International Justice. Forty-two States are bound by the Optional Clause, and additional States have conferred limited compulsory

¹ Moore, *International Adjudications* (1929), Vol. I, p. xv ff.

jurisdiction on the court. As a member of the International Labor Organization, the United States of America has conferred compulsory jurisdiction on the court to the extent that it is provided for in the constitution of the International Labor Organization. (3) In thirteen years the Permanent Court of International Justice has shown itself an appropriate body to interpret international conventions, and its prestige throughout the world warrants its being given this function with respect to legislative instruments if it is really desired to provide for the effective settlement of disputes.

SCHEDULE A

RESERVATION NUMBER ONE CAPITAL PUNISHMENT

A requested State may make the extradition of any person conditional upon the receipt of satisfactory assurance that, in case of conviction, neither the death penalty, nor any cruel or unusual punishment, will be imposed upon him by the requesting State.

COMMENT

As there are States which do not employ or approve of the death penalty, it is not unusual for treaties to make provision that upon extradition such penalty shall not be imposed upon the extradited person. Such provision is found in the South American Convention of 1889,¹ and in the Central American Convention of 1934.² The South American Convention of 1911 provides that the death penalty shall not be imposed by the requesting State unless it is permitted by the requested State.³ The Bustamante Code declares that in no case shall the death penalty be imposed upon an extradited person.⁴ A number of bipartite treaties condition extradition upon a formal declaration by the requesting State that the death penalty will not be exacted.⁵

It seems wise to provide a reservation which will permit a requested State to condition an extradition upon an assurance that "in case of conviction, neither the death penalty, nor any cruel or unusual punishment will be imposed."

RESERVATION NUMBER TWO FISCAL OFFENSES

A requested State may decline to extradite a person claimed if the extradition is sought for an act which constitutes a fiscal offense, or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a fiscal offense. For the purposes of this reservation a fiscal offense is an offense in connection with the

¹ Art. 29, Appendix III, No. 2.

² Art. 2, Appendix III, No. 7.

³ Art. 10, Appendix III, No. 4.

⁴ Art. 378, Appendix III, No. 5.

⁵ *E.g.*, United States-Venezuela, Art. 4, Appendix I, No. 13; Uruguay-Switzerland, Art. 8, Appendix I, No. 19; Greece-Czechoslovakia, Art. 1, Appendix I, No. 50; Bulgaria-Greece, Art. 1, Appendix I, No. 62; Poland-Sweden, Art. 10, Appendix I, No. 81.

customs or revenue law of a State, and it does not involve misuse of public funds.

COMMENT

St. Aubin says that treaties in the 18th century generally allowed extradition for smuggling.¹ In the 19th and 20th centuries, however, fiscal offenses have generally not been included in lists of extraditable offenses. Extradition treaties at first covered principally the serious crimes of violence; for the most part, crimes of a fraudulent character have more recently found their place in extradition treaties, as they have been incorporated progressively in municipal penal laws.

A fiscal officer has been described as one who collects or receives the public moneys,² and fiscal offenses are those directed against the internal revenue, or the customs of a State. Under a theory of international society which involves the concept of international economic warfare as a normal condition, it is not unnatural that States have refused to give aid to each other in the enforcement of customs regulations. Refusal to assist in the enforcement of internal revenue laws is less easy to explain, except on the ground that the two categories of fiscal regulations and offenses have not been distinguished. Even as to customs laws, it must be borne in mind that their machinery is not only revenue producing and regulatory of international trade, but is often used by a State to protect its inhabitants from an unlicensed importation of such goods as narcotics, considered dangerous to their health and good morals, where international coöperation is highly desirable.

Travers³ describes correctly the situation which generally existed during the 19th century, when he says:

It is not customary to allow extradition for fiscal offenses. Art. 11 of the Swiss Extradition Law of January 22,⁴ 1892, is, in this respect, the expression of the prevalent views.

M. Vespasien Pella, reporting to the International Congress of Comparative Law held at the Hague in August, 1932, advised against the extradition of fiscal offenders,⁵ and the congress adopted such views.⁶

It seems to have been the belief of nations during the 19th century that each was benefited by the contravention of the revenue laws, and by especially the customs laws, of the others. It became the practice in England,

¹ *L'Extradition et le Droit Extraditionnel* (1913), I, 16. See also Billot, *Traité de l'Extradition* (1874), 43.

² *Dorian v. Walter* (1909), 132 Kentucky Reports, 54.

³ *Droit Pénal International* (1922), IV, §2128.

⁴ "L'extradition ne sera pas accordée pour les infractions aux lois fiscales, ni pour les délits purement militaires." Appendix VI, No. 13.

⁵ "L'extradition ne sera pas accordée: . . . 3—Pour les infractions aux lois de douane, d'impôts et autres lois financières." Propositions de M. Pella, Rapporteur General.

⁶ "L'extradition serait exclue: . . . b) pour les infractions aux lois fiscales." Resolutions adopted by the Section on Extradition, International Congress of Comparative Law, The Hague, August, 1932.

as well as in other countries, to disregard completely foreign revenue laws. In England, "the case in which the rule concerning non-enforcement of foreign revenue laws is supposed to have been laid down, two hundred years ago, by Lord Harwicke, is that of *Boucher v. Lawson*."¹ This case, decided in 1734,² upheld a contract in violation of a Portuguese revenue law. It is Lord Mansfield, however, who is more often quoted as authority for such proposition. In *Holman et al v. Johnson*,³ decided in 1775, he expressed it in these words: ". . . no country ever takes notice of the revenue laws of another."

So jealous was Great Britain of her own economic welfare in competition with that of other States, that the general rule that she would not enforce a contract to be performed in a foreign country, its performance there being illegal,⁴ was amended, an exception being made in favor of contracts which contemplated the violation of the revenue laws of the foreign country.⁵

The rule found its way to American courts rather early. The Supreme Court of Mississippi said in 1869, in the case of *Ivey v. Lalland*:

Where a contract which violates the revenue laws of the country where it was made comes before the courts of another country, those courts will not take notice of the foreign revenue laws.⁶

France, as well as England and the United States, has accepted this rule.⁷ A contract of insurance on spirits shipped in France to be smuggled into the United States, against the Volstead Act and the revenue laws, was declared to be valid by the *Cour de Cassation* in 1928.⁸

It must be clear that under the prevalence of such a rule, one could hardly expect nations to extradite for fiscal offenses. If the courts in certain countries are not only not disposed to enforce the revenue laws of a foreign State, but, on the other hand, are willing to declare valid contracts whose objective is the violation of foreign revenue laws, we can easily understand the reluctance to add to the list of extraditable offenses those committed against the revenue laws.

In Great Britain a better understanding of the importance of international coöperation has brought a certain reaction. In 1929 Sankey, L. J., said:⁹

¹ "(Non-) Enforcement of Foreign Revenue Laws, in International Law and Practice," Alexander N. Sack, 81 *University of Pennsylvania Law Review*, 559-560.

² "It has been settled or at least considered ever since the time of Lord Hardwicke, that in a British court we cannot take notice of the revenue laws of a foreign state." *James v. Catherwood* (1823, Kings Bench), 3 Dow. & Ry. 190.

³ (1775, Kings Bench), 1 Cowp. 341. See also *Planche v. Fletcher* (1779, Kings Bench), 1 Doug. 251.

⁴ "A contract is, in general, invalid in so far as . . . the contract forms part of a transaction which is unlawful by the law of the country where the transaction is to take place." Dicey, *Conflict of Laws* (1927, 4th ed.), 618.

⁵ *Planche v. Fletcher* (1779, Kings Bench), 1 Doug. 251.

⁶ 42 Mississippi Reports, 444.

⁷ "The great majority of cases in France also validates these foreign contraband contracts." Sack, *op. cit.*, 564.

⁸ *Cours de Cassation*, 28 mars 1928, 56 *Journal du Droit International*, 333.

⁹ *Foster v. Driscoll* [1929], 1 Kings Bench Reports, 470. See also *Ralli Bros. v. Compania Naviera Sato y Azner* [1920], 2 Kings Bench Reports, 287.

. . . In my view the present position of the law is that the mere fact that a vendor of goods knows that the purchaser proposes to run them into a country where they are prohibited by some revenue law is not sufficient to render the contract of sale illegal, but if beyond mere knowledge the vendor actively engages in an adventure to get the goods into such country, the Court will not assist the parties to the adventure by entertaining or settling any dispute between the parties arising out of the contract.

The principle that a nation will encourage the violation of foreign revenue laws can be said, therefore, not to exist in English law today.¹

With the exception of France, Continental practice seems to have run counter to the English and American view.² Even in France cases may be found in which contracts violating revenue laws of a foreign nation have been declared illegal.³ Germany,⁴ Austria⁵ and Belgium⁶ uphold what has

¹ "But the decisions just noticed, validating contracts whose incidental effect is to evade foreign revenue laws, are condemned by the high authority of Pothier, of Judge Story, of Chancellor Kent, of Mr. Chitty, of Mr. Westlake, of Mohl and of Bar." Wharton's *Conflict of Laws* (3rd ed., 1905), 1139. "If our law be justifiable in protecting these transgressions, it can be only on the plea of necessity. But where is the necessity? Shall we be told, that it is impossible to ascertain in the English courts the complex provisions of another country's revenue law? . . . It may be true, that the rule of our law was adopted by way of retaliation for the illiberal conduct of other states and is continued from a cautious policy. But a cautious policy in a great State is but too often a narrow policy; and after all, the best policy for a State, as well as for an individual, will perhaps be found in honesty and honorable conduct. Indeed the system is so directly opposite to the clear principles of right feeling between man and man, that nothing could have withheld the States of Europe from concurring for its total abrogation, except the smallness of the gain or loss, that attends upon it." 1 Chitty on *Commerce and Manufacture*, 83-84. See also Marshall, *Insurance*, 1, 59-61; Westlake, *Private International Law* (7th ed.), 305; Story, *Conflict of Laws* (6th ed.), 316; Pollack, *Contracts* (9th ed.), 391.

² Sack, *op. cit.*, 564.

³ "Les opérations de contrebande à l'étranger ne tombent pas sous l'application des lois répressives françaises, mais elles n'en sont pas moins reprouvées par la conscience publique. Une société n'ayant pour objet des opérations de cette nature est frappé d'une nullité radicale et absolue, aussi bien que les sociétés ayant pour objet la contrebande en France." Trib. Dunkerque, 27 novembre 1906, 36 *Journal du Droit International*, 138.

⁴ "Si une charte-partie a pour objet l'exécution ou le concours à des opérations de contrebande professionnelle dirigée contre un État avec lequel on entretient des rapports amicaux, elle est nulle suivant le sec. 138 B.G.B.

"Selon la jurisprudence du Tribunal d'Empire toute sanction juridique doit être refusée en vertu du sec. 138 B.G.B. aux actes juridiques dont le caractère générale déterminé en considération de leur contenu, motif et but, pris dans leur ensemble, apparaît tant au point de vue objectif qu'au point de vue subjectif comme contraire aux bonnes mœurs. Relativement à la contrebande professionnelle dirigée contre un État ami, il est exigé par la jurisprudence, pour que le sec. 138 B.G.B. 1er alinéas, soit applicable, que les contrats la concernant aient pour objet direct de l'exécuteur ou d'y apporter une aide." Arrêt du 9 février 1926, Reichsgericht; 57 *Journal du Droit International*, 430.

⁵ "Le contrat conclu par le propriétaire d'une marchandise avec un commissionnaire-expéditeur dans le but de se procurer une fausse preuve d'une origine française de la marchandise, en vérité allemande, et de l'introduire par ce moyen frauduleux en Pologne malgré la guerre douanière germano-polonaise, est contraire aux bonnes mœurs et donc annulable pour cause illicite." Cour Suprême Vienne, 3 mars 1931, 58 *Journal du Droit International*, 1180.

⁶ "Attendu . . . que la contrebande ne viole pas seulement les lois fiscales étrangères, mais les notions de droit et de justice qui doivent dominer les relations internationales; qu'elle pervertir la loyauté commerciale et est un acte de concurrence malhonnête, même vis-à-vis des nationaux qui, plus scrupuleux, n'importent leurs marchandises dans les pays voisins qu'en acquittant les droits d'entrées." Arrêt rendu par la cour de Bruxelles le 17 février, 1886, 29 *Revue de Droit International*, p. 276.

Vide "Des Contrats conclus par Correspondance," M. A. Hindenburff, avocat à la Cour Suprême de Danemark, 29 *Revue de Droit International*, 275.

been called the doctrine of good morals, *i.e.*, that a nation ought not to encourage the violation of the revenue laws of another, even if such acts are not prohibited by its own laws, because such acts are against the essentials of comity and morality.

With the earlier tendencies practically abandoned in England, as well as generally on the Continent, it would seem that nations should be more ready to consider the extradition of fiscal offenders.¹ Indeed the same forces of comity and international friendship, as well as of economic advantages, which have been forcing into oblivion this rule, have also led some of the leading international law jurists to accept extradition of fiscal offenders as in the best interest of all nations concerned.

Travers, in his *Droit Pénal International*,² says:

We do not approve of that principle [non extradition of fiscal offenders]. Many treaties have provisions to do away with smuggling in connection with customs, and there is not any reason why other violations of fiscal laws be dealt with differently from custom's infractions. In the second place, the state has, generally speaking, more interest in seeing to it that its fiscal laws are kept, than in indirectly hindering the punishment of offenses committed against the fiscal laws of the foreign States. Consequently, the following treaties ought to be commended: between France and China, 1886 and 1915; France and Spain, 1916 (in regard to Morocco), and France and England, 1815 (in regard to India). These treaties must be considered for the reasons given above, as permitting extradition of fiscal offenses.³

¹ "It should be pointed out that the non inclusion of fiscal offenses in extradition treaties in the 19th century can be explained also because at the time the general tendency was to extradite only for 'grand crimes', *i.e.* crimes of such a nature that offended the universal and most elemental notions of morality like murder, rape, arson, etc. Offenses of a violent character against the person were the first included. Afterwards offenses against property, and offenses which were committed without violence were included in the extraditable list. The complexities of modern commercial life and the new requirements of social security have demanded that offenses which are not personal or violent be made extraditable. John Bassett Moore, writing a long time ago, said: 'There has been a general disposition on the part of the United States to include in extradition treaties crimes of violence and to exclude crimes of fraud. . . . In the refusal to include in its treaties of extradition crimes of fraud, the government of the United States has failed to recognize the change which, in the development of civilization, has taken place in the relative importance of criminal offenses.'" Moore, *Extradition* (1891), I, p. 111. ² IV, §2128

³ The treaty between France and Spain of 1916, in regard to Morocco, provides: Art. 2—"A person arrested by virtue of decisions, sentences, requisitions of preventive justice of one of the zones in the other zone, will be surrendered to the agents of the authorities asking for the surrender, at the place of exchange, later to be specified, without charge." This treaty does not limit the offenses for which extradition is possible, and therefore includes, according to Travers, fiscal offenses.

The treaty between France and China, in regard to Anaam, does not seem to be reciprocal in that France will extradite Chinese from Anaam only in cases in which they could be extradited from France proper, while China promises to extradite Frenchmen without any sort of limitation as to offences, thereby including fiscal offences. See Art. 17 of the Treaty.

Saint-Aubin, *L'Extradition et le Droit Extraditionnel* (1913), I, 387, tells of a French law of June 27, 1866, not included in the text of the code of criminal instruction, which authorized the prosecution in France of special offences committed in foreign countries, among others certain fiscal offences. Art. 5, sec. 2 of the law says: "Any Frenchman, guilty of offences and contraventions in matters of forestry, fisheries, customs and indirect contributions, committed within the territory of one of the neighboring states, can be prosecuted and tried in France according to French law, if that State authorizes the prosecution of its citizens for the same offenses committed in France."

The Model Draft of the International Penal and Prison Commission of 1931,¹ provides for the extradition of fiscal offenders in Art. 8, which reads:

Extradition shall only be granted for fiscal offences if they are punishable under the laws of the State making the application by imprisonment for a term of five years or more, if a sentence of imprisonment of two years or more has been validly pronounced, or if the offender has acted out of base motives. The decision regarding the nature of the motives shall be taken exclusively by the State applied to.²

M. Roux, Professor at the University of Strasbourg, and a member of the 1932 International Congress of Comparative Law at the Hague, is also of the opinion that fiscal offenders should be extradited, on the ground that a State, in its proprietary capacity, has the same rights as any private individual, and because exile is not enough sanction for such offenses.³

He also refers (*ibid.*, p. 391) to conventions between Spain and France, by which they agree that, when Frenchmen violate custom laws of Spain, or *vice versa*, within four leagues of the frontier, the accused shall be surrendered to his country (really extradited, although without formal procedure) in case of the first offense; for the second, he will be punished by the country whose revenue laws he violated.

¹ Appendix IV, No. 6.

² It is interesting to contrast penalty provisions of Canada and of the United States. Art. 593 of the United States Customs Laws (1922) punishes, generally, the smuggling or unlawful entry of merchandise of whatever nature into the United States by imprisonment not to exceed two years. Accordingly, smugglers of opium, coca leaves and other habit-forming drugs, as well as smugglers of jewelry, could only be extradited to the United States, under such a provision as that in the above draft on the ground of the base motives of the offender.

By Art. 203 of the Canadian Customs Law, if the articles smuggled or illegally entered are of a value under \$200, imprisonment will not exceed a year, but if the value is above \$200, imprisonment will be extended up to seven years. The result of the difference of punishment of these offenders in Canada and the United States would be, under Article 8 of the "Model Draft," that Canada could ask extradition for most offenses against her tariff laws, while the United States could not ask Canada to extradite the violators of her own laws.

Just the reverse situation is presented by the Income Tax-laws of both countries: the United States punishes (Income Tax Law of 1928, 45 Stat. at Large, 835) wilful evaders of the Income Tax-law with not to exceed five years imprisonment. Sec. 80 of Canada's Income Tax law only provides for 6 months imprisonment to its violators.

After a careful survey of all the fiscal offenses defined and punished by the Internal Revenue Laws of the United States (about 200 in number) only the following are punishable by imprisonment up to five years:

§454. Evading or attempting to evade tax on wines—5 yrs.

§337. Failing to efface marks, stamps, etc., on emptying cask or package having uncanceled stamps—5 years.

§485. Removing, using, etc., alcohol withdrawn for denaturing, in violation of provisions relating thereto—5 years.

§705. Violations of provisions relating to sale, etc., of opium and coca leaves—5 years.

§725. Violations of prohibitions concerning opium—5 years.

§765. Manufacturer of tobacco failing to procure or post certificate—5 years.

§781. Affixing false stamp to tobacco and snuff, box, or re-using stamp—5 years.

§882. Manufacturer failing to give bond—5 years.

§1183. Fraudulent execution of documents required by internal revenue law.

§1188. Manufacturing boxes, barrels, etc., unlawfully stamped or marked.

§1267. Aiding, assisting or advising in preparation or presentation of false return, etc.

All other offenses under the revenue laws are penalized by fines, or by imprisonment for from 3 months to 3 years.

³ "Pour les délits fiscaux, qui généralement ne figurent pas dans les traités particuliers d'extradition, la Commission pénale et pénitentiaire internationale a songé à les comprendre dans son avant-projet de traité type (art. 8). Il semble que ce soit avec raison. Un état, lésé dans ses intérêts pécuniaires, a le même droit qu'un particulier, pour que justice lui soit rendue. Les motifs de l'extradition se remontrent dans le bas. L'absence d'une

M. Ugo Aloisi, Italian representative at the same congress, substantially concurred in this view,¹ adding that the lack of punishment encouraged the continued commission of offenses.

The French Extradition Law of 1927, by omitting fiscal offenses from the list of non-extraditable offenses, has implicitly admitted that they can give rise to extradition proceedings, according to the maxim *inclusus unus est exclusus alterius*. Such is the opinion of Travers, in his recent book on the new French extradition law.² He hails such law in these enthusiastic words:

This is a reaction against the practice of non extraditing for fiscal offenses, which for a long time has remained unchallenged in Europe. We have shown the error of such practice in our *Traité de Droit Pénal International* (t. 4, no. 2128, p. 615) and we should congratulate the French Parliament for having taken a forward and decisive step in international coöperation.

He also cites the Bustamante Code³ as favoring the extradition of fiscal offenders, as well as the Rio de Janeiro Draft of 1912.⁴ He might have added that fiscal offenses are not excepted from the operation of the South American Convention of 1889,⁵ the Pan American Convention of 1902,⁶ the Montevideo Convention of 1933,⁷ the Central American Convention of 1934,⁸ Field's Code of 1876,⁹ or the Oxford Resolutions of 1880.¹⁰ On the other hand fiscal offenses are not included in the list of offenses in the Draft of the International Law Association of 1928.¹¹ Travers' Draft is in skeleton form,

répression d'imitation pour les autres fraudeurs; et l'exil n'est plus une sanction suffisante pour le délinquant lui-même." *Unification des règles relatives à l'extradition*. Rapport présenté par M. I. A. Roux, p. 7.

¹ "Le projet de la Commission Internationale Pénale et Pénitentiaire (art. 8) comprend les *délits fiscaux*, parmi les délits, pour lesquels l'extradition doit être accordée. Justement M. le Prof. Roux fait remarquer que un État, lésé dans ses propres biens patrimoniaux a le même droit d'un particulier a que justice lui soit rendue. D'autre part, la non-punibilité encouragerait les fraudeurs de l'État a perpétrer de nouveaux délits a son prejudice; tandis que l'exile ne serait pas un châtiment suffisant non plus pour le délinquant, qui a réussi a échapper a la justice de son Pays." Rapport de S. Exc. Ugo Aloisi, *Unification des règles relatives à l'extradition*, p. 45.

Fauchille, *Traité de Droit International Public* (1922), 1012, and Rolin, 16 *Revue de Droit International*, 159, have clearly shown that a fiscal offense is not in any way to be considered as a political offense, merely because it is committed directly against the State and not against a particular person. They distinguish, as is usually done in regard to our municipal corporations, the governmental and proprietary functions of the government. It is against the latter that such offenses are committed.

² *L'Entr'Aide Répressive Internationale* (1928), 110-112.

³ Appendix III, No. 5.

⁴ Appendix IV, No. 3. In both cases, M. Travers infers such tendency from the failure to expressly place fiscal offenses on the non-extraditable list. "... par leur silence meme sur les infractions fiscales, consacre une conception aussi large que la loi française du mars 10 1927." But he seems to be in error as to the Rio de Janeiro Draft, for that contains a list of extraditable offenses, and fiscal offenses are not included.

It is of interest in this connection to note that almost unanimously the extradition laws of the different nations, while making express declaration that political, and in some cases military and religious offenses are not extraditable, do not include fiscal offenses in the exception. See Appendix VI.

⁵ Appendix III, No. 2.

⁷ Appendix III, No. 6.

⁹ Appendix IV, No. 1.

¹¹ Appendix IV, No. 5.

⁶ Appendix III, No. 3.

⁸ Appendix III, No. 7.

¹⁰ Appendix IV, No. 2.

leaving to parties the option to except any or all of the following: military, political, fiscal or religious offenses.¹

The League of Nations took the lead in making coöperation in the field of fiscal affairs the rule and not the exception when it called in 1927 a general meeting of government experts to consider and discuss the matter of double taxation and tax evasion in its international aspects.² An invitation was extended to non-members of the League. The technical experts of 27 countries, including the United States, Great Britain, France, Germany, Bulgaria, China, Czechoslovakia, Danzig, Denmark, Estonia, Greece, Hungary, Irish Free State, Italy, Japan, Latvia, Netherlands, Norway, Poland, Rumania, South Africa, Spain, Sweden, Switzerland and Russia, agreed in principle³ on bilateral conventions for the prevention of double taxation in the matter of direct taxes and of succession or inheritance taxes, for the administrative assistance among the nations in matters of taxation, and finally for the assistance in the collection of taxes.⁴ This last convention, for the assistance in the collection of taxes, clearly shows that the reaction is in full swing against the narrow view that nations ought to disregard foreign revenue laws, and ought even to encourage their violation.

Austria and Hungary have already by bilateral conventions⁵ agreed to give each other such assistance as they need "regarding the prevention of, prosecution in respect of and punishment of infringements of customs regulations and regarding the mutual rendering of legal assistance in connection with such infringements," though this assistance is not rendered by means of extradition but by making the violation of the tariff law of one equally a violation of the tariff law of the other.⁶

The most convincing evidence which we could offer to show that nations are moving up to the point in which, for their mutual and best interests they are willing to extradite for fiscal offenses is the recent amendment to the extradition treaty between the United States and Mexico.⁷

Article 1 reads in part:

The High Contracting Parties agree that the following crimes are added to the list of crimes numbered 1 to 21 in the treaty of the 2nd of February, 1899:

24—Smuggling. Defined to be the act of wilfully and knowingly violating the custom laws with intent to defraud the revenue by international traffic in merchandise subject to duty.

While bipartite extradition treaties registered with the League of Nations, which list extraditable offenses, do not appear to show a tendency to include

¹ Note to Art. I, Appendix IV, No. 4.

² *League of Nations Official Journal*, Vol. 10, p. 205.

³ "The meeting, which is attended by the representatives of twenty-seven countries, notes that as regards their main principles, the model draft conventions prepared by the technical experts constitute a useful basis of discussion for the preparation of model texts, whose object shall be to prevent double taxation and tax evasion." *Ibid.*, p. 206.

⁴ *Ibid.*, p. 221.

⁵ *Ibid.*, Art. 17.

⁶ 16 *League of Nations Treaty Series*, p. 123.

⁷ Treaty of Dec. 23, 1925.

fiscal offenses in these lists,¹ it is interesting that, of the 40 no-list extradition treaties which have been registered, only 15 except fiscal offenses from their operation.²

In view of the tendency towards coöperation in fiscal affairs, and the fact that no multipartite no-list conventions and the majority of bipartite no-list treaties do not except fiscal offenses from their operation, it has not seemed desirable to except such offenses from the operation of this Convention. It is always to be borne in mind that a fiscal offense to be extraditable must carry a possible punishment of two years imprisonment or more in both the requesting and the requested States.³ However, as it is apparent that a number of States still desire to except fiscal offenses from the operation of extradition treaties, it has seemed wise to provide the present reservation.

RESERVATION NUMBER THREE NON-EXTRADITION OF NATIONALS WITH DUTY OF PROSECUTION

A requested State may decline to extradite a person claimed on the ground that he is a national of the requested State and was such national at the time when the act in question is alleged to have been done, if the act for which extradition is sought is punishable in the courts of the requested State; however, in any case in which this right to decline extradition is exercised, the requested State shall have a duty to prosecute the person claimed for the act for which his extradition is sought, [and in such a case, the requesting State shall have to furnish so far as practicable to the requested State all articles, documents, evidence and information which may be useful in expediting the trial].

COMMENT

See the comment attached on Article 7, on the subject of extradition of nationals.

While the non-extradition of nationals has not always gone hand in hand with provision under the municipal law for trial of nationals for acts done abroad,⁴ today it is probably to be found as a rule of national policy, embodied in municipal law, in cases of States which also, as a matter of national policy, oppose extradition of their nationals; and the assertion of jurisdiction to punish nationals for acts done abroad is given as a justification for their non-extradition.⁵ It is therefore reasonable, in the furtherance of inter

¹ See, for these treaties, Appendix I.

² (References are to Appendix I): Rumania-Czechoslovakia, Art. 3(d), No. 36; Estonia-Czechoslovakia, Art. 3(d), No. 37; Latvia-Czechoslovakia, Art. 3(d), No. 38; Bulgaria-Czechoslovakia, Art. 3(d), No. 39; Greece-Czechoslovakia, Art. 3(d), No. 50; Spain-Czechoslovakia, Art. 3(d), No. 51; Portugal-Czechoslovakia, Art. 3(d), No. 52; Hungary-Yugoslavia, Art. 3 (II), (4), No. 61; Bulgaria-Greece, Art. 3(d), No. 62; Bulgaria-Spain, Art. 3(d), No. 73; Latvia-Spain, Art. 3(d), No. 74; Germany-Turkey, Art. 5(3), No. 75; Poland-Sweden, Art. 3(d), No. 81; Sweden-Czechoslovakia, Art. 4(d), No. 88; Denmark-Czechoslovakia, Art. 3(d), No. 89.

³ See Article 2.

⁴ See the situation in France before 1866, *supra*, comment to Article 7.

⁵ Moore, *Extradition* (1891), I, §122, pp. 153 and 154; *Charlton v. Kelley* (1913), 229 U. S. 447.

national war on crime, to limit the scope of this reservation to cases where the act charged is punishable in the courts of the requested State. It is because the United States has not adopted a general policy of punishing its nationals for acts done abroad that, in ratifying the Montevideo Convention, it made a reservation to Article 2.¹

Though the trial of nationals for crimes committed in the territory of other States is generally agreed to be less satisfactory than trial in *foro delicti commissi*,² it is better that persons accused of crime should be tried before the courts of their own nationality than that they should not be tried at all. Therefore conventions and drafts, which have provided for the non-extradition of nationals have quite generally required that the requested State, which refuses extradition of one of its nationals, shall try him before its own courts.³

International solidarity in the suppression of crime seems to justify the inclusion in this reservation of the last clause for the supplying by the requesting State of articles, documents, evidence and information which, may be useful in expediting the trial in the courts of the nationality of accused persons. It is found in the Central American Convention.⁴

Certainly a reservation as to non-extradition of nationals should not apply to those who have acquired nationality by naturalization or marriage since the commission, outside of the territory of the requested State, of the act for which extradition is sought.⁵ This limitation is embodied in the second clause of the present reservation, requiring that the person claimed shall have been a national of the requested State "at the time when the act in question is alleged to have been done."⁶

When a State, in whose territory an offense has been committed, discovers that the offender has escaped to the territory of his State of nationality, and knows that that State will not extradite its nationals, it is likely to ask that State of nationality to undertake the prosecution of the offender so that he may not go free. If this is done, and later the culprit is found in the State where he committed the offense, there is no rule of international law to prevent his being prosecuted there also.⁷ In the absence of interstate agreement, it

¹ See Appendix III, No. 6.

² See opinions in comment attached to Article 7, *supra*.

³ Bustamante Code of 1928, Art. 345, Appendix III, No. 5; Montevideo Convention of 1933, Art. 2, Appendix III, No. 6; Central American Convention of 1934, Art. 4, Appendix III, No. 7; Rio de Janeiro Draft of 1912, Art. 5, Appendix IV, No. 3; Model Draft of the International Penal and Prison Commission, Art. 17, Appendix IV, No. 6.

⁴ Art. 4, Appendix III, No. 7; also in the Draft of the International Penal and Prison Commission, Art. 17, Appendix IV, No. 6.

⁵ Travers, *Droit Pénal International* (1922), V, §§2249 to 2256, pp. 41 to 48; Resolutions of Oxford (1880), Art. 7, Appendix IV, No. 2.

⁶ French Law of May 10, 1927, Art. 5, has the same provision. See Appendix VI, No. 7. Similar provisions are found in the laws of Estonia, Latvia and Lithuania, following the Russian Penal Code of 1914, Art. 852(3); of Ecuador, Extradition Law, Oct. 6, 1921, Art. 41; of Panama, Extradition Law, Nov. 22, 1930, Art. 5; of Peru, Extradition Law, Oct. 23, 1882, Art. 3. Mexico and Cuba provide that naturalization shall only bar extradition if the person claimed has been a citizen for two years. Mexican Law, May 19, 1897, Art. 10, §3.

⁷ Travers, "Les effets Internationaux de Jugements Répressifs," *Cours de l'Académie*

will be a question of municipal law as to whether the proceedings will be barred or the penalty reduced by the proceedings in the State of nationality.¹

In some instances municipal law has provided that a person convicted of an offense, for which he has previously been tried and punished in another State, shall have the earlier punishment deducted from the punishment to be imposed. This has not proved satisfactory to certain States, which have declared by legislation that they will only pursue their own national for an offense committed abroad, at the instance of the State in whose territory the offense was committed, if that State shall guarantee not to prosecute the person in question for the same offense. A number of States, including France, have also now made a broad legislative declaration that they will not put a person on trial for an offense with regard to which he has been finally judged in another State.²

In some extradition treaties, in connection with the declaration against the extradition of nationals, it is provided that the State of nationality will try its nationals at the request of the other party, whose laws have been infringed, the other party agreeing upon its part not to prosecute the same person for the same offense.³

It has not been thought necessary or wise to incorporate such a provision in this reservation. It would be likely to meet with strong opposition;⁴ and it is not at all clear that the doctrine *non bis in idem* should be carried so far as entirely to exclude successive prosecutions in different States for the same offense, when the first prosecution is undertaken by the State of the accused's nationality, within whose territory the alleged offense did not take place.⁵

RESERVATION NUMBER FOUR NON-EXTRADITION OF NATIONALS WITHOUT DUTY OF PROSECUTION

A requested State may decline to extradite a person claimed on the ground that he is a national of the requested State, and was such national at the time when the act in question is alleged to have been done.

COMMENT

See comment on Article 7, and on Reservation Number Three.

This reservation is included because there are States which are reluctant to extradite their nationals, and yet who do not provide for the prosecution of their nationals for acts done abroad. Such States could not fulfil this condition incorporated in Reservation Number Three.

RESERVATION NUMBER FIVE *PRIMA FACIE* CASE

A requested State may require that the requesting State make out a *prima facie* case of guilt on the part of the person claimed such as would be

Internationale de la Haye, p. 40; Barbey, *De L'Application Internationale de la Règle Non Bis in Idem en Matière Répressive* (1930), p. 49.

¹ Barbey, *op. cit.*, pp. 97-126.

² *Ibid.*, pp. 83-96.

⁴ *Ibid.*, p. 90.

³ *Ibid.*, pp. 89 and 90.

⁵ See comment on Article 9 of this Convention.

sufficient, in case the person claimed were accused of having committed the alleged act or acts within the territory of the requested State, to justify a magistrate of that State in ordering that he be held for trial.

COMMENT

The subject of the *prima facie* case is fully discussed in comment on Article 17, paragraph (2) (a) *supra*.

Because the doctrine of the *prima facie* case is so strongly adhered to at present by the United States and Great Britain, and because it has been accepted by some other States, it has seemed advisable to provide the present reservation.

RESERVATION NUMBER SIX *PRIMA FACIE* CASE IN EXTRADITION OF NATIONALS

A requested State may require that the requesting State make out a *prima facie* case of guilt on the part of the person claimed, if he is a national of the requested State, such as would be sufficient, in case the person claimed were accused of having committed the alleged act or acts within the territory of the requested State, to justify a magistrate of that State in ordering that he be held for trial.

COMMENT

See the comment on Article 17, paragraph (2) (a), and on Reservation Number Five.

This reservation differs only from the one next preceding in that this one applies only when extradition of a national of the requested State is involved. It is thought that States which will insist upon a *prima facie* case being made out against one of its nationals, will be willing to accept the provisions of Article 17 of this Convention when the surrender of nationals of other States are requested.

SCHEDULE B

DECLARATION AS TO POLITICAL AND MILITARY OFFENSES

A requested State which has signed this declaration will not extradite a person claimed if the extradition is sought for an act which constitutes a political or military offense, or if it appears to the requested State that extradition is sought in order that the person claimed may be prosecuted or punished for a political or military offense, and will not give consent to such prosecution or punishment of a person who has been extradited.

COMMENT

This declaration is provided for those States which prefer to bind themselves in no case to extradite the persons here named, instead of exercising the discretion which is allowed by the terms of Articles 5 and 6 of this Convention.

APPENDIX I

CHRONOLOGICAL LIST OF EXTRADITION TREATIES

Registered and Published in League of Nations Treaty Series

1. AUSTRIA—HUNGARY—GREECE	1904	2 L.N.T.S.	174
2. GERMANY—GREECE	1907	2 L.N.T.S.	112
3. COLOMBIA—CHILE	1914	82 L.N.T.S.	244
*4. ESTONIA—LATVIA	1921	37 L.N.T.S.	423
*5. ESTONIA—LITHUANIA	1921	43 L.N.T.S.	179
*6. LATVIA—LITHUANIA	1921	25 L.N.T.S.	312
7. UNITED STATES—SIAM	1922	25 L.N.T.S.	395
*8. BRAZIL—PARAGUAY	1922	138 L.N.T.S.	211
9. UNITED STATES—GREAT BRITAIN	1922	14 L.N.T.S.	91
*10. ITALY—KINGDOM OF SERBS, CROATS AND SLOVENES	1922	118 L.N.T.S.	221
*11. GERMANY—CZECHOSLOVAKIA	1922	23 L.N.T.S.	173
*12. ITALY—CZECHOSLOVAKIA	1922	55 L.N.T.S.	171
13. UNITED STATES—VENEZUELA	1922	49 L.N.T.S.	435
14. UNITED STATES—LATVIA	1923	27 L.N.T.S.	372
15. UNITED STATES—ESTONIA	1923	43 L.N.T.S.	277
*16. BULGARIA—KINGDOM OF SERBS, CROATS AND SLOVENES	1923	26 L.N.T.S.	120
*17. FINLAND—SWEDEN	1923	23 L.N.T.S.	51
18. FINLAND—DENMARK	1923	18 L.N.T.S.	33
19. SWITZERLAND—URUGUAY	1923	63 L.N.T.S.	207
20. GREAT BRITAIN—LATVIA	1924	37 L.N.T.S.	369
21. FINLAND—LATVIA	1924	38 L.N.T.S.	344
*22. BULGARIA—RUMANIA	1924	33 L.N.T.S.	223
23. UNITED STATES—FINLAND	1924	34 L.N.T.S.	104
24. UNITED STATES—BULGARIA	1924	26 L.N.T.S.	29
25. GREAT BRITAIN—FINLAND	1924	34 L.N.T.S.	80
26. UNITED STATES—LITHUANIA	1924	51 L.N.T.S.	191
27. HUNGARY—RUMANIA	1924	42 L.N.T.S.	145
28. GREAT BRITAIN—CZECHOSLOVAKIA	1924	59 L.N.T.S.	269
29. FRANCE—LATVIA	1924	93 L.N.T.S.	265
30. GREAT BRITAIN—ESTONIA	1925	50 L.N.T.S.	225
31. UNITED STATES—CZECHOSLOVAKIA	1925	50 L.N.T.S.	143
32. FRANCE—POLAND	1925	95 L.N.T.S.	217
33. ESTONIA—FINLAND	1925	43 L.N.T.S.	11
34. AUSTRIA—NORWAY	1925	48 L.N.T.S.	77
*35. FINLAND—NORWAY	1925	43 L.N.T.S.	381
*36. RUMANIA—CZECHOSLOVAKIA	1925	54 L.N.T.S.	51
*37. ESTONIA—CZECHOSLOVAKIA	1926	63 L.N.T.S.	255
*38. LATVIA—CZECHOSLOVAKIA	1926	62 L.N.T.S.	229
*39. BULGARIA—CZECHOSLOVAKIA	1926	60 L.N.T.S.	169
40. BELGIUM—PARAGUAY	1926	97 L.N.T.S.	197
41. BELGIUM—ESTONIA	1926	65 L.N.T.S.	407
42. BELGIUM—LATVIA	1926	63 L.N.T.S.	299
43. FRANCE—SAN MARINO	1926	89 L.N.T.S.	9
*44. ALBANIA—KINGDOM OF SERBS, CROATS AND SLOVENES	1926	91 L.N.T.S.	81
45. AUSTRIA—ESTONIA	1926	74 L.N.T.S.	213
46. GREAT BRITAIN—LITHUANIA	1926	61 L.N.T.S.	401

47. GREAT BRITAIN—ALBANIA	1926	69	L.N.T.S.	165
48. LIBERIA—MONACO	1926	68	L.N.T.S.	241
49. ALBANIA—GREECE	1926	83	L.N.T.S.	305
*50. GREECE—CZECHOSLOVAKIA	1927	88	L.N.T.S.	219
*51. SPAIN—CZECHOSLOVAKIA	1927	121	L.N.T.S.	271
*52. PORTUGAL—CZECHOSLOVAKIA	1927	124	L.N.T.S.	7
53. BELGIUM—CZECHOSLOVAKIA	1927	73	L.N.T.S.	283
*54. COLOMBIA—PANAMA	1927	87	L.N.T.S.	409
*55. LATVIA—NORWAY	1927	71	L.N.T.S.	303
56. BELGIUM—LITHUANIA	1927	77	L.N.T.S.	123
57. UNITED STATES—POLAND	1927	92	L.N.T.S.	101
58. BELGIUM—FINLAND	1928	74	L.N.T.S.	353
59. AUSTRIA—FINLAND	1928	89	L.N.T.S.	69
60. FRANCE—CZECHOSLOVAKIA	1928	114	L.N.T.S.	117
*61. HUNGARY—KINGDOM OF SERBS, CROATS AND SLOVENES	1928	104	L.N.T.S.	151
*62. BULGARIA—GREECE	1928	106	L.N.T.S.	443
*63. COLOMBIA—NICARAGUA	1928	132	L.N.T.S.	261
64. LATVIA—HUNGARY	1928	101	L.N.T.S.	449
*65. BULGARIA—TURKEY	1928	122	L.N.T.S.	17
*66. FINLAND—ITALY	1928	111	L.N.T.S.	297
*67. ITALY—VENEZUELA	1930	128	L.N.T.S.	377
68. LATVIA—NETHERLANDS	1930	117	L.N.T.S.	343
69. TURKEY—CZECHOSLOVAKIA	1930	138	L.N.T.S.	325
70. UNITED STATES—GERMANY	1930	119	L.N.T.S.	247
71. UNITED STATES—AUSTRIA	1930	106	L.N.T.S.	379
72. AUSTRIA—SWEDEN	1930	105	L.N.T.S.	313
*73. BULGARIA—SPAIN	1930	114	L.N.T.S.	43
*74. LATVIA—SPAIN	1930	113	L.N.T.S.	135
*75. GERMANY—TURKEY	1930	133	L.N.T.S.	321
*76. ESTONIA—NORWAY	1930	106	L.N.T.S.	147
77. ESTONIA—DENMARK	1930	106	L.N.T.S.	159
*78. LATVIA—SWEDEN	1930	110	L.N.T.S.	139
79. LATVIA—DENMARK	1930	113	L.N.T.S.	169
80. ESTONIA—SWEDEN	1930	106	L.N.T.S.	279
*81. POLAND—SWEDEN	1930	129	L.N.T.S.	383
*82. ITALY—PANAMA	1930	140	L.N.T.S.	241
*83. LITHUANIA—CZECHOSLOVAKIA	1931	126	L.N.T.S.	261
84. UNITED STATES—GREECE	1931	138	L.N.T.S.	293
85. BELGIUM—POLAND	1931	131	L.N.T.S.	109
86. NETHERLANDS—CZECHOSLOVAKIA	1931	129	L.N.T.S.	343
*87. ITALY—BRAZIL	1931	132	L.N.T.S.	345
*88. SWEDEN—CZECHOSLOVAKIA	1931	134	L.N.T.S.	136
*89. DENMARK—CZECHOSLOVAKIA	1931	127	L.N.T.S.	103
90. AUSTRIA—BELGIUM	1932	129	L.N.T.S.	141
*91. IRAQ—TURKEY	1932	139	L.N.T.S.	273
*92. AUSTRIA—LATVIA	1932	133	L.N.T.S.	59
93. GREAT BRITAIN—IRAQ	1932	141	L.N.T.S.	277
94. BRAZIL—SWITZERLAND	1932	145	L.N.T.S.	167
95. FINLAND—NETHERLANDS	1933	139	L.N.T.S.	365
96. ESTONIA—NETHERLANDS	1933	146	L.N.T.S.	319
98. ROUMANIA—YUGOSLAVIA	1933	146	L.N.T.S.	81

* Indicates the absence in the text of the list of extraditable offenses. There are 40 no-list treaties.

APPENDIX II (A)

EXTRADITABLE OFFENSES IN UNITED STATES TREATIES

Between 1900 and 1930

LIST OF TREATIES

CHILE, 1900. 1 Malloy, 192
 SWITZERLAND, 1900. 2 Malloy, 1771
 BOLIVIA, 1900. 1 Malloy, 125
 SERBIA, 1901. 2 Malloy, 1622
 BELGIUM, 1901. 1 Malloy, 106
 DENMARK, 1902. 1 Malloy, 390
 MEXICO, 1902. 1 Malloy, 1193 (Suppl. Conv.)
 GUATEMALA, 1903. 1 Malloy, 878
 CUBA, 1904. 1 Malloy, 366
 HAITI, 1904. 1 Malloy, 941
 PANAMA, 1904. 2 Malloy, 1357
 SPAIN, 1904. 2 Malloy, 171
 GREAT BRITAIN, 1905. 1 Malloy, 798 (Suppl. Conv.)
 DENMARK, 1905. 1 Malloy, 395 (Suppl. Conv.)
 NICARAGUA, 1905. 2 Malloy, 1292
 URUGUAY, 1905. 2 Malloy, 1825
 JAPAN, 1906. 1 Malloy, 1039 (Suppl. Conv.)
 SAN MARINO, 1906. 2 Malloy, 1598
 PORTUGAL, 1908. 2 Malloy, 1469
 DOMINICAN REPUBLIC, 1909. 3 Malloy, 2567; Treaty Series No. 550
 FRANCE, 1909. 3 Malloy, 2580; Treaty Series No. 561
 HONDURAS, 1909. 3 Malloy, 2685; Treaty Series No. 589
 SALVADOR, 1911. 3 Malloy, 2820; Treaty Series No. 560
 PARAGUAY, 1913. 3 Malloy, 2783; Treaty Series No. 584
 COSTA RICA, 1922. 3 Malloy, 2548, Treaty Series No. 668
 VENEZUELA, 1922. 3 Malloy, 2870; Treaty Series No. 675
 SIAM, 1922. Treaty Series No. 681
 LATVIA, 1923. Treaty Series No. 677
 ESTONIA, 1923. Treaty Series No. 703
 BULGARIA, 1924. Treaty Series No. 687
 LITHUANIA, 1924. Treaty Series No. 699
 FINLAND, 1924. Treaty Series No. 710
 RUMANIA, 1924. Treaty Series No. 713
 MEXICO, 1925. Treaty Series No. 741 (Suppl. Conv.)
 GREAT BRITAIN, 1925. Treaty Series No. 719 (Suppl. Conv.)
 CZECHOSLOVAKIA, 1925. Treaty Series No. 734
 CUBA, 1926. Treaty Series No. 737 (Suppl. Conv.)
 HONDURAS, 1927. Treaty Series No. 761 (Suppl. Conv.)
 POLAND, 1929. Treaty Series No. 784
 FRANCE, 1929. Treaty Series No. 787 (Suppl. Conv.)
 AUSTRIA, 1930. Treaty Series No. 822
 GERMANY, 1930. Treaty Series No. 836

LIST OF OFFENSES

Unless otherwise specified in the note following each extraditable offense, such offense is enumerated in every treaty contained in this list. Unless otherwise indicated, the list of extraditable offenses is contained in Article II of the extradition treaties.

1. Murder (comprehending the crimes, parricide, assassination, voluntary manslaughter, poisoning and infanticide) and attempt to commit murder.

Note. The following treaties do not include an attempt to commit murder among extraditable offenses:

United States—Czechoslovakia, 1925, Art. II (1). T. S. No. 734.

United States—Austria, 1930, Art. II (1). T. S. No. 822.

United States—Germany, 1930, Art. III (1). T. S. No. 836.

The treaty with Germany indicates a departure from the definition of murder in that manslaughter need not be voluntary in order to constitute extraditable offense. The text of Art. III, par. (1) of the treaty with Germany reads: "Murder, including the crimes designated by the terms assassination, manslaughter and infanticide."

In the more recent treaties, attempt to commit murder is enumerated separately as an offense, as numbers 1 and 2 of the list (Appendix I). In the earlier treaties attempt is listed together with murder, assassination, etc.

2. Rape, abortion, carnal knowledge of children under a certain age.

Note. The earlier treaties usually listed rape with abduction and kidnapping (Chile, 1900, 1 Malloy 192; Bolivia, 1900, 1 Malloy 125; Serbia, 1901, 1 Malloy 1622; Denmark, 1902, 1 Malloy 390), although these offenses in later treaties are listed separately.

The treaty with Switzerland, 1900 (2 Malloy 1771), lists abduction, rape, kidnapping of minors, bigamy and abortion together.

In the treaty with Uruguay, 1905 (2 Malloy 1825), rape, abortion and bigamy are listed separately.

The treaties with Cuba, 1904 (1 Malloy 366), and with Nicaragua, 1905 (2 Malloy 1292), omit abortion from the list of extraditable offenses. While in the treaty with Cuba rape is listed together with bigamy, in the treaty with Nicaragua these two offenses are listed separately.

The treaties with Belgium, 1901 (1 Malloy 106), with San Marino, 1906 (2 Malloy 1598), and with France, 1909 (3 Malloy 2581; T. S. No. 561), list rape, abortion and bigamy together; the Belgian and San Marino treaties, moreover, specify attempt to commit rape as an extraditable offense in this category of crimes.

A change in the phrasing of this type of offense was introduced in the treaty with Honduras, 1909 (3 Malloy 2685; T. S. No. 589), (this phrasing also occurs, however, in the treaty with Spain, 1904, 2 Malloy 1712, Art. II (3)), in that carnal knowledge of children under the age of 12 was listed with rape and abortion as extraditable offense; this provision is contained in every extradition treaty concluded thereafter without change of phraseology up to the treaty with Germany, 1930, Art. III (T. S. No. 836), which latter treaty added immoral assault and incest to this category of crimes. The age limit of children is usually 12 years, with the exception of the following treaties: Czechoslovakia, 1925 (T. S. No. 734), and Austria, 1930 (T. S. No. 822), where the age limit is 14.

It should be observed that beginning with the treaty with Honduras, 1909 (3 Malloy 2685; T. S. No. 589), bigamy is not any longer listed with this category but always separately. It is listed separately in the treaty with Haiti, 1904 (1 Malloy 941) Art. II (9).

The Supplementary Convention with Cuba (T. S. No. 737), changed the text of Art. II (10) of the original treaty of 1904 (1 Malloy 366) to read:

"Rape; bigamy; immoral abuses when made criminal by the laws of both countries" and added abortion as well as "seduction and corruption of minors if made criminal by the laws of both countries" to the list of extraditable offenses.

3. Bigamy.

Note. See Note under rape as to listing bigamy with rape and other offenses in earlier treaties. Beginning with the treaty with Honduras, 1909 (3 Malloy 2685; T. S. No. 589), all

subsequent treaties list bigamy by itself as a separate item on the list of extraditable offenses.¹

In the following treaties bigamy is not included in the list of extraditable offenses:

Chile, 1900 (1 Malloy 192)

Bolivia, 1900 (1 Malloy 125)

Serbia, 1901 (2 Malloy 1622)

Denmark, 1902 (1 Malloy 106)

Panama, 1904 (2 Malloy 1357)

4. Arson.

Note. Contained in the list of all extradition treaties. Listed with destruction of railways, Haiti, 1904 (1 Malloy 941), Art. II (7).

5. Wilful and unlawful destruction or obstruction of railroads which endangers human life.

Note. With the exceptions indicated hereafter, this offense is included in the list of every extradition treaty without change of phraseology. The following treaties contain a broader definition of this offense:

Denmark, 1902 (1 Malloy 390), Art. II (10): "Malicious destruction of, or attempt to destroy, railways, trains or cars, bridges, dwellings, public edifices, or other buildings when the act endangers human life."

Guatemala, 1903 (1 Malloy 878), Art. II (3), and Nicaragua, 1905 (2 Malloy 1292), Art. II (3): "The malicious and unlawful destruction or attempted destruction of railways, trains, bridges, vehicles, vessels, and other means of travel, or of public edifices and private dwellings, when the act committed shall endanger human life."

Cuba, 1904 (1 Malloy 366), Art. II (11): "Willful and unlawful destruction or obstruction of railroads, trains, bridges, vehicles, vessels or other means of transportation or public or private buildings, when the act committed endangers human life."

A curious shift in substance can be seen in the treaty with Germany, 1930 (T. S. No. 836), Art. III. While in all the previous treaties the important test which makes this type of offense extraditable is—in spite of the slight change in phraseology indicated above—that the act (or attempt) should endanger *human life*. This test is shifted in the German treaty to danger to *traffic*. The provision in this treaty reads: "Willful and unlawful destruction or obstruction of railroads, which endangers traffic."

Haiti, 1904 (1 Malloy 941), Art. II (7). This offense is listed with arson; the text reads: "destruction of railways, bridges, trainways, vessels, public edifices, or other buildings, endangering human life."

6. Crimes committed at sea:

(a) Piracy, as commonly known and defined by the law of nations or by statute.

(b) Wrongfully sinking or destroying a vessel at sea or attempting to do so.

(c) Mutiny or conspiracy by two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain or commander of such vessel or by fraud or violence taking possession of such vessel.

(d) Assault on board ships upon the high seas with intent to do bodily harm.

Note. This phraseology was first used in the treaty with Portugal, 1908 (2 Malloy 1469), Art. II (7), and has been used thereafter in every extradition treaty with the exceptions noted below in the treaties with France, 1909, and with Germany, 1936.

Some of the earlier treaties listed the various offenses committed at sea in one comprehensive paragraph.

Switzerland, 1900 (2 Malloy 1771), Art. II (11): "Piracy; willful acts causing the loss or destruction of a vessel."

¹ The offense is listed separately in the treaty with Haiti, 1904 (1 Malloy 941), Art. II (10).

Belgium, 1901 (1 Malloy 106), Art. II (5)

Uruguay, 1905 (2 Malloy 1825), Art. II (5)

San Marino, 1906 (2 Malloy 1598), Art. II (5)

"Piracy, or mutiny on shipboard whenever the crew, or part thereof, shall have taken possession of the vessel by fraud or by violence against the commander."

The other early treaties, preceding the treaty with Portugal, while in substance identical with the above standard phraseology, used a somewhat simpler text. The following treaties:

Chile, 1900 (1 Malloy 192)

Bolivia, 1900 (1 Malloy 125)

Serbia, 1901 (2 Malloy 1622)

Denmark, 1902 (1 Malloy 390)

Guatemala, 1903 (1 Malloy 878)

Cuba, 1904 (1 Malloy 366)

Haiti, 1904 (1 Malloy 941) Art. II (12): "Piracy, as defined by statute or international law."

Panama, 1904 (2 Malloy 1357)

Nicaragua, 1905 (2 Malloy 1292) used the following text:

"Crimes committed at sea:

"(a) Piracy, by statute or by the law of nations.

"(b) Wrongfully sinking or destroying a vessel at sea, or attempting to do so.

"(c) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master.

"(d) Assaults on board a ship on the high seas with intent to do grievous bodily harm."

In the treaty with France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (13), the following, slightly different, text was adopted:

"a) Piracy, by the law of nations.

"b) The act by any person, being or not being one of the crew of a vessel, of taking possession of such vessel by fraud or violence.

"c) Wrongfully sinking or destroying a vessel at sea.

"d) Revolt or conspiracy to revolt, by two or more persons on board a ship on the high seas, against the authority of the captain or master.

"e) Assaults on board a ship on the high seas, with intent to do grievous bodily harm."

Some changes may be noticed in the treaty with Germany, 1930 (T. S. No. 836), Art. III. The offenses forming subsections of a paragraph devoted to "Crimes committed at sea" in all the earlier treaties (with the exceptions noted above with respect to treaties with Switzerland, Belgium, Uruguay and San Marino), are listed in the German treaty separately. There is also some textual modifications: Piracy is not followed by the customary proviso "as commonly known and defined by the law of nations or by statute." The proviso concerning sinking of vessels reads: "Wrongfully sinking or destroying a vessel." In other words, the qualification that such act should be committed "at sea" is not retained. Nor is the attempt proviso included. Finally, the assault proviso reads: "Assault on board ship upon the high seas committed by a member of the crew upon an officer." This is a substantial departure from the heretofore standard provision which is in general terms and does not require that the person committing the assault be a member of the crew, nor that the assaulted be an officer. On the other hand, the text in the German treaty does not require, as the standard proviso does, that the assault be committed with intent to do bodily harm.

7. Robbery, defined to be the act of feloniously and forcibly taking from the person of another goods or money by violence or by putting him in fear.

Note. The crime of robbery is included in every treaty, but in the earlier treaties it was listed together with other offenses. The standard proviso with the definition listed separately appeared the first time in the treaty with Guatemala, 1903 (1 Malloy 878), Art. II (10), and appears in this form in every subsequent treaty with the following exceptions:

Panama, 1904 (2 Malloy 1357)
 Cuba, 1904 (1 Malloy 366)
 San Marino, 1906 (2 Malloy 1598)
 France, 1909 (3 Malloy 2580; T. S. No. 561)
 As to these exceptions see below.

In the treaties with Switzerland, 1900 (2 Malloy 1771) Art. II (3), Denmark, 1902 (1 Malloy 390) Art. II (3), Cuba, 1904 (1 Malloy 366) Art. II (3), and France, 1909 (3 Malloy 2580) Art. II (4), robbery is listed with burglary, house-breaking and shop-breaking. The Swiss and French treaties content themselves with enumerating these four offenses without any definitions. The Danish and Cuban treaties contain the standard definition of robbery; the other three offenses are listed without any definition.

In the treaties with Chile, 1900 (1 Malloy 192), Bolivia, 1900 (1 Malloy 125) and Panama, 1904 (2 Malloy 1357), Art. II (3), robbery is listed with burglary. The definition of robbery in these three treaties is slightly different from the later adopted standard definition ("the act of feloniously and forcibly taking from the person of another money, goods, documents, or other property"); burglary, on the other hand, is not defined.

The Serbian treaty, 1901 (2 Malloy 1622), Art. II (3), lists robbery, with burglary, house-breaking and shop-breaking. Robbery and burglary are defined; the two other offenses merely named. The definition of robbery is the standard text which was adopted in the treaty with Guatemala, concluded in the same year. The definition of burglary is "the act of breaking and entering by night, into the dwelling house of another, with intent to commit felony"—this became the standard text recurring in later treaties where burglary is listed separately. See *Note* under burglary.

In the treaties with Belgium, 1901 (1 Malloy 106), Haiti, 1904 (1 Malloy 941) Art. II (5), San Marino, 1906 (2 Malloy 1598), in all three Art. II (6), and with Finland, 1924 (T. S. No. 710), Art. II (9), robbery is listed with larceny and burglary. Larceny is not defined; the definitions of robbery and burglary correspond to the standard text. This paragraph of the Belgian and San Marino treaties reads:

"Larceny; the crime of burglary, defined . . . ; and the crime of robbery, defined . . . ; and the corresponding crimes punished by the Belgian [San Marino] laws under the description of thefts committed in an inhabited house by night, and by breaking in by climbing or forcibly, and thefts committed with violence or by means of threats."

The clause in the Finnish treaty reads: "Burglary, robbery with violence, and larceny when the amount stolen exceeds two hundred dollars or Finnish equivalent." This treaty is the only one where a minimum is set above which the crime of burglary or robbery becomes extraditable.

Finally the treaty with Rumania, 1924 (T. S. No. 713) Art. II, and the German treaty, 1930 (T. S. No. 836) Art. III (12), omitted the characterization of "feloniously and forcibly"; the text reads:

"Robbery, defined to be the act of taking from the person of another goods or money by violence or by putting him in fear."

8. Burglary, defined to be the act of breaking into and entering the house of another in the night time with intent to commit a felony therein.

Note. As to the listing of burglary together with robbery and other similar crimes in earlier treaties see *Note* under robbery. It was listed separately the first time in the treaty with Guatemala, 1903 (1 Malloy 878), Art. II (8), and appears thereafter in every treaty as such, without change of phraseology with the exception of the following treaties:

Cuba, 1904 (1 Malloy 366), Art. II (3)
 Panama, 1904 (2 Malloy 1357), Art. II (3)
 Uruguay, 1905 (2 Malloy 1825), Art. II (7)
 San Marino, 1906 (2 Malloy 1598), Art. II (6)
 France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (4)

Germany, 1930 (T. S. No. 836), Art. III (11).

In the first five of these treaties, burglary is listed with robbery and other offenses. In the treaty with Germany, the phraseology is changed to read:

"Breaking into and entering the house or the office of another with intent to commit a theft therein."

9. The act of breaking into and entering the office of the Government and public authorities or the offices of banks, banking-houses, savings-banks, trust-companies, insurance and other companies, or other buildings not dwellings with intent to commit a felony therein.

Note. This offense is first specified in the treaty with Guatemala, 1903 (1 Malloy 878), Art. II (9), and appears thereafter in every treaty with the following exceptions:

Cuba, 1904 (1 Malloy 366)—Haiti, 1904 (1 Malloy 941)

Haiti, 1904 (1 Malloy 941)

Panama, 1904 (2 Malloy 1357)

Uruguay, 1905 (2 Malloy 1825)

San Marino, 1906 (2 Malloy 1598)

France, 1909 (3 Malloy 2580; T. S. No. 561)

The German treaty 1930 (T. S. No. 836), Art. III (11), apparently included this offense in a simplified definition of burglary; for text see *Note* under Burglary.

10. Forgery or the utterance of forged papers.

Note. Standard proviso appearing in every treaty with the following changes of phraseology:

In the treaty with Switzerland, 1900 (2 Malloy 1771), Art. II (4): "The counterfeiting or forgery of public and private instruments; the fraudulent use of counterfeited or forged instruments."

In the treaties with Belgium, 1901 (1 Malloy 106), and San Marino, 1906 (2 Malloy 1598), Art. II (7): "The crime of forgery, by which is understood the utterance of forged papers, and also the counterfeiting of public, sovereign, or governmental acts."

In the treaties with:

Chile, 1900 (1 Malloy 192)

Bolivia, 1900 (1 Malloy 125)

Serbia, 1901 (2 Malloy 1622)

Denmark, 1901 (1 Malloy 390)

Cuba, 1904 (1 Malloy 366)

Panama, 1904 (2 Malloy 1357)

Uruguay, 1905 (2 Malloy 1825)

France, 1909 (3 Malloy 2580; T. S. No. 561)

} Art. II (4)

} Art. II (5)

to "forgery or utterance of forged papers" is added: "the forgery or falsification of official acts of Government, of public authorities, or of courts of justice, or the utterance of the thing forged or falsified."

This second part of the proviso in later treaties is listed separately as distinguished from the crime of forgery of private documents. The distinction is first made,—*i.e.*, the crime of forgery of private papers is first listed separately—in the treaty with Guatemala, 1903 (1 Malloy 878), Art. II (11).

The Treaty with Venezuela, 1922 (T. S. No. 672), Art. II (11), contains the following modification:

"Forgery or the utterance of forged papers or the illegal sale of documents belonging to the national archives."

The treaty with Poland, 1929 (T. S. No. 789), Art. II (9), makes the fraudulent use of forged papers an extraditable offense under this heading only when the loss occasioned exceeds \$1,000 or its Polish equivalent.

Haiti, 1904 (1 Malloy 941), Art. II (7): "Forging of public or private documents; use of forged documents."

11. The forgery or falsification of the official acts of the Government or public authority, including courts of justice, or the uttering or fraudulent use of the same.

Note. The distinction between the forgery of public documents and of private papers, and the separate listing of these offenses, can first be found in the treaty of Guatemala, 1903 (1 Malloy 878), Art. II (12). In the earlier treaties and some of the later treaties (Chile, 1900; Bolivia, 1900; Serbia, 1901; Denmark, 1902; Cuba, 1904; Haiti, 1904; Panama, 1904; Uruguay, 1905; San Marino, 1906; France, 1909), forgery of public as well as of private documents were listed together. See *Note* under Forgery of papers.

The treaty with Poland, 1929 (T. S. No. 789), does not contain this clause; nor is there any indication in the forgery clause that it includes public as well as private papers.

12. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, created by national, state, provincial, territorial, local or municipal governments, bank notes, or other instruments of public credit; of counterfeit seals, stamps, dies and marks of State or public administration, and the utterance, circulation, or fraudulent use of any of the above mentioned objects.

Note. Counterfeiting of money is listed separately in every treaty with the sole exception of the treaty with Uruguay, 105 (2 Malloy 1825), Art. II (5), where this offense is enumerated together with forgery of papers. The above standard text was used first in the treaty with Portugal, 1908 (2 Malloy 1469), Art. II (13), and was inserted without change into every subsequent treaty with the exception of the German treaty, 1931 (T. S. No. 836), where the proviso appears substantially modified. As to this, see below. Prior to the treaty with Portugal, the text is found in the various treaties with slightly varying phraseology without in any way affecting the substance.

For the sake of completeness the various texts used in the earlier treaties follow:

In the treaty with Switzerland, 1900 (2 Malloy 1771), Art. II (5): "The forgery, counterfeiting or alteration of coin, paper-money, public bonds and coupons thereof, bank notes, obligations, or other certificates or instruments of credit, the emission or circulation of such instruments of credit, with fraudulent intent; the counterfeiting or forgery of public seals, stamps or marks, or the fraudulent use of such counterfeited or forged articles."

In the treaties with:

Chile, 1900 (1 Malloy 192)	} Art. II (5)
Bolivia, 1900 (1 Malloy 125)	
Denmark, 1902 (1 Malloy 390)	
Panama, 1904 (2 Malloy 1357)	
Uruguay, 1905 (2 Malloy 1825)	

France, 1909 (3 Malloy 2580; T. S. No. 561) Art. II (6):

"The counterfeiting, falsifying or altering of money, whether coin or paper, or of instruments of debt created by national, state, provincial or municipal governments, or of coupons thereof, or of banknotes, or the utterance or circulation of the same; or the counterfeiting, falsifying or altering the seals of state."

The treaty with Serbia, 1901 (2 Malloy 1622), Art. II (5), contains the same text with one modification; following the last semi-column, the text reads: "or the counterfeiting, falsifying or altering seals, dies or stamps of state; of postage and revenue stamps."

In the treaties with Belgium, 1901 (1 Malloy 106), and San Marino, 1906 (2 Malloy 1598), Art. II (8):

"The fabrication or circulation of counterfeit money either coin or paper, or of counterfeit public bonds, coupons of the public debt, bank notes, obligations, or in general anything being a title or instrument of credit; the counterfeiting of seals and dies, impressions, stamps, and marks of State and public administration, and the utterance thereof."

The treaties with Guatemala, 1903 (1 Malloy 878) Art. II (12), Cuba, 1904 (1 Malloy 366) Art. II (5), and Nicaragua, 1905 (2 Malloy 1292) Art. II (13), reproduce the standard text, with one textual change; following "titles or coupons of public debt", the qualification:

"created by national, state, provincial, territorial, local or municipal governments" is omitted.

As indicated above, substantial change was introduced by the German treaty, 1930 (T. S. No. 836), Art. III (16) of which reads:

"Any fraudulent making or altering or uttering of currency including banknotes; of titles or coupons of public debt, seals, stamps, dies or marks of State or public administrations, whatever means are employed; or the introduction into a country or the receiving or obtaining of counterfeit objects of the foregoing character with a view to uttering them and with knowledge that they are counterfeit; or the fraudulent making, receiving or obtaining of instruments or other articles peculiarly adapted for the counterfeiting or altering of objects of the foregoing character."

The only treaties wherein the dealing with instruments adapted for counterfeiting is made an extraditable offense are the treaties with Guatemala, 1903 (1 Malloy 878), and Nicaragua, 1905 (2 Malloy 1292), in both Art. II (14). In these treaties, this offense is listed separately; the text reads:

"The introduction of instruments for the fabrication of counterfeit coin or bank notes or any other paper current as money."

Curiously enough, in the treaty with Haiti, 1904 (1 Malloy 941), the counterfeiting of money and counterfeiting of securities are listed as separate offenses; the provisions of Art. II (3) and (4) read:

"(3) Counterfeiting of money, either coin or paper; utterance or circulation of counterfeit or altered money; introduction of counterfeit or altered money into the territory of one of the Contracting Parties."

"(4) Counterfeiting of any securities issued by one of the Contracting Parties, of bonds or coupons of the public debt, of bank notes or other instruments of credit authorized by law; utterance, use, or introduction, in the territory of one of the Parties, of the aforementioned counterfeit or falsified securities or notes."

13. Embezzlement or criminal malversation of public funds committed within the jurisdiction of one or the other party by public officers or depositaries where the amount of money embezzled exceeds. . . .

Note. The standard text was first used in the treaty with Guatemala, 1903 (1 Malloy 878), Art. II (15), and inserted in every subsequent treaty with the exceptions indicated below.

In several of the earlier treaties embezzlement by public officers and embezzlement by private persons are listed together, although most treaties list them separately.

In the treaties with

Chile, 1900 (1 Malloy 192)	} Art. II (6)
Bolivia, 1900 (1 Malloy 125)	
Panama, 1904 (2 Malloy 1357)	
Uruguay, 1905 (2 Malloy 1825)	

larceny is listed together with embezzlement.

Embezzlement by public officers as distinguished from embezzlement by other persons, is listed separately the first time in the treaty with Belgium, 1901 (1 Malloy 106), Art. II (9).

In the following treaties:

Switzerland, 1900 (2 Malloy 1771)
 Serbia, 1901 (2 Malloy 1622) Art. II (6)
 Denmark, 1902 (1 Malloy 390)
 Cuba, 1904 (1 Malloy 366)

embezzlement by both public officers and private persons is listed with larceny and the following offense: "obtaining money, valuable securities or other property by false pretenses, or receiving money, valuable securities, or other property, knowing the same to have been embezzled, stolen or fraudulently obtained, when such act is made criminal by the laws of

both countries and the amount of money or the value of property fraudulently obtained or received is not less than. . . ."

This offense of obtaining embezzled or stolen property is listed separately in later treaties.

In the treaty with France, 1909 (3 Malloy 2580; T. S. No. 561) Art. II (7), embezzlement by both public officers and by private persons is listed together with fraud and breach of trust; this offense is listed separately in most of the other treaties.

Most of the treaties specify a minimum amount under which embezzlement is not an extraditable crime.

No amount is specified in the following treaties:

Belgium, 1901 (1 Malloy 106)

San Marino, 1906 (2 Malloy 1598)

France, 1909 (3 Malloy 2580; T. S. No. 561)

Estonia, 1923 (T. S. No. 703).

The majority of the treaties specify \$200 or its equivalent in the currency of the other contracting nation as the minimum. The following treaties specify a different amount:

Switzerland, 1900 (2 Malloy 1771), Art. II (6), 1,000 francs

Bulgaria, 1924 (T. S. No. 687), Art. II (16)

Czechoslovakia, 1925 (T. S. No. 734), Art. II (14) } \$100

Austria, 1930 (T. S. No. 822), Art. II (14)

Poland, 1929 (T. S. No. 789), Art. II (10), 1,000

Germany, 1930 (T. S. No. 836), Art. III (17), 25 marks

14. Embezzlement by any person or persons hired, salaried or employed, to the detriment of their employers or principals, when the crime or offense is punishable by imprisonment or other corporal punishment by the laws of both countries, and where the amount embezzled exceeds. . . .

Note. As to the listing of this crime together with other offenses see also *Note* under Embezzlement of public funds by public officers.

This offense was first listed separately, as distinguished from embezzlement of public funds, in the treaty with Belgium, 1901 (1 Malloy 106), Art. II (10).

In the treaties with Chile, 1900 (1 Malloy 192), and Uruguay, 1905 (2 Malloy 1825), in both Art. II (6), this offense is listed with embezzlement of public funds and with larceny.

In the treaties with Switzerland, 1900 (2 Malloy 1771), Serbia, 1901 (2 Malloy 1622), Denmark, 1902 (1 Malloy 390), and Cuba, 1904 (1 Malloy 366), in all Art. II (6), this offense is listed together with embezzlement of public funds, larceny and receiving stolen or embezzled money or property. In the treaty with Cuba, larceny is listed, however, separately.

In the treaties with Bolivia, 1900 (1 Malloy 125), Art. II (6), Haiti, 1904 (1 Malloy 941), Art. II (6), Panama, 1904 (2 Malloy 1357), Art. II (6), and Finland, 1924 (T. S. No. 710), Art. II (12), this offense is listed with embezzlement of public funds.

In the treaty with France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (7), embezzlement of public and private funds is listed together with fraud and breach of trust.

In the following treaties:

Belgium, 1901 (1 Malloy 106), Art. II (10)

Guatemala, 1903 (1 Malloy 878), Art. II (17)

Nicaragua, 1905 (2 Malloy 1292), Art. II (17)

San Marino, 1906 (2 Malloy 1598), Art. II (10)

the offense of embezzlement is extraditable "when the crime is subject to punishment *by the laws of the place where it was committed.*" (The standard text makes the offense extraditable when it is "punishable by imprisonment or other corporal punishment *by the laws of both countries.*")

In the treaties with Guatemala, 1903 (1 Malloy 878), and Nicaragua, 1905 (2 Malloy 1292), in both Art. II (16), the following offense is specified, in addition to embezzlement of public and of private funds:

"Embezzlement of funds of a bank of deposit or savings bank or trust company chartered under Federal or State laws."

Most of the treaties specify a minimum under which embezzlement is not an extraditable crime.

No amount is specified in the following treaties:

France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (7)

Estonia, 1923 (T. S. No. 703), Art. II (16).

(It may be observed that in the treaties with Belgium, 1901 (1 Malloy 106), and San Marino 1906 (2 Malloy 1598), no amount is specified with respect to the embezzlement of public funds; the embezzlement of private funds must involve an amount exceeding \$200 in order to be extraditable.)

The majority of the treaties specify \$200 or its equivalent in the currency of the other contracting nation as the minimum. The following treaties specify a different amount:

Switzerland, 1900 (2 Malloy 1771), Art. II (6), 1,000 francs

Bulgaria, 1924 (T. S. No. 687), Art. II (17)

Czechoslovakia, 1925 (T. S. No. 734), Art. II (15) } \$100

Austria, 1930 (T. S. No. 822), Art. II (15)

Poland, 1929 (T. S. No. 789), Art. II (11), \$1,000

Germany, 1930 (T. S. No. 836), Art. III (18), \$25

This offense was added to the list of extraditable offenses contained in the treaty with Japan, 1886 (1 Malloy 1025), by the Supplementary Convention, 1906 (1 Malloy 1039).

15. Larceny, defined to be the theft of effects, personal property or money of the value of . . .

Note. This text was first used in the treaty with Portugal, 1908 (2 Malloy 1469), Art. II (17), and can be found in every subsequent treaty without textual modification with the sole exception of the treaty with France, 1909.

In the earlier treaties, larceny was listed together with other offenses.

In the treaties with Chile, 1900 (1 Malloy 192), Bolivia, 1900 (1 Malloy 125), Panama, 1904 (2 Malloy 1357), and Uruguay, 1905 (2 Malloy 1825), in all four Art. II (6), larceny was listed with embezzlement of public and private funds.

In the treaties with Switzerland, 1900 (2 Malloy 1771), Serbia, 1901 (2 Malloy 1622), and Denmark, 1902 (1 Malloy 390), in all three Art. II (6), larceny was listed with embezzlement of public and private funds and receiving stolen or embezzled property.

In the treaties with Belgium, 1901 (1 Malloy 106), and San Marino, 1906 (2 Malloy 1598), in both Art. II (6), larceny is listed with burglary, robbery, home-breaking and theft.

In the treaty with France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (8), larceny is listed with the offense of obtaining fraudulently money or other property.

See also *Notes* under Embezzlement of public funds and Embezzlement by persons hired.

Larceny was first listed separately in the treaty with Guatemala, 1903 (1 Malloy 878), Art. II (20). The text, which was repeated also in the treaty with Nicaragua, 1905 (2 Malloy 1292), Art. II (20), reads:

"Larceny, defined to be the theft of effects, personal property, horses, cattle, or live stock, or money, of the value of \$25 or more, or receiving stolen property, of that value, knowing it to be stolen."

A slightly different text is to be found in the treaty with Cuba, 1904 (1 Malloy 366), Art. II (15):

"Larceny, defined to be the theft of money, effects, documents, horses, cattle, live stock or any other movable property of the value more than \$50."

Most of the treaties specify a minimum under which larceny is not an extraditable offense.

No amount is specified in the following treaties:

Belgium, 1901 (1 Malloy 106)

San Marino, 1906 (2 Malloy 1598) } Art. II (6)

Estonia, 1923 (T. S. No. 703), Art. II (18)

The majority of the treaties specify \$25 or its equivalent in the currency of the other contracting nation as the minimum. The following treaties specify a different amount:

Switzerland, 1900 (2 Malloy 1771), Art. II (6), 1,000 francs		
Chile, 1900 (1 Malloy 192)	} Art. II (6)	\$200
Bolivia, 1900 (1 Malloy 125)		
Serbia, 1901 (2 Malloy 1622)		
Denmark, 1902 (1 Malloy 390)		
Panama, 1904 (2 Malloy 1357)		
Uruguay, 1905 (2 Malloy 1825)		
France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (8)		
Cuba, 1904 (1 Malloy 366), Art. II (15)	}	\$50
Venezuela, 1922 (T. S. No. 675), Art. II (17)		
Austria, 1930 (T. S. No. 822), Art. II (17)		100
Poland, 1929 (T. S. No. 789), Art. II (14),		1,000

This offense was added to the list of extraditable offenses contained in the treaty with Japan, 1886 (1 Malloy 1025), by the Supplementary Convention, 1906 (1 Malloy 1039).

16. Obtaining money, valuable securities or other property by false pretences, or receiving money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of property so obtained or received exceeds . . .

Note. This offense is not listed at all among the extraditable offenses in some of the earlier treaties, namely: Chile, 1900, Bolivia, 1900, Switzerland, 1900, Denmark, 1902, Panama, 1904 and Uruguay, 1905.

In the treaty with Serbia, 1901 (2 Malloy 1622), Art. II (6), it is listed with embezzlement of public and private funds and larceny. In the treaty with France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (8), it is listed with larceny.

It is listed the first time separately in the treaty with Belgium, 1901 (1 Malloy 106), Art. II (12). In that treaty, as well as in the treaty with San Marino, 1906 (2 Malloy 1598), Art. II (12), and in the treaty with France, the text reads:

"Obtaining money, valuable securities or other property by false pretences, when such act is made criminal by the laws of both countries and the amount of money or the value of the property fraudulently obtained is not less than \$200."

In the treaties with Guatemala, 1903 (1 Malloy 878), and Nicaragua, 1905 (2 Malloy 1292), in both Art. II (19), the following more elaborated text has been used:

"Obtaining by threats of injury, or by false devices, money, valuables or other personal property, and the receiving of the same with the knowledge that they have been so obtained, when such crimes or offenses are punishable by imprisonment or other corporal punishment by the laws of both countries, and the amount of money, or the value of the property so obtained is not less than \$200."

The standard text was first adopted in the treaty with Portugal, 1908 (2 Malloy 1469), Art. II (18), and used without change of phraseology in every subsequent treaty with the exception of those with France (see *supra*), and Germany, 1930 (T. S. No. 836), Art. III (21); the latter reads:

"Obtaining money, valuable securities or other property by false pretences, where the amount of money or the value of property so obtained or received exceeds \$25 . . ."

Most of the treaties specify a minimum under which larceny is not an extraditable offense.

No amount is specified in the treaty with Estonia, 1923 (T. S. No. 703), Art. II (19).

The majority of the treaties specify \$200 or its equivalent in the currency of the other contracting nation as the minimum. The following treaties specify a different amount:

Bulgaria, 1924 (T. S. No. 687), Art. II (19)	}	\$100
Czechoslovakia (T. S. No. 734), Art. II (19)		
Austria, 1930 (T. S. No. 822), Art. II (18)		
Poland, 1922 (T. S. No. 789), Art. II (13)		1,000
Germany, 1930 (T. S. No. 836), Art. III (21)		25

It should be observed that in the treaty with France, 1909 (3 Malloy 2580), while this offense is listed with larceny (Art. II (8)), the offense of "Receiving money, valuable securities . . . etc." is listed separately. Art. II (15).

In the treaty with Cuba, 1904 (1 Malloy 366), Art. II (16), the provision reads:

"Obtaining, by threats of doing injury, money, valuables or other personal property."

17. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director or officer of any company or corporation, or by any one in a fiduciary position, where the amount of money or the value of the property misappropriated exceeds . . .

Note. The only treaties wherein this crime is not listed among extraditable offenses are those with Belgium, 1901, Uruguay, 1905, and San Marino, 1906.

The only treaty where it is not listed separately is that with France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (7), where it is listed with embezzlement of both public and private funds.

The standard text was first used in the treaty with Honduras 1909 (3 Malloy 2685; T. S. No. 589), Art. II (20), and appears without any change in every subsequent treaty.

Slightly differently phraseology can be found in some of the earlier treaties.

In the treaty with Switzerland, 1900 (2 Malloy 1771), Art. II (7), the text reads:

"Fraud or breach of trust, committed by a fiduciary, attorney, banker, administrator of the estate of a third party, or by the president, a member or an officer of a corporation or association, when the loss involved exceeds 1,000 francs."

In the following treaties:

Chile, 1900 (1 Malloy 192)	}	Art. II (7)
Bolivia, 1900 (1 Malloy 125)		
Serbia, 1901 (2 Malloy 1622)		
Denmark, 1902 (1 Malloy 390)		
Guatemala, 1903 (1 Malloy 878), Art. II (21)	}	Art. IV (7)
Cuba, 1904 (1 Malloy 366)		
Panama, 1904 (2 Malloy 1357)		
Nicaragua, 1905 (2 Malloy 1292), Art. II (21)		
Portugal, 1908 (2 Malloy 1469), Art. II (20)		

the text reads:

"Fraud or breach of trust by a bailee, banker, agent, factor, trustee, or other person acting in a fiduciary capacity, or director or member or officer of any company, when such act is made criminal by the law of both countries and the amount of money or the value of the property is not less than \$200."

The French treaty (3 Malloy 2580; T. S. No. 561), Art. II (7), merely lengthened the list of persons by whom this offense committed is extraditable in saying, "by a bailee, banker, agent, factor, executor, administrator, guardian, trustee or other person."

It should be observed that the condition contained in these earlier treaties, namely, that this act is made criminal by the law of both countries, is omitted from all treaties subsequent to and inclusive of the treaty with Honduras, 1909.

Most treaties specify \$200 as a minimum amount involved to make the offense extraditable.

No amount is defined in the treaty with Estonia, 1923 (T. S. No. 703), Art. II (21).

A different amount is specified in the following treaties:

Switzerland, 1900 (2 Malloy 1771), Art. II (7), 1,000 francs

Bulgaria, 1924 (T. S. No. 687), Art. II (21)	} Art. II (20) }	\$100
Czechoslovakia, 1925 (T. S. No. 734)		
Austria, 1930 (T. S. No. 822)		
Poland, 1929 (T. S. No. 789), Art. II (12),		1,000
Germany, 1930 (T. S. No. 836), Art. III (23),		25

18. Perjury or subornation of perjury.

Note. The only treaties wherein this crime is not listed among extraditable offenses are those with Belgium, 1901, and San Marino, 1906.

In all other treaties it is listed separately; a different text has been adopted in the following treaties:

Guatemala, 1903 (1 Malloy 878), and Nicaragua, 1905 (2 Malloy 1292), in both Art. II (22):

"Perjury; violation of an affirmation or a promise to state the truth when required by law; subornation to commit said crime."

Poland, 1929 (T. S. No. 789), Art. II (15):

"Perjury or subornation of perjury where as a result of such a false testimony, an innocent person has been punished by imprisonment or a more severe penalty, or a person has been unjustly acquitted of a crime, or an unjust sentence was pronounced in a civil case where the amount exceeds \$1,000 or the Polish equivalent and a loss of this amount actually resulted."

In the treaty with Haiti, 1904 (1 Malloy 941), Art. II (8), this offense is listed with bribery.

19. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons in order to exact money from them or their families, or for any other unlawful end.

Note. This proviso appears without exception in every treaty.

In several treaties kidnapping is listed with other offenses.

In the treaty with Switzerland, 1900 (2 Malloy 1771), Art. II (9), the provision reads: "Abduction; rape; kidnapping of minors; bigamy; abortion."

In the following treaties:

Chile, 1900 (1 Malloy 192)	} Art. II (9)
Bolivia, 1900 (1 Malloy 125)	
Serbia, 1901 (2 Malloy 1622)	
Denmark, 1902 (1 Malloy 390)	
Panama, 1904 (2 Malloy 1357)	

kidnapping is listed with rape; the provision reads: "Rape; abduction; kidnapping."

In the treaty with Uruguay, 1905 (2 Malloy 1825), Art. II (11), it reads: "Kidnapping; abduction."

In the treaties with Belgium, 1901 (1 Malloy 106), and San Marino, 1906 (2 Malloy 1598), in both Art. II (13), and in the treaty with Haiti, 1904 (1 Malloy 941), Art. II (11), as in the treaty with Switzerland, only the kidnapping of minors is made extraditable.

In the treaty with France, 1909 (3 Malloy 2580; T. S. No. 561), Art. II (10 & 11), child-stealing and kidnapping are listed separately; the text reads:

"Child-stealing, or abduction of a minor under the age of 14 for a boy and of 16 for a girl.

"Kidnapping of minors or adults."

The phraseology was slightly changed in the treaty with Germany, 1930 (T. S. No. 836), Art. III (19):

"Kidnapping, defined to be the abduction or detention of a person or persons, in order to exact money from them, their families or any other person or persons, or for any other unlawful end; abandonment of infants."

It will be observed that abandonment of infants is listed with kidnapping, although in earlier treaties this offense is listed separately. See *Note* under Wilful Desertion of Children.

20. Wilful desertion or wilful non-support of minor or dependent children.

Note. This offense first was included among the list of extraditable offenses in the treaty with Siam, 1922 (T. S. No. 681), Art. II (23). It is listed in the subsequent treaties with the exception of the treaties with

Costa Rica, 1922 (T. S. No. 668)

Venezuela, 1922 (T. S. No. 675)

Finland, 1924 (T. S. No. 710)

Poland, 1929 (T. S. No. 789)

wherein this offense is not in the list.

In the treaty with Latvia, 1923 (T. S. No. 677), Art. II (23), the offense is specified as "wilful desertion"; "wilful non-support" is not mentioned.

In the treaty with Germany, 1930 (T. S. No. 836), Art. III (19), this offense—"abandonment of infants" is listed with kidnapping. See *Note* under Kidnapping.

This offense was added to the list of extraditable crimes contained in the treaty with Great Britain, 1889 (1 Malloy 740), by the Supplementary Convention, 1922 (3 Malloy 2658; T. S. No. 666), limiting the operation of this provision to Canada and the United States, respectively.

21. Crimes and offenses against the laws of both countries for the suppression of slavery and slave-trading.

Note. This offense is not listed among extraditable offenses in the treaties with Switzerland, 1900, Belgium, 1901, Guatemala, 1903, Nicaragua, 1905, Uruguay, 1905, San Marino, 1906, Honduras, 1909, and Venezuela, 1922.

In the treaty with Serbia, 1901 (2 Malloy 1622), Art. II (12), the text reads:

"Crimes and offenses against the laws of the United States of America for the suppression of slavery and slave-trading."

In all other treaties the text is unchanged.

22. Abduction or detention of women or girls for immoral purposes.

Note. This offense is listed first in the treaty with Siam, 1922 (T. S. No. 681), Art. II (4), and appears thereafter in every subsequent treaty, with the exception of the treaty with Germany, 1930 (T. S. No. 836).

In the treaty with Poland, 1929 (T. S. No. 789), Art. II (18), the text reads:

"Crimes defined as traffic of women and girls, that means reeruiting, abduction or seduction for immoral purposes of said persons, provided such crimes be punishable by imprisonment of at least one year or more severe penalty."

23. Wilful assault resulting in grievous bodily harm.

Note. This offense is listed only in the treaty with Germany, 1930 (T. S. No. 836), Art. III (2).

24. Mayhem and other wilful mutilation causing disability or death.

Note. This offense is listed only in the following treaties:

Guatemala, 1903 (1 Malloy 878), Art. II (2)

Cuba, 1904 (1 Malloy 366), Art. II (17)

Nicaragua, 1905 (2 Malloy 1292), Art. II (2)

Salvador, 1911 (3 Malloy 2820; T. S. No. 560), Art. II (4).

25. Bribery, defined to be the giving, offering or receiving of a reward to influence one in the discharge of a legal duty.

Note. This offense is listed in the following treaties:

Cuba, 1904 (1 Malloy 366), Art. II (9)

Panama, 1904 (2 Malloy 1357), Art. II (13)

Nicaragua, 1905 (2 Malloy 1292), Art. II (23)

Uruguay, 1905 (2 Malloy 1825), Art. II (13)

Germany, 1930 (T. S. No. 836), Art. III (26).

In the treaty with Haiti, 1904 (1 Malloy 941), Art. II (8), it is listed together with perjury and subornation of perjury.

This offense was added to the list of extraditable offenses contained in the treaties with Mexico, 1899 (1 Malloy 1184), by Suppl. Conv., 1902 (1 Malloy 1193)

Great Britain, 1889 (1 Malloy 740), by Suppl. Conv., 1905 (1 Malloy 798)

Denmark, 1902 (1 Malloy 390), by Suppl. Conv., 1905 (1 Malloy 395)

In the treaty of Germany, the definition of the offense is omitted.

26. Crimes or offenses against the laws for the suppression of the traffic in narcotics.

Note. This offense is first listed among extraditable crimes in the treaty with Germany, 1930 (T. S. No. 836), Art. III (28).

It was added to the list contained in the following earlier treaties:

Great Britain, 1889 (1 Malloy 740), by Suppl. Conv., 1925 (T. S. No. 719) (with respect to Canada only)

Mexico, 1899 (1 Malloy 1184), by Suppl. Conv., 1925 (T. S. No. 741)

Cuba, 1904 (1 Malloy 366), by Suppl. Conv., 1926 (T. S. No. 737)

Honduras, 1909 (3 Malloy 2685; T. S. No. 589), by Suppl. Conv., 1927 (T. S. No. 761).

Query. The Supplementary Convention with France, 1929 (T. S. No. 787), adds the following offense to the list of extraditable offenses contained in the original treaty of 1909 (3 Malloy 2580; T. S. No. 561):

"Infractions of the laws concerning poisonous substances."

It would seem that this may be an unhappy phrasing of the offense against laws for the suppression of traffic in narcotics. On the other hand, the Supplementary Convention with Mexico, 1925 (T. S. No. 741), while specifying this offense as extraditable, also lists the following offense:

"Crimes and offenses against the laws relating to the illicit manufacture of or traffic in substances injurious to health, or poisonous chemicals."

This seems to be an offense quite distinct from that of traffic in narcotics.

27. Smuggling and violation of customs laws.

Note. This offense is listed only with three Latin American countries, added recently by supplementary conventions to the list contained in the original treaties.

In the Supplementary Convention with Mexico of 1925 (T. S. No. 741), the offense is specified as:

"Smuggling; defined to be the act of willfully and knowingly violating the customs laws with intent to defraud the revenue by international traffic in merchandise subject to duty."

In the supplementary conventions with Cuba, 1926 (T. S. No. 737), and Honduras, 1927 (T. S. No. 761), the following simple text is used:

"Infractions of the customs laws or ordinances which may constitute crimes."

28. Crimes or offenses against the bankruptcy laws.

Note. This offense is listed in the treaty with Germany, 1930 (T. S. No. 836), Art. III (27).

The Supplementary Convention with Cuba, 1926 (T. S. No. 737), added this offense to the list of extraditable crimes contained in the original treaty of 1904, in the following text:

"Crimes against bankruptcy laws and suspension of payment laws if made criminal by the laws of both countries."

29. Blackmail or extortion by unlawful means.

Note. This offense is listed only in the treaty with Germany, 1930 (T. S. No. 836), Art. III (13).

30. Use of explosives so as to endanger human life or property.

Note. This offense is listed only in the treaty with Germany, 1930 (T. S. No. 16683).
III (25).

APPENDIX II (B)

EXTRADITABLE OFFENSES IN TREATIES CONCLUDED BY
STATES OTHER THAN THE UNITED STATESLIST OF TREATIES^a

(1) ENGLAND-GERMANY, May 14, 1872. ^b	62 B.F.St.P. 5
(2) ENGLAND-AUSTRIA-HUNGARY, Dec. 3, 1873. ^c	63 B.F.St.P. 213
(3) BELGIUM-FRANCE, Aug. 15, 1874. ^d	65 B.F.St.P. 446
(4) BELGIUM-ITALY, Jan. 15, 1875. ^e	66 B.F.St.P. 578
(5) BELGIUM-PORTUGAL, Mar. 8, 1875.	66 B.F.St.P. 574
(6) FRANCE-DENMARK, Mar. 28, 1877.	4 Martens (2 ^e sér.) 369
(7) ENGLAND-COLOMBIA, Oct. 27, 1888. ^f	79 B.F.St.P. 12
(8) BELGIUM-NETHERLANDS, May 31, 1889. ^g	81 B.F.St.P. 276
(9) GREECE-AUSTRIA-HUNGARY, Dec. 8/21, 1904. ^h	2 L.N.T.S. 173
(10) GREECE-GERMANY, Feb. 27/Mar. 12, 1907.	2 L.N.T.S. 112
(11) BELGIUM-BULGARIA, Mar. 15/28, 1908. ⁱ	101 B.F.St.P. 705
(12) BULGARIA-AUSTRIA-HUNGARY, May 18/31, 1911. ^j	104 B.F.St.P. 720
(13) CHILE-COLOMBIA, Nov. 16, 1914.	82 L.N.T.S. 243
*(14) LATVIA-LITHUANIA, July 12, 1921.	25 L.N.T.S. 312
*(15) ESTONIA-LATVIA, July 12, 1921.	37 L.N.T.S. 424
*(16) ESTONIA-LITHUANIA, July 12, 1921.	43 L.N.T.S. 180

^a This is a study principally of treaties published in the League of Nations Treaty Series, Volumes 1-114. Consequently, the great majority of the treaties are of the 20th century. The few treaties of the 19th century, which were consulted, were such as were recently put into effect again, following their suspension in consequence of the World War. No attempt has been made to collect every extradition treaty, because it is believed that a sufficient number of treaties have been studied for obtaining the necessary information.

An asterisk (*) indicates that the treaty does not contain a list of offenses. See full list of such bipartite treaties in Appendix I.

For references, the following abbreviations are used:

L.N.T.S. = League of Nations Treaty Series

B.F.St.P. = British and Foreign State Papers

Martens = Nouveau Recueil Général de Traités.

As many treaties were drafted in the French language only, it has been necessary to rely on the English translations of the League Secretariat which contain occasional inaccuracies. So far as possible these have been corrected.

^b Revived, in accordance with Art. 289 of the Treaty of Versailles, by a note from England to Germany, dated June 25, 1920. 5 L.N.T.S. 304.

^c Revived, in accordance with Art. 241 of the Treaty of St. Germain, as between England and Austria, by a note from England to Austria, dated Sept. 22, 1920. 5 L.N.T.S. 312.

Revived in accordance with Art. 224, of the Treaty of Trianon, as between England and Hungary, by a note from England to Hungary, dated Oct. 24, 1921. 8 L.N.T.S. 376.

^d Additional Agreement, June 24, 1926. 94 L.N.T.S. 349.

^e *Ibid.*, June 28, 1929. 92 L.N.T.S. 263.

^f *Ibid.*, Dec. 2, 1929. 110 L.N.T.S. 401.

^g *Ibid.*, Oct. 25, 1927. 69 L.N.T.S. 29.

^h Revived in accordance with Art. 224 of the Treaty of Trianon, as between Greece and Hungary, by a note from Greece to Hungary, dated Jan. 9/27, 1922. 11 L.N.T.S. 434.

ⁱ Revived in accordance with Art. 168 of the Treaty of Neuilly, by a note from Belgium to Bulgaria, dated Jan. 27, 1927. 3 L.N.T.S. 276.

^j Put into force, as between Hungary and Bulgaria, by exchange of notes, dated May 17, 1929. 92 L.N.T.S. 197.

* (17) ITALY-CZECHOSLOVAKIA, April 6, 1922.	55 L.N.T.S. 171
* (18) GERMANY-CZECHOSLOVAKIA, May 8, 1922.	23 L.N.T.S. 172
(19) DENMARK-FINLAND, Feb. 12, 1923.	18 L.N.T.S. 34
(20) SWITZERLAND-URUGUAY, Feb. 27, 1923.	63 L.N.T.S. 207
* (21) BULGARIA-YUGOSLAVIA, Nov. 26, 1923.	26 L.N.T.S. 120
* (22) FINLAND-SWEDEN, Nov. 29, 1923.	23 L.N.T.S. 42
(23) HUNGARY-RUMANIA, Apr. 16, 1924.	42 L.N.T.S. 146
* (24) BULGARIA-RUMANIA, Apr. 19, 1924.	33 L.N.T.S. 222
(25) ENGLAND-FINLAND, May 30, 1924.	34 L.N.T.S. 80
(26) FINLAND-LATVIA, June 7, 1924.	38 L.N.T.S. 344
(27) ENGLAND-LATVIA, July 16, 1924.	37 L.N.T.S. 370
(28) FRANCE-LATVIA, Oct. 29, 1924.	93 L.N.T.S. 265
(29) ENGLAND-CZECHOSLOVAKIA, Nov. 11, 1924.	59 L.N.T.S. 269
(30) ESTONIA-FINLAND, Jan. 2, 1925.	43 L.N.T.S. 12
* (31) CZECHOSLOVAKIA-RUMANIA, May 7, 1925.	54 L.N.T.S. 51
* (32) FINLAND-NORWAY, Nov. 10, 1925.	43 L.N.T.S. 387
(33) ENGLAND-ESTONIA, Nov. 18, 1925.	50 L.N.T.S. 226
(34) AUSTRIA-NORWAY, Dec. 17, 1925.	48 L.N.T.S. 78
(35) FRANCE-POLAND, Dec. 30, 1925.	95 L.N.T.S. 217
(36) BELGIUM-PARAGUAY, Jan. 20, 1926.	97 L.N.T.S. 197
(37) FRANCE-SAN MARINO, April 30, 1926.	89 L.N.T.S. 9
* (38) BULGARIA-CZECHOSLOVAKIA, May 15, 1926.	60 L.N.T.S. 169
(39) ENGLAND-LITHUANIA, May 18, 1926.	61 L.N.T.S. 401
* (40) ALBANIA-YUGOSLAVIA, June 22, 1926.	91 L.N.T.S. 81
(41) ALBANIA-GREECE, June 25, 1926.	83 L.N.T.S. 305
* (42) ESTONIA-CZECHOSLOVAKIA, July 17, 1926.	63 L.N.T.S. 255
(43) ALBANIA-ENGLAND, July 22, 1926.	67 L.N.T.S. 165
(44) BELGIUM-LATVIA, Oct. 11, 1926.	63 L.N.T.S. 299
(45) AUSTRIA-ESTONIA, Oct. 15, 1926.	74 L.N.T.S. 213
(46) LIBERIA-MONACO, Oct. 28, 1926.	68 L.N.T.S. 241
(47) BELGIUM-ESTONIA, Nov. 11, 1926.	65 L.N.T.S. 405
* (48) GREECE-CZECHOSLOVAKIA, Apr. 7, 1927.	88 L.N.T.S. 219
(49) BELGIUM-LITHUANIA, May 17, 1927.	77 L.N.T.S. 123
(50) BELGIUM-CZECHOSLOVAKIA, July 19, 1927.	73 L.N.T.S. 283
* (51) LATVIA-NORWAY, Sept. 12, 1927.	71 L.N.T.S. 303
* (52) COLOMBIA-PANAMA, Dec. 24, 1927.	87 L.N.T.S. 409
* (53) HUNGARY-YUGOSLAVIA, Feb. 22, 1928.	104 L.N.T.S. 151
(54) BELGIUM-FINLAND, June 28, 1928.	74 L.N.T.S. 353
(55) AUSTRIA-FINLAND, Oct. 22, 1928.	89 L.N.T.S. 69
* (56) BULGARIA-GREECE, Feb. 21, 1929.	106 L.N.T.S. 443
(57) HUNGARY-LATVIA, May 4, 1929.	101 L.N.T.S. 449
* (58) FINLAND-ITALY, July 10, 1929.	111 L.N.T.S. 295
(59) ESTONIA-SWEDEN, Jan. 20, 1930.	106 L.N.T.S. 279
* (60) LATVIA-SWEDEN, Jan. 30, 1930.	110 L.N.T.S. 139
(61) DENMARK-ESTONIA, May 13, 1930.	106 L.N.T.S. 159
* (62) BULGARIA-SPAIN, July 17, 1930.	114 L.N.T.S. 41

LIST OF OFFENSES^a

1. Assassination, poisoning, parricide, infanticide, murder.

Note. Homicide, with its various technical designations, is included in every treaty. It usually heads the list. The above phraseology is adopted in many treaties, namely:

^a Unless otherwise specified in the *Note* following each extraditable offense, such offense is enumerated in every treaty contained in the above list,—except, of course, those treaties which do not contain a list of extraditable offenses.

Greece-Austria-Hungary (9), Greece-Germany (10), Belgium-Bulgaria (11), Denmark-France (6), Belgium-Italy (4), Belgium-Latvia (44), Belgium-Estonia (47), Belgium-Czechoslovakia (50), Belgium-Finland (54), Belgium-Lithuania (49), Belgium-Paraguay (36), Switzerland-Uruguay (20).

Textual variations in defining homicide are, however, frequent. In some treaties the various types of homicide are listed separately; in others homicide is listed together with other, kindred crimes.

In France-Belgium (3) "murder" is listed separately, Art. 2 (2), while assassination, etc., heads the list.

In France-San Marino (37), each of the five above types of homicide is listed separately, Art. 2 (1) to (5).

The treaties of England show considerable variations: in England-Germany (1) the text reads simply: "Murder or attempt to commit murder;" England-Finland (25), and England-Czechoslovakia (29), are more specific: "Murder, including assassination . . . etc., or attempt to commit murder." In the treaties with Latvia (27), Estonia (34), Lithuania (39), and Colombia (7), "attempt or *conspiracy* to murder" is the specification.

Some treaties make only "wilful", "deliberate" or "premeditated" homicide extraditable: France-Latvia (28), Austria-Finland (55), Austria-Estonia (45), France-Poland (35), Estonia-Sweden (59), Art. 2 (5).

On the other hand, several treaties include both wilful murder and accidental killing, *e.g.*, Estonia-Finland (30), and Finland-Latvia (26): "Homicide, deliberate and accidental; infanticide"; Hungary-Latvia (57): "Wilful or unpremeditated homicide," Belgium-Netherlands (8), Belgium-Italy (4), Greece-Albania (41), and Liberia-Monaco (46), in all three Art. 2 (2): "Murder or wilful murder; murder or wilful murder committed against a child."

Denmark-Estonia (61), Art. 2 (7): "Murder (including infanticide); homicide."

In Chile-Colombia (13), wherein the various offenses are not even numbered, this crime is simply designated with the word "Murder."

In some treaties homicide is listed with other offenses: In Estonia-Finland (30), Finland-Latvia (26), Austria-Estonia (45), Austria-Finland (55), and Hungary-Latvia (57), it is listed with abortion. In Denmark-Finland (19), Art. 1 (7), and France-Poland (35), Art. 3 (1), it is listed with manslaughter and wilful manslaughter, respectively.

In Hungary-Rumania (23), and Austria-Norway (34), Art. 1, it is listed with assault and manslaughter. The respective texts in these two treaties read:

(23) "Homicide, assassination, parricide, infanticide, poisoning, malicious blows and wounds causing death even without intent to kill, and also homicide as a result of imprudence."

(34) "Homicide, wounding and crimes against health."

In a few treaties murder or attempted murder of the head of state, the king or members of the reigning family, or of the head of state of a friendly nation, are specifically enumerated as extraditable offenses. See: Belgium-Italy (4), Belgium-Netherlands (8), Liberia-Monaco (46), in all three Art. 2 (1)a and (b). In this connection it may be observed that in the great majority of treaties, while "political offenses" are not extraditable, it is specifically provided that murder *per se* of the head of state shall not be considered a political offense.

2. Manslaughter.

Note. As to the listing of this offense with homicide, see *Note* under that crime.

It is listed separately in all the treaties to which England is a party.

In the *Notes* the treaties are referred to by the names of the contracting parties; the date of and reference to the treaty is not given. In order to facilitate the location of reference, each treaty in the above list is followed by its number in *italic*. Unless otherwise indicated in the *Notes*, the list of extraditable offenses is contained in Article 2 of the treaty referred to.

3. Wilful [or premeditated] assault and battery, resulting in death, permanent disability or disease, the loss of a limb, or the use of an organ.

Note. The above text is a composite phraseology on the basis of the greatly varying texts describing this type of offense.

In the treaties to which England is a party (with the exception of England-Germany (1), England-Austria-Hungary (2)), this offense is described:

"Maliciously wounding or inflicting grievous bodily harm."

"Assault occasioning actual bodily harm." See: England-Finland (25), Art. 2 (11) and (12), and the corresponding paragraphs in England-Colombia (7), England-Latvia (27), England-Estonia (34), England-Lithuania (39), England-Albania (43). In England-Czechoslovakia (29), the "assault" provision is omitted.

The usual phraseology is as follows:

"Deliberate and premeditated [or wilful] assault or assault which caused an apparently incurable disease, permanent disability for work, the loss of the use [or full use] of an organ, serious [or grave] mutilation or unintended death." See: Greece-Austria-Hungary (9), Greece-Albania (41), the treaties of Belgium with Paraguay (36), Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), Finland (54), France (3) [in this latter it is specified: "the loss of an organ, an eye, or any other limb"], France-Latvia (28), Switzerland-Uruguay (20), France-Poland (35), Hungary-Rumania (23), Belgium-Bulgaria (11).

In the German-Greek treaty (10), Art. 2 (2), assault is extraditable if the disability caused by it lasts more than 3 months.

The France-San Marino treaty (37), Art. 2 (13), is somewhat more specific: "Assault causing death or illness or incapacity to work lasting more than 20 days, or followed by mutilation, amputation or loss of the use of a limb, blindness, loss of an eye, or other permanent injuries; assault with premeditation, even in cases where the disability occasioned is of less than 20 days' duration."

A few treaties use simpler phraseology. Denmark-Finland (19), Art. 1 (8); "Assault, resulting in death or bodily injury."

Liberia-Monaco (46), Art. 2 (4): "Violence having caused serious bodily injury or death, or serious violence."

Denmark-Estonia (61), Art. 1 (8): "Assault and battery of a serious character or resulting in death or mutilation."

In some treaties, this offense is listed with offenses which are committed against health—although this latter type of offense is listed separately in the majority of treaties. See: Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), Hungary-Latvia (57), in all five Art. 2 (3): "Deliberately inflicting bodily injury, poisoning or deliberately administering any other substance injurious to health."

Estonia-Sweden (59), Art. 2 (10): "Ill-treatment resulting in death (without intent to kill), or a disease, or grievous bodily harm."

The following treaties do not include this offense in the list of extraditable crimes: England-Germany (1), England-Austria-Hungary (2), France-Belgium (3), Belgium-Italy (4), Belgium-Netherlands (8), Chile-Colombia (13), Austria-Norway (34).

4. Administering substances injurious to or other offenses committed against health.

Note. This text is a paraphrase of the greatly varying phraseology describing this type of offense in the various treaties.

A number of treaties define this offense as follows: "The deliberate and culpable administering of substances capable of causing death or of seriously [grievously] injuring health, but without intent to cause death." See the treaties of Belgium with France (6), Art. 2 (6); Paraguay (36), Art. 3 (4); Bulgaria (11), Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), Finland (54), in all six Art. 2 (3); Hungary-Rumania (23), Art. 2 (4).

The Greece-Albania treaty (41), Art. 2 (24) uses the simple definition: "Criminal acts directed against public health."

In the following treaties: Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), the "deliberately administering any other substance injurious to health" is listed with assault and battery (see *Note* thereunder). In addition to this, however, the following kindred offense is listed in these four treaties as well as in Hungary-Latvia (57), in all five Art. 2 (19): "Poisoning of springs, wells, aqueducts or reservoirs or of articles intended for public sale, consumption or use; the admixture of foreign bodies injurious to health, the wilful putting into circulation of poisoned articles or of articles mixed with such substances."

In Denmark-Finland (19), Art. 1 (20); Estonia-Sweden (59), Art. 2 (8); Denmark-Estonia (61), Art. 1 (23), the following definitions are given, respectively:

(19) "Poisoning; the distribution of noxious products."

(59) "Poisoning of goods, putting on the market articles injurious to the health of human beings or animals."

(61) "Malicious administration of poison or other substances injurious to health."

In addition, all three treaties specify and list separately the following kindred offense (in (19), Art. 1 (21); in (59), Art. 2 (9); in (61), Art. 1 (24)): "Propagation [the causing] of infectious and dangerous diseases among human beings or [domestic] animals; breaches of the regulations promulgated to prevent or combat epizootic diseases;^a malicious [wilful, intentional] transmission, [or transmission by gross negligence] of a venereal disease."

The following treaties do not include this type of offense in the list of extraditable crimes: Greece-Austria-Hungary (9), Greece-Germany (10), Switzerland-Uruguay (20), the treaties of France with Belgium (3), Latvia (28), Poland (35), San Marino (37), Chile-Colombia (13), Austria-Norway (34), Liberia-Monaco (46), Belgium-Netherlands (8); and the treaties of England with Germany (1), Austria-Hungary (2), Colombia (7), Finland (25), Latvia (27), Czechoslovakia (29), Estonia (34), Lithuania (39), Albania (43).

5. Arson.

Note. This offense is listed in every treaty with the sole exception of that between Austria and Norway (34). In the majority of treaties it is listed separately and without any definition.

In some instances it is listed with kindred offenses, such as causing a flood or injury by use of explosives, the collapse of a building, etc. See: Switzerland-Uruguay (20), Art. 2 (14); Hungary-Rumania (23), Art. 2 (18): "Arson and criminal use of explosives." Hungary-Latvia (57), Art. 2 (17): "Arson and wilful damage by causing explosion, subsidence or flood."

Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), in all four Art. 2 (15): "Arson, or deliberately causing an explosion, the collapse of a building or a flood."

Denmark-Finland (19), Art. 1 (19); Denmark-Estonia (61), Art. 1 (22): "Arson, destruction by means of explosives; malicious acts causing floods, railway accidents, shipwrecks; or any action involving the risk of disaster or accidents of this nature."

Estonia-Sweden (59), Art. 2 (23): "Arson; a malicious act causing a fire, an explosion or other damage; the malicious destruction of a public building."

A curious qualification is attached to the definition of this offense in the Belgian-Netherlands treaty (8), Art. 2 (16): "Arson when danger to property or of death of another person may result therefrom; arson with intent to procure for oneself or to a third party illegal profit to the prejudice of the insurer of the lawful insured (*porteur légal d'un contrat à la grosse*)."

6. Bigamy.

Note. This offense is included in every extradition treaty with the exception of the treaties of England with Germany (1), and Austria-Hungary (2). In the majority of treaties, it is listed separately.

^a This provision only in Estonia-Sweden (59).

In the following treaties, it is listed with other offenses:

In Denmark-France (6), Art. 2 (3) with abduction of minors, rape, abortion, indecent assault on minors.

In Liberia-Monaco (46), Art. 2 (3), with rape and abortion.

In Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), in all three Art. 2 (8), with "incest, indecent assault upon a female under the age of 14, carnal knowledge of a person under the authority of the offender, rape, procuring."

In Hungary-Latvia (57), Art. 2 (9), with incest, indecent assault, rape, procuring.

7. Abortion.

Note. This offense is listed separately in almost every treaty. In most instances the offense is listed without any qualifications.

In Chile-Colombia (13), and Switzerland-Uruguay (20), Art. 2 (2), it is qualified as "wilful"; in Belgium-Paraguay (36), Art. 3 (2), as "voluntary"; in Greece-Albania (41), Art. 2 (2), as "criminal" abortion.

In Belgium-Netherlands (8), Art. 2 (4): "Abortion brought about by the pregnant woman or by other persons."

In Estonia-Sweden (59), Art. 2 (6), on the other hand: "Wilful abortion brought about by some person other than the woman herself."

In the treaties of England with Colombia (7), Finland (25), Latvia (27), Czechoslovakia (29), Estonia (34), Lithuania (39), Albania (43), in all Art. 2 (3): "Administering drugs or using instruments with intent to procure the miscarriage of women."

In the following treaties this is listed with other offenses: In Denmark-France (6), Art. 2 (3), with bigamy, abduction of minors, indecent assault upon minors. In Liberia-Monaco (46), Art. 2 (3), with rape and bigamy.

In the following treaties this offense is not listed among extraditable crimes: England-Germany (1), England-Austria-Hungary (2), Greece-Austria-Hungary (9), Finland-Latvia (26), Estonia-Finland (30), Austria-Norway (34), Austria-Estonia (45), Austria-Finland (55), Hungary-Latvia (57).

8. Rape; indecent assault upon a minor under a certain age [and under the authority of the offender]; incest; carnal knowledge of a woman under a certain age; procuring [*i.e.*, traffic in women and children].

Note. The above text is paraphrased from the definitions and specifications of the various kinds of sexual offenses. In some treaties the various offenses are listed separately; in others together. The divergence in the treatment of this type of offenses is such that there are few treaties which are identical.

In Greece-Germany (10), Art. 2 (7), only rape is listed.

In Chile-Colombia (13), Art. 2, the offense is defined as "Seduction of minors" (*estupro*). "Rape" is listed separately.

In Austria-Norway (34), Art. 1 (9), the broad and all-including definition is used: "Offenses against morals."

In the treaties of France with Latvia (28), Art. 2 (4), and Poland (35), Art. 3 (4): "Rape, indecent assault with violence, indecent assault without violence on children under the age laid down in the criminal laws of both countries." In addition, these two treaties, in Art. 2 (21) and Art. 3 (19), respectively, specify the following kindred offenses under the heading "Offenses against public morals":

"(a) By habitually instigating [encouraging] aiding or abetting the debauchery or corruption of young persons of either sex under the age of 21;

"(b) By procuring, enticing or leading away to gratify the passions of another person, a married woman or a girl under age, for immoral purposes, even with her consent;

"(c) By procuring, enticing or leading away a woman, whether married or not, over age

for immoral purposes in order to gratify the passions of another person, by fraud or by means of violence, threats, abuse of authority or any other method of compulsion;

"(d) By retaining, by the same methods, against her will in a brothel, whether or not on account of debt, a person over or under age, or by compelling her to lead an immoral life." [(c) and (d) omitted from France-Poland (35), Art. 3 (19).]

In Greece-Albania (41), Art. 2 (5): "Rape and other assaults on virtue, and indecent assaults which instigate, facilitate or encourage the debauchery or corruption of another."

In Belgium-Estonia (47), Art. 2 (5): "An act of immorality capable of giving rise to extradition under the laws of the two contracting countries."

In the other treaties of Belgium with Paraguay (36), Latvia (44), Lithuania (49), Czechoslovakia (50), Finland (54), in all Art. 2 (5): "Rape; indecent assault with violence; indecent assault without violence or threats on the person or with the aid of a minor of either sex under 16; indecent assault without violence or threats committed by an ascendant relative upon the person or with the aid of the person of a minor of either sex, even if over 16, but not emancipated by marriage; offenses against morals by instigating, facilitating or encouraging the debauchery, corruption or prostitution of a minor of either sex in order to satisfy another's passion; enticing, seducing or abducting a woman or girl who has reached her majority for the purpose of debauchery, when the act is committed by fraud or with the aid of violence; threats, the abuse of authority, or any other means of compulsion employed to satisfy another's passion; the retention of a person in a brothel against his or her will, or constraint put upon an adult person for the purpose of debauchery."

[In the treaty Belgium-Paraguay (36), the word "rape" is omitted.]

The same text is used in Belgium-France (3), with the difference that these offenses are listed separately, Art. 2 (10) to (13), and the age limit is 13. Art. 2 (12)—the "assault by ascendant relative" proviso—was modified by the Additional Agreement of June 24, 1926 [94 L.N.T.S. 349.]

Substantially the same text with a slight difference of phraseology is used in Belgium-Netherlands (8), Art. 2 (5) to (7), but the age limit is 14. Art. 2 (6)—the "assault by ascendant relative" proviso—was modified by the Additional Agreement of Oct. 25, 1927 [69 L.N.T.S. 29] setting the age limit in case of that offense at 16, instead of the original 14.

Substantially the same text is used in Belgium-Bulgaria (11), Art. 2 (5), and in Austria-Finland (55), Art. 2 (9), but "incest" and "procuring" is added; the age limit set is 14; and the "indecent assault by an ascendant relative" proviso is omitted.

In Denmark-France (6), Art. 2 (3), substantially the same text is found as in Belgium-Bulgaria (*supra*), but the age limit is 13 in case a person requested by France, and 12 in case a person is requested by Denmark; moreover bigamy and abortion are listed together with these offenses.

In Belgium-Italy (4), Art. 2 (3), substantially identical with Denmark-France, the original age limit of 14 was changed to 16, by the Additional Convention of Jan. 28, 1929 [92 L.N.T.S. 263].

In some treaties these offenses are listed with bigamy and abortion both of which offenses are, in the majority of treaties, listed separately.

In Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), in all Art. 2 (8): "incest, indecent assault upon a female under the age of 14, carnal knowledge of a person under the authority of the offender, rape and procuring" are listed with bigamy.

In Liberia-Monaco (46), Art. 2 (3), rape is listed with bigamy and abortion.

In Hungary-Latvia (57), Art. 2 (9), "incest, indecent assault, rape, procuring" are listed with bigamy.

On the other hand, in a number of treaties, these various types of sexual offenses are listed separately under two or three headings.

The treaties of England with Finland (25), Latvia (27), Czechoslovakia (29), Estonia (34), Lithuania (39), Albania (43), in all Art. 2 (5) specify as extraditable: "[Unlawful] carnal knowledge, or any attempt to have carnal knowledge of a girl under 14 [15] years of

age." In some of these treaties the age limit is 14, in others 15. In all these treaties "rape" is listed separately, Art. 2 (4) or (9), and "Procuration" also, Art. 2 (9) or (10).^a

In Switzerland-Uruguay (20), Art. 2 (4): "Rape; indecent assault with violence, procuring" (5) "Indecent assault, with or without violence, on a child of either sex under 14 years of age."

In Hungary-Rumania (23), Art. 2 (8): "Rape and other indecent assaults," (9) "Offenses against morals through the inciting of minors of either sex to debauchery or corruption for the satisfaction of one's own or another's passions."

In Denmark-Finland (19), Art. 1 (4): "Incest." (5) "Carnal knowledge of irresponsible women or with women who are in a state of unconsciousness, or are unable to protect themselves, or with a person in respect of whom the offender stands in a special relationship [of parentage]; carnal knowledge of a girl under 15." (6) "Procuration; the delivery of a girl or woman, in respect of whom the offender stands in a special relationship [of parentage, to another person for purposes of prostitution]." (13) "Abduction of females under age with their consent, but without the consent of their guardian or other custodian, for delivery to prostitution." (14) "Rape."

In France-San Marino (37), Art. 2 (7): "Rape." (8) "Indecent assault committed or attempted with or without violence." (9) "Offenses against public morals by habitually encouraging or facilitating unlawful carnal knowledge of young persons of either sex under the age of 21."

In Estonia-Sweden (59), Art. 2 (15) "Rape". (16) "Carnal knowledge of a demented, delirious, sleeping or unconscious person or of a minor under 14 years of age, or a person under the authority of the offender." (17) "Procuration, prostitution or corruption of minors aided or abetted by parents or any other person under whose authority the minors have been placed." (18) "Incest."

In Denmark-Estonia (61), Art. 1 (4) "Sexual relations between persons related in the prohibited degrees." (5) "Illicit carnal knowledge of a person *non compos mentis* or unable to resist, or by abuse of authority, or unnatural relations, or of a child under 15 years of age." (6) "Procuring; aiding a person under 18 years of age to become a prostitute; aiding a person to leave the country with a view to becoming a prostitute or being employed for prostitution, if the person in question is under 21 years of age or is ignorant of the object of the journey." (13) "Rape."

This type of offense is not listed among extraditable offenses in the treaty between Greece and Austria-Hungary (9).

9. Abduction; kidnapping of minors.

Note. This offense is included in some form or another, listed separately or with other offenses, in the overwhelming majority of treaties.

In a number of instances it is listed separately. In Chile-Colombia (13), and in the treaties of England with Germany (1), Austria-Hungary (2), Colombia (7), Finland (25), in all Art. 2 (8); Latvia (27), Estonia (34), Lithuania (39), and Albania (43), in the last four Art. 2 (9), it is simply characterized as "Abduction." In England-Czechoslovakia (29), Art. 2 (8), it is specified: "Abduction of a female with intent to have carnal knowledge."

In the treaties of Belgium with France (3), Art. 2 (8); Italy (4); Netherlands (8), Art. 2 (10); Bulgaria (11), Art. 2 (7); Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), Finland (54), in the last five Art. 2 (7); in the treaties of France with San Marino (37), Art. 2 (10); and Poland (35), Art. 3 (5); in Greece-Austria-Hungary (9), Art. 2 (4)—it is specified: "Abduction of minors."

In Greece-Germany (10), Art. 2 (5), the text is elaborated and more specific: "Kidnaping of persons under 14 years of age, abduction of minors."

In Greece-Albania (41), Art. 2 (6): "Abduction of minors or women."

^a In the treaties of England with Latvia (27), Estonia (34), Lithuania (39), Albania (43), Colombia (7), in all Art. 2 (6) "Indecent assault" is listed separately.

In Hungary-Rumania (23), Art. 2 (7): "Abduction of minors and abduction or detention of women or girls for immoral purposes."

In Liberia-Monaco (46), Art. 2 (15): "Kidnapping of minors, defined to be the abduction or detention of a minor for any unlawful end."

In Estonia-Sweden (59), Art. 2 (12): "Abduction of children under 15 years of age."

In the following treaties: Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), Hungary-Latvia (57), in all five Art. 2 (7), abduction or kidnapping of minors as well as abduction of persons of age against their will is extraditable.

A somewhat different phraseology is used in the following treaties:

Denmark-Finland (19), Art. 1 (12): "Illegal separation of a child under 15 from the care of its parents or from other care."

Austria-Norway (34), and Denmark-Estonia (61), in both Art. 1 (10): "Illegal detention of a minor under 18 against the will [from the authority] of his parents or guardian."

In many treaties these offenses are listed with other offenses—with that of abandonment of children or false imprisonment, both of which, in the majority of treaties, are listed as separate offenses.

In the treaties of England with Finland (25), Latvia (27), Estonia (34), Lithuania (39), Albania (43), Art. 2 (6) or (7), and in Chile-Colombia (13), Art. 2, kidnapping is listed separately from abduction but with false imprisonment. In England-Colombia (7), Art. 2 (7), kidnapping is listed separately from abduction but with child-stealing. In England-Austria-Hungary (2), Art. 2 (11), kidnapping is listed with child-stealing and false imprisonment.

In Switzerland-Uruguay (20), Art. 2 (7): "Abduction or unlawful detention of persons" is listed with "concealment of birth or substitution of children." In Art. 2 (8), "kidnapping of minors" is listed separately from abduction, but together with exposure and abandonment of children.

In Denmark-France (6), Art. 2 (4), abduction of minors is listed with false imprisonment.

In France-Latvia (28), Art. 2 (5), kidnapping or non-representation of minors is listed with "concealing, removing, substituting or wrongfully exchanging a child."

In Belgium-Paraguay (36), Art. 3 (8), abduction of minors is listed with "the abduction, receiving, removal, replacement or substitution of children of either sex; the exposing or abandonment of a child."

10. (a) Exposure, abandonment or substitution of children; false allegations of parenthood.

(b) The exposure, abandonment or desertion of persons unable to protect themselves.

Note. The above text is a paraphrase of this type of offense described in various terminologies in different treaties.

As to the listing of this type of offense with abduction or kidnapping in France-Latvia (28), and Belgium-Paraguay (36), see *Note* under Abduction.

The majority of treaties make the exposure, abandonment, etc., of a child an extraditable offense; a few treaties include under this heading, or lists as a separate offense, the abandonment or neglect of helpless adults also.

The offenses are listed separately in the following treaties:

In Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), in all four Art. 2: (2) "Exposure of a person unable to protect himself or deliberate desertion of such a person." (6) "Substitution [replacement] of a child or false allegation of parenthood." Substantially the same text can be found in Hungary-Latvia (57), Art. 2 (2) and (6), and Estonia-Sweden (59), Art. 2 (12) and (13).

The offense, whether committed against children or adults, is listed singly in Switzerland-Uruguay (20), Art. 2 (8): "Exposure or abandonment of children or helpless persons" [listed also with kidnapping of minors]; and in Estonia-Sweden (59), Art. 2 (7): "Exposure or abandonment of a child or other person unable to protect himself."

The majority of treaties makes this type of offense extraditable only when committed against children. The following variations in terminology can be found:

In the treaties of England (*i.e.*, 7, 25, 27, 29, 34, 39, 43) Art. 2 (7) or (8): "Child-stealing, including abandoning, exposing or unlawfully detaining." In England-Germany (1), Art. 2 (11), it is merely "child-stealing," while in England-Austria-Hungary (2), Art. 2 (11), child-stealing is listed with kidnapping and false imprisonment.

In Greece-Austria-Hungary (9), Art. 2 (5); and Greece-Albania (41), Art. 2 (7): "Exposure or desertion of a child below the age of 7 years." In the latter treaty, Art. 2 (8): "Receiving, concealing, substituting or wrongfully exchanging a child." On the other hand, in Greece-Germany (10), Art. 2 (6), the age limit is omitted from the exposure and abandonment proviso.

In France-San Marino (37), Art. 2 (11): "Exposing of children."

In the treaties of Belgium with France (3), Netherlands (8), Bulgaria (11), Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), Finland (54) and in Hungary-Rumania (23): "Kidnapping [child-stealing], concealment, substitution [replacement], removal, or false allegations of parenthood" are listed separately from "exposure, abandonment or desertion."

In Denmark-Estonia (61), Art. 1 (10), the somewhat different terminology is found: "Neglecting and keeping persons in a state of destitution."

The following treaties do not include these offenses in the list of extraditable crimes: Chile-Colombia (13), Denmark-Finland (19), Austria-Norway (34), France-Poland (35), Liberia-Monaco (46).

11. False imprisonment; offenses against inviolability of residence.

Note. Some treaties list false imprisonment alone as an extraditable offense. The phrasing varies. See: France-San Marino (37), Art. 2 (19): "Detention or illegal confinement."

Denmark-Finland (19), Estonia-Sweden (59), Denmark-Estonia (61), in all three Art. 1 (11); and Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), in all four Art. 2 (5): "Deliberately [unlawfully] depriving a person of his freedom [liberty]." Austria-Norway (34), Art. 1 (12), and Belgium-Paraguay (36), Art. 3 (7): "Crimes against personal liberty."

In a number of treaties false imprisonment is defined as the "Deliberate and unlawful deprivation of personal freedom committed by private individuals." See: Greece-Austria-Hungary (9), Art. 2 (7); Greece-Germany (10), Greece-Albania (41), in both Art. 2 (9); Denmark-France (6), Art. 2 (4) [where it is listed together with "Abduction of minors,"]; Belgium-Finland (54), Art. 2 (14).

Other treaties list false imprisonment together with offenses against the inviolability of dwelling. The text most frequently used: "Offenses by private persons against personal freedom and the inviolability of residence [domicile, dwelling]." See the treaties of Belgium with Italy (4), Art. 2 (10); France (6), Bulgaria (11), Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), in the last six Art. 2 (14); Hungary-Rumania (23), Art. 2 (10); and the treaties of France with Latvia (28), Art. 2 (15), and Poland (35), Art. 3 (14).

In Greece-Albania (41), Art. 2 (9) and (10); and in Hungary-Latvia (57), Art. 2 (5) and (7), false imprisonment and offenses against the inviolability of dwelling are listed separately.

In the treaties of England with Finland (25), Latvia (27), Estonia (34), Lithuania (39), Albania (43), in all Art. 2 (6) or (7): "False imprisonment" is listed with "kidnapping." In England-Colombia (7), Art. 2 (7), "Child-stealing" is added to these two offenses; while in England-Czechoslovakia (29), Art. 2 (6), kidnapping is omitted.

The following treaties do not list this offense among extraditable crimes: England-Germany (1), England-Austria-Hungary (2), Chile-Colombia (13), Switzerland-Uruguay (20), Liberia-Monaco (46).

12. Perjury; subornation to perjury, false testimony by witnesses, experts or interpreters.

Note. This offense is included in the list in every extradition treaty, with the sole exception of England-Germany (1). The text used in the different treaties varies.

In the treaties to which England is a party it reads: "Perjury or subornation to perjury."

In Austria-Norway (34), Art. 1 (5): "False declaration."

In Estonia-Sweden (59), Art. 2 (4): "Perjury."

In Denmark-Finland (19), Denmark-Estonia (61), in both Art. 1 (2): "Perjury; false oath [declaration]."

In the treaties of Belgium with Italy (4), France (6), Bulgaria (11), Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), Finland (54); in the treaties of Greece with Austria-Hungary (9), Germany (10), Albania (41); in France-Denmark (6), France-San Marino (37),—perjury, on the one hand, and false testimony by experts, witnesses or interpreters, on the other, are listed separately.

In Belgium-Paraguay (36), Art. 3 (11); in the treaties of France with Latvia (28), Art. 2 (16), and Poland (35), Art. 3 (15); Switzerland-Uruguay (20), Art. 2 (11),—perjury, and false testimony by experts, etc., are listed together.

In the treaties of Hungary with Rumania (23), Art. 2 (15), and Latvia (57), Art. 2 (23); Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45); Austria-Finland (55), Art. 2 (23), these offenses are listed with "slandorous accusation."

In Chile-Colombia (13): "False statements by public officials or employees, judges sitting in a court of arbitration or arbitrators, experts or interpreters appointed or approved by the authorities."

13. Malicious prosecution; slanderous [false] accusation.

Note. As to the listing of this offence in a few treaties with perjury, see *Note* under *Perjury*.

In addition to those already indicated in the preceding *Note*, this offense is listed separately in the following treaties: France-San Marino (37), Art. 2 (29); Denmark-Finland (19), Art. 1 (15); Estonia-Sweden (59), Art. 2 (20); Austria-Norway (34), Art. 1 (6); Denmark-Estonia (61), Art. 1 (15).

14. Fraudulent bankruptcy.

Note. This offense is included in the list of extraditable crimes in every treaty, with the exception of Estonia-Sweden (59). In many cases it is simply stated as "Fraudulent bankruptcy," without further qualifications.

In other treaties, the following text is used: "Fraudulent bankruptcy and fraud committed in bankruptcy." See the treaties to which Belgium and Greece are parties; furthermore, Hungary's treaties with Rumania (23), and Latvia (57). It may be observed that in Belgium-France (3), Art. 2 (30), the offense is qualified to be extraditable only in cases foreseen in certain articles of the French Commercial and the Belgian Penal Codes, respectively.

In the treaties to which England is a party, the offense is designated: "Crimes against bankruptcy laws."

It is not clear, but seems probable, that the following designations are intended to cover this type offense:

In Austria-Norway (34), Art. 1 (16): "Crimes in connection with debt."

In Denmark-Estonia (61), Art. 1 (18): "Fraud committed against a creditor."

15. Embezzlement; swindling; breach of trust; fraud.

Note. This type of offense is included in the list of extraditable crimes in every treaty. The designation of this type of offense varies greatly in the different treaties. In some treaties, embezzlement, criminal malversation, breach of trust, etc., are listed together; in others, these are listed separately. Again, in some treaties, these offences are listed with other crimes, such as robbery, larceny, extortion, etc.

In the treaties of England with Germany (1), Austria-Hungary (2), in both Art. 2 (5); Colombia (7), Finland (25), Latvia (27), Estonia (34), in all four Art. 2 (16); Lithuania (39), Albania (43), in both Art. 2 (17),—embezzlement is listed with larceny. In England-Czechoslovakia (29), Art. 2 (16), embezzlement is listed with "Fraud by a bailee, banker, factor, trustee, or director, or member or public officer of any company, made criminal by any law for the time being in force." This "Fraud by a bailee, etc." proviso is listed separately in the above treaties of England in (1) and (2), Art. 2 (8); in (7), Art. 2 (16); in (25); Art. 2 (17); in (34), (39), and (43), Art. 2 (18). In England-Latvia (27), Art. 2 (18), the "made criminal . . ." qualification is omitted, and "fraudulent conversion" is added.

In Belgium-France (3), Art. 2 (27) and (28), "Swindling" and "Breach of trust" are listed separately.

In Belgium-Netherlands (8), Art. 2 (23), "Swindling"; while in Art. 2 (25), "Breach of trust" is listed with "embezzlement."

In Belgium-Paraguay (36), Art. 3 (13), "Embezzlement or malversation of public funds; unlawful exaction by public officials"; while in Art. 3 (18) and (19), "Swindling" and "Breach of trust" are listed separately.

In the other treaties of Belgium this type of offense is listed with other offenses. In Belgium-Latvia (44), Estonia (47), Lithuania (40), in all three, Art. 2 (11): "Theft [larceny], extortion, swindling, breach of trust, fraud." In Belgium-Czechoslovakia (50), Art. 2 (11): "Larceny, extortion, obtaining money or goods by false pretenses, breach of trust, fraud." In Belgium-Finland (54), Art. 2 (11): "fraud" is qualified to be extraditable only "if punishable under the Finnish Penal Code with a graver penalty than imprisonment." In all these treaties of Belgium, Art. 2 (20), embezzlement is listed separately but together with bribery, the text reading: "Embezzlement and malversation [peculation] by public officials; bribery of public officials." It may be noted that "bribery" is omitted from Belgium-Finland (54).

In Switzerland-Uruguay (20), Art. 2 (13): "Embezzlement or malversation of public funds, peculation by officials or trustees."

In France-Latvia (28), Art. 2 (12), and France-Poland (35), Art. 3 (11): "Embezzlement of public funds by public officials or depositaries [i.e., trustees]; bribery of officials." In France-Latvia (28), Art. 2 (17) and (18), "swindling" and "Breach of trust, wrongful use of a signed document which has not yet been filled up" are each listed separately; while in France-Poland (35), Art. 3 (16), "Swindling, breach of trust" are listed together, but separately from embezzlement.

Chile-Colombia (13): "Swindling and other forms of fraud."^a

Liberia-Monaco (46), Art. 2 (12), "malversation in office, embezzlement committed by officers or by those regarded as such" is listed with "bribery of public officers"; while Art. 2 (13) lists separately: "Embezzlement by any person or persons hired or salaried to the detriment of their employers, where this offense is subject to punishment by imprisonment by the laws of both countries." (16) "Swindling, breach of trust."

Denmark-Finland (19), Art. 1 (17): "Fraud; embezzlement."

Belgium-Italy (4), Art. 2 (16); Estonia-Sweden (59), Art. 2 (22); and Denmark-Estonia (61), Art. 1 (17): "Swindling, embezzlement, breach of trust."

In Hungary-Rumania (23), Art. 2 (16): "Embezzlement and peculation by public officials," while Art. 2 (21) lists swindling and minor frauds [*tromperie*] "when the sums obtained exceed 200 Hungarian gold crowns or 210 gold lei," together with extortion, and Art. 2 (22) reads: "Fraudulent theft, conversion of funds and breach of trust when the sums stolen exceed. . . ."

^a In Chile-Colombia (13), the following two hundred offenses are listed separately:

"Misappropriation of funds, property, documents, and all kinds of public or private title-deeds, committed by persons entrusted with their custody, or fraudulent abstraction of the above by partners or persons employed in the firm or establishment in which the act was committed."

"Embezzlement or malversation of public funds by officials or public trustees."

France-San Marino (37), Art. 2 (22) and (23), lists "Swindling" on the one hand, and "Breach of trust, embezzlement, malversation of public funds," on the other, separately.

In Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), in all Art. 2 (9) and (10), "Larceny [theft], receiving of stolen goods, embezzlement, peculation, extortion" are listed together, while "Swindling [fraud]" is listed separately. Hungary-Latvia (57), Art. 2 (10) and (11) is substantially identical with the above four treaties, with the difference that in (10) "robbery" takes the place of "peculation."

Austria-Norway (34), Art. 1 (15): "Embezzlement, theft, extortion, robbery with violence, obtaining money by false pretenses, breach of trust, including the disposal of an article the ownership or usufruct of which has already been transferred to a third person, or disposal of an acknowledgment of a debt wholly or partly settled."

In the treaties of Greece with Austria-Hungary (9); Germany (10), Art. 2 (6); Bulgaria (11); Albania (41), Art. 2 (11): "Theft, extortion, embezzlement, breach of trust, fraud, extortion."

In France-Denmark (6), Art. 2 (14), embezzlement and breach of trust are qualified to be extraditable only "in cases foreseen simultaneously by the legislation of both countries."

16. Bribery; bribery of public officials.

Note. This offense is included in the majority of treaties. The text varies; sometimes it is bribery, other times it is described as corruption.

It is listed separately in the following treaties: Belgium-Paraguay (36), Art. 3 (12); Switzerland-Uruguay (20), Art. 2 (12); Liberia-Monaco (48), Art. 2 (12); Belgium-France (3), Art. 2 (23) [in the last: "Corruption of public officials or arbitrators"]; France-San Marino (37), Art. 2 (23b) [in the last: "Subornation of public officials"]; in Hungary-Rumania (23), Art. 2 (17); and Hungary-Latvia (57), Art. 2 (13) [in the last: "Bribery of public officials, judges or jurors"].

In other treaties, it is listed together with other offenses.

In Belgium-Italy (4), Art. 2 (14); Greece-Austria-Hungary (9), Art. 2 (13); Greece-Germany (10), Art. 2 (15); Greece-Albania (41), Art. 2 (17); in treaties of Belgium with Bulgaria (11), Art. 2 (20), Italy (4), Art. 2 (14), Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), in the last five Art. 2 (20); in the treaties of France with Latvia (28), Art. 2 (12), and Poland (35), Art. 3 (11), it is listed with "embezzlement [of public funds] by public officials [peculation]." The same text can be found (*i.e.*, listing this offense with embezzlement, etc.) in Belgium-Netherlands (8), Art. 2 (15), and Liberia-Monaco (46), Art. 2 (12); but the offense of bribery is qualified to be extraditable only "if the laws of both countries permit extradition therefor."

The following treaties do not include bribery among extraditable offenses: France-Denmark (6), Chile-Colombia (13), Denmark-Finland (19), Belgium-Finland (54), Estonia-Sweden (59), Denmark-Estonia (61), Austria-Norway (34), Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55); and the treaties to which England is a party.

17. Larceny, theft [with or without violence]; robbery [with or without violence]; burglary; receiving or dealing in stolen goods.

Note. These types of offenses are listed in every extradition treaty with considerable textual variations. In some treaties the various offenses are each listed separately; in others they are listed together; there are also treaties wherein these offenses are listed with other crimes.

In the treaties to which England is a party, with the exception of England-Czechoslovakia (29), "larceny" is listed with "embezzlement" (see *Note* under Embezzlement); and, with the exception of England-Germany (1), England-Austria-Hungary (2), also with "robbery with violence," and with "burglary or housebreaking." In (1) and (2) burglary and robbery are each listed separately, in both Art. 2 (12) and (14).

In Chile-Colombia (13), "Larceny" and "Robbery" are listed separately.

In Denmark-Finland (19), Art. 2 (16) reads: "Robbery; burglary; illicit dealing in stolen goods"; while Art. 2 (18) lists separately: "Robbery with violence; blackmail; illicit dealing in goods which are the proceeds of robbery with violence or blackmail."

France-San Marino (37), Art. 2 (21) lists "Larceny," while Art. 2 (36) lists "receiving stolen goods" separately but together with "harboring of criminals."

Switzerland-Uruguay (20), Art. 2 (16) lists robbery, larceny and receiving of stolen goods with extortion.

Hungary-Rumania (23), Art. 2 (19) makes larceny extraditable only when the value of the stolen article exceeds 200 Hungarian gold crowns or 210 gold lei. In Art. 2 (20) and (24) "Robbery with violence," and "Receiving stolen goods" are each listed separately.

Hungary-Latvia (57), Art. 2 (10) lists larceny, receiving of stolen goods and robbery together with embezzlement and extortion.

In France-Latvia (28), Art. 2 (6), larceny is listed alone; while in France-Poland (35), Art. 3 (6), larceny "of all kinds" is listed with extortion.

In Liberia-Monaco (46), Art. 2 (7), theft, in Art. 2 (8), robbery, "according to the terms of law of Monaco," Art. 2 (17), larceny, are each listed separately,—the last one, however, together with swindling [*filouterie*].

Austria-Norway (34), Art. 1 (15) lists "theft, extortion, robbery with violence," together with embezzlement, obtaining money by false pretenses, and breach of trust. On the other hand, Art. 1 (19) lists receiving stolen goods with aid to a criminal after perpetration of an offense.

Estonia-Sweden (59), Art. 2 (21) lists "Theft with or without violence, house-breaking, receiving of stolen goods" together.

Denmark-Estonia (61), Art. 1 (16) lists larceny, separately, while in Art. 1 (19) "theft with violence or threats" is listed with blackmail. In Art. 1 (20) the following offense is listed separately: "Illicit use of money or property acquired by means of one of the offenses enumerated in paragraphs 16–19 [*i.e.*, larceny, embezzlement, breach of trust, fraud against a creditor, theft, blackmail]; assistance given with the object of securing for another the proceeds of such an offence."

In Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), in all Art. 2 (9), "Theft [larceny] and receiving of stolen goods" are listed with embezzlement, peculation and extortion.

Belgium-Paraguay (36), Art. 3 (16) lists theft with extortion.

In the treaties of Belgium with Bulgaria (11), Latvia (44), Estonia (47), Lithuania (49), Finland (54), in all Art. 2 (11), "Larceny [theft]" is listed with extortion, swindling, breach of trust, fraud; in Belgium-Czechoslovakia (50), Art. 2 (11), also with obtaining money by false pretenses." The same listing together of these offenses can be found in the treaties of Greece with Austria-Hungary (9), Germany (11), in both Art. 2 (6); Albania (41), Art. 2 (11). In the treaties of Belgium with France (3), Art. 2 (25); and Netherlands (8), Art. 2 (22); and in France-Denmark (6), Art. 2 (7), theft is listed separately.

Perhaps it may be noted that a great many treaties list separately the following offense, which, in my opinion, might well be classified under this heading: "Receiving of articles obtained by means of one of the crimes covered by the present Convention." This provision can be found in the treaties of Greece with Austria-Hungary (9), Art. 2 (17); Germany (10), Art. 2 (20); Albania (41), Art. 2 (25); in France-Denmark (6), Art. 2 (16); in the treaties of Belgium with France (3), Art. 2 (30); Italy (4), Art. 2 (19); Bulgaria (11), Art. 2 (30); Paraguay (36), Art. 3 (21); Latvia (44); Estonia (47); Lithuania (49); Czechoslovakia (50); Finland (54), the last five Art. 2 (30); France-Latvia (28), Art. 2 (22).

18. Extortion; blackmail [with or without violence].

Note. As observed in the preceding *Notes*, these offenses are, in the majority of treaties, listed with other crimes, such as larceny, robbery, bribery. In a few treaties, extortion or blackmail is listed separately.

Chile-Colombia (13) lists "Extortion by public officials" only.

France-San Marino (37), Art. 2 (18) lists extortion separately, while Art. 2 (17) defines blackmail as follows: "Threats against persons or property with a view to obtaining money or the fulfillment of some other condition."

In the treaties to which England is a party, in all Art. 2 (12), or (13) or (14), extortion and blackmail is defined as follows: "Threats by letter or otherwise with intent to extort money or other things of value."

It seems that the same type of offense is intended to be covered by the following phraseology used in Estonia-Sweden (59), Art. 2 (14): "Attempt to deprive a person of his liberty committed with violence or threats, with a view to compelling him to do, tolerate or refrain from an action."

In France-Latvia (28), Art. 2 (14), extortion is listed with "threats of attack against persons or property punishable by criminal penalties."

Denmark-Estonia (61), Art. 1 (19) lists blackmail with theft.

Belgium-Paraguay (36), Art. 3 (16) lists extortion with theft.

In Hungary-Rumania (23), Art. 2 (21), extortion is listed with swindling and minor frauds (*tromperie*).

France-Poland (35), Art. 3 (6) lists extortion with "larceny of all kinds."

Denmark-Finland (19), Art. 1 (18) lists blackmail with robbery and dealing in stolen goods.

Belgium-Netherlands (8), Art. 2 (3) defines blackmail: "Threats by letter and in determined condition as far as the laws of both countries permit extradition on this account."

In France-Belgium (3), Art. 2 (26), extortion is extraditable in cases foreseen by Art. 400, § 1 of the French, and Art. 470 of the Belgian Penal Codes, respectively.

In many treaties extortion is listed with larceny, robbery, embezzlement, receiving stolen goods, breach of trust. See: Switzerland-Uruguay (20), Art. 2 (16); Hungary-Latvia (57), Art. 2 (10); Finland-Latvia (26); Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), in all four Art. 2 (9); in the treaties of Belgium with Bulgaria (11), Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), Finland (54), in all six, Art. 2 (11); the treaties of Greece with Austria-Hungary (9), Germany (10), in both Art. 2 (6), and Albania (41), Art. 2 (11); Austria-Norway (34), Art. 1 (15).

This offense is not listed in Liberia-Monaco (46).

19. Obtaining money, goods or other valuable property by false pretenses with knowledge that same has been stolen or feloniously obtained.

Note. This offense is listed separately in the treaties of England, with Germany (1), Austria-Hungary (2), in both Art. 2 (6); Colombia (7), Czechoslovakia (29), in both Art. 2 (17); Finland (25), Art. 2 (18); Latvia (27), Estonia (34), Lithuania (39), Albania (43), in all four Art. 2 (19); Switzerland-Uruguay (20), Art. 2 (18).

In Chile-Colombia (13), this offense is defined as follows: "Obtaining possession of real property or title-deeds by wrongful means."

In Austria-Norway (34), Art. 1 (15) and in Belgium-Czechoslovakia (50), Art. 2 (11), this offense is listed with embezzlement, larceny, extortion, robbery and breach of trust.

This offense is not listed in the other treaties.

20. Malicious injury to property; threats or attacks upon persons or property.

Note. These offenses are included among extraditable crimes in a great many treaties. In some treaties, injury to property is specified alone; in others, both damage to property and injury to persons are specified. This offense is listed separately and should be carefully distinguished from the offense of damaging railways, ships, bridges and other properties of public utilities, which are separate offenses and listed also in those treaties which do not specify this offense as extraditable.

The following treaties list this offense with various phraseology:

The treaties of England with Austria-Hungary (2), Art. 2 (20); Colombia (7), Art. 2 (21); Finland (25); Latvia (27); Czechoslovakia (29); Estonia (34); Lithuania (39); and Albania (43), in all Art. 2 (22) or (23) or (24): "Malicious injury to property if such offense be indictable." However, in England-Czechoslovakia (29), Art. 2 (22), the "if indictable" proviso is omitted.

The treaties of Belgium with France (3), Art. 2 (3); Italy (4), Art. 2 (9); Bulgaria (11); Latvia (44); Estonia (47); Lithuania (49); Czechoslovakia (50); in all five Art. 2 (12): "Threatened attacks upon persons or property when punishable by death, hard labor or solitary confinement."

Substantially the same text is used in Franco-Denmark (6), Art. 2 (8), with this qualification: "in cases foreseen by Articles 305-307 of the French and Art. 245 of the Danish Penal Codes, respectively."

In Belgium-Netherlands (8), however, Art. 2 (17) defines the offense as "Intentional and illegal destruction of a building owned in whole or in part by another"; while Art. 2 (18) lists separately "Acts of violence, committed in public by united forces against property so far as such are extraditable by the laws of both countries."

Austria-Norway (34), Art. 1 (17): "Damage to the goods or capital of another person."

France-Poland (35), Art. 3 (13): "Threats to commit offenses against persons or property."

France-San Marino (37), Art. 2 (32): "Any destruction of or malicious damage or injury to movable or immovable property."

In Greece-Albania (41), Art. 2 (19), and Hungary-Latvia (57), Art. 2 (21): "Wilfully destroying or damaging movable property, public or private."

Denmark-Estonia (61), Art. 2 (21): "Serious illegal damage to another's property."

Denmark-Finland (19), Art. 1 (10) lists only "Assault on helpless persons." [*Quaere*: whether this should not be classified under "Abandonment" or "Assault."]

21. Endangering means of communications: Malicious [deliberate] acts destroying or damaging railways; endangering railway or aerial traffic or navigation, or lines of communication by telegraph or telephone, or endangering the life of passengers.

Note. The above text is a paraphrase of this type of offense on the basis of greatly varying texts used in the different treaties. These offenses are listed in the overwhelming majority of treaties. In some treaties all these kindred offenses are listed together; in others they are divided into two or three separate headings; again, in others they are listed with other offenses, such as destruction of or damage to tombs, monuments, public buildings, etc.

In Switzerland-Uruguay (20), Art. 2 (15): "Malicious acts resulting in the destruction of, or damage to, railways, steamships, mail-vans or electrical apparatus or conduits (telegraphs, telephones), or endangering their working."

In Finland-Latvia (26), Estonia-Finland (30), Austria-Estonia (45), Austria-Finland (55), in all four Art. 2 (18): "Deliberately endangering the safety of a railway line."

France-Latvia (28), Art. 2 (7); France-Poland (35), Art. 3 (7); and France-San Marino (37), Art. 2 (31): "Destroying or damaging with culpable intent a railway line or telegraphic communications."

Greece-Albania (41), Art. 2 (22): "Acts imperilling railway traffic."

Liberia-Monaco (46), Art. 2 (18): "Wilful and unlawful destruction or obstruction of railroads endangering human life."

In the treaties to which England is a party—(with the exception of England-Germany (11), and England-Austria-Hungary (2))—in Art. 2 (20), or (21) or (22) or (23): "Any malicious act done with intent to endanger the safety of any person travelling or being upon a railway."

Belgium-France (3), Art. 2 (31) qualifies this offense as follows: "Acts endangering traffic on railways in cases foreseen by Articles 16-17 of the French statute of July 15, 1845, and by Articles 406-408 of the Belgian Penal Code, respectively."

Belgium-Netherlands (8), Art. 2 (21) makes "Intentionally committed acts causing danger on a railway" extraditable only "so far as the laws of both countries permit extradition on this account."

Hungary-Rumania (23), Art. 2 (25): "Acts directed against the security of traffic on railways, waterways, airways or any other means of transport, and involving danger to life"; while Art. 2 (26) lists separately: "Malicious and unlawful destruction or injury, whether total or partial, and by any means whatever, of railways, vessels, aircraft or any other means of transport, their working stock, steam engines, telegraphs and telephones or wirelesses, when employed in public service."

These offenses are, however, listed together in Hungary-Latvia (57), Art. 2 (18), and the offense of destruction of buildings is added thereto.

In Denmark-France (6), Art. 2 (6); and Belgium-Paraguay (36), Art. 3 (15): "Destruction of buildings, steam engines or telegraphs."

In the treaties of Belgium with Bulgaria (11), Latvia (44), Estonia (47), Lithuania (49), Czechoslovakia (50), Finland (54), in all six Art. 2 (22): "Deliberate obstruction of railway trains by the placing of objects of any kind on the line, by interfering with the rails or their supports, by removing bolts or pins, or by the use of any other means, calculated to stop the train or cause it to leave the rails." In all these treaties (with the exception of Belgium-Finland (54)), in Art. 2 (24), the destruction of steam-engines and telegraphic lines is listed separately but together with other offenses. The same is true with respect to Belgium-France (3), Art. 2 (33).

Chile-Colombia (13), lists together: "Total or partial destruction with criminal intent of vessels, bridges, roads, railways, telegraph lines, public or private buildings."

In Denmark-Finland (19), Art. 1 (19); and Denmark-Estonia (61), Art. 1 (22), "malicious acts causing floods, railway accidents, shipwrecks, or any action involving the risk of disaster or accidents of this nature" is listed with arson and destruction by means of explosives.

In Austria-Norway (34), this offense is not specified, but Art. 1 (4) apparently intended to cover it in the following broad language: "Crimes constituting a public danger."

This offense is not included in the list of the following treaties: England-Germany (1), England-Austria-Hungary (2), Greece-Austria-Hungary (9), Greece-Germany (10), Estonia-Sweden (59).

APPENDIX III

MULTIPARTITE EXTRADITION CONVENTIONS

1. TREATY OF AMIENS, MARCH 27, 1802¹

ARTICLE 20. It is agreed that the contracting parties shall, on requisitions made by them respectively, or by their ministers or persons or officers duly authorised to make the same, deliver up to justice persons accused of crimes of murder, forgery, or fraudulent bankruptcy, committed within the jurisdiction of the requiring party, provided that this shall be done only when the evidence of the criminality shall be so authenticated as that the laws of the country where the person so accused shall be found would justify his apprehension and commitment for trial, if the offence had been there committed. The expenses of such apprehension and delivery shall be borne and defrayed by those who make the requisition. It is understood that this article does not regard in any manner crimes of murder, forgery, or fraudulent bankruptcy, committed antecedently to the conclusion of this definitive treaty.

¹ This English text is taken from the Definitive Copy of the Treaty presented to the House of Commons by His Majesty's command, found in *Cobbett's Parliamentary History*, Vol. 36, p. 563. See also *Martens, Supplément au Recueil des Principaux Traités* (1802), Tome II, pp. 571-572.

2. TREATY OF INTERNATIONAL PENAL LAW

Entered into between the Republics of Paraguay, Argentina, Bolivia, Peru and Uruguay on the 23rd of January, 1889, in the City of Montevideo¹

CHAPTER III

ON THE POLICY OF EXTRADITION

Article 19

The signatory States bind themselves to surrender delinquents who have taken refuge in their territory, provided the following circumstances exist:

1. The Nation reclaiming the delinquent must have jurisdiction to hear the case and pronounce sentence on the infraction on which the claim is based.
2. The infraction must be of such a nature or such gravity as to authorize the surrender.
3. The nation demanding the extradition must present documents which, according to its own laws, authorize the imprisonment and prosecution of the culprit.
4. The crime must not have lapsed through prescription, according to the law of the nation presenting the claim.
5. The criminal must not have been punished [previously] for the same crime, nor have served the whole of his sentence.

Article 20

Extradition takes complete effect without regard, in any case, to the nationality of the accused.

Article 21

Acts authorizing the extradition of the accused are the following:

1. In the case of supposed delinquents, infractions which, according to the penal law of the nation presenting the demand, are punishable by a deprivation of liberty for a period of not less than two years, or by another and equivalent penalty.
2. In the case of sentenced persons, those infractions which are punishable by a year's duration of the said penalty, as a minimum.

Article 22

Persons accused of the following crimes are not liable to extradition:

Duelling;
Adultery;
Insults and slanders;
Crimes against religious worship.

Persons guilty of common crimes in connection with any of those above listed, are liable to extradition.

Article 23

Neither do political crimes, nor any crimes which imperil the internal or external security of a State, nor common crimes in connection with these, afford grounds for extradition.

The classification of these crimes shall be made by the nation to which the claim is presented, and in accordance with the law most favorable to the person whose extradition is sought.

Article 24

No civil or commercial suit involving the accused, shall prevent his extradition.

Article 25

The surrender of the accused may be deferred while penal action is being brought against him by the State receiving the demand, though this shall not prevent the carrying on of the trial of extradition.

¹ *Actas y Tratados celebrados por el congreso Internacional Sud-Americano de Montevideo, 1888-1889* (Montevideo, 1911), p. 803. See also 18 Martens, *Nouveau Recueil Général de Traités* (2d sér.), p. 432. Unofficial translation.

Article 26

Individuals whose extradition has been conceded, can not be tried nor punished for political crimes prior to the extradition, nor for acts connected with such crimes.

Crimes punishable by extradition may be judged, and sentence pronounced thereon, when the State receiving the demand has given its consent, in accordance with the stipulations of the present treaty, if the said crimes have not served as grounds for the extradition already granted.

Article 27

When various nations request the surrender of one and the same individual by reason of different crimes, the request to be acceded to first, shall be that of the country where, in the opinion of the State receiving the request, the most serious offense has been committed. If the crimes should be considered as equally serious, the preference shall be given to the nation that first made the request for extradition; and if all the requests should be of the same date, the country receiving the request shall determine the order to be observed in surrendering [that individual].

Article 28

If the accused should already have been surrendered to one State, and a new request for the extradition of the same individual should subsequently be presented by another State, the granting or refusing of the new request shall rest with the nation that brought about the first surrender, provided the person whose extradition is sought, has not been set at liberty.

Article 29

When the penalty to be imposed on the accused is the death penalty, the State acceding to the extradition may demand that a lesser penalty, of the next degree of gravity, be substituted.

CHAPTER IV

ON THE LEGAL PROCEDURE OF EXTRADITION

Article 30

Requests for extradition shall be presented by the appropriate diplomatic or consular agents, or, in default of these, directly by the one Government to the other; and the requests shall be accompanied by the following documents:

1. In the case of supposed delinquents, a copy, in due legal form, of the penal law applicable to the infraction that is the basis of the request; and copies in legal form of the warrant for arrest and the other documents referred to, in part 3 of Article 19;

2. In the case of a person [already] sentenced, a copy, in legal form, of the authoritative condemnatory sentence, accompanied by evidence, in like form, of the fact that the accused has been given judicial notice, and either represented in court or legally declared a defaulter.

Article 31

If the State receiving the demand should consider it illegal because of defects of form, that State shall return the documents in question to the Government which formulated the demand, and shall state the reason and name the defects which prevent the taking of judicial steps.

Article 32

If the request for extradition has been presented in due form, the Government receiving the demand shall transmit all the documents to the proper judge or tribunal, and this judge or tribunal shall order the apprehension of the accused and the sequestration of the articles connected with the crime, if, in his judgment, such a step is permissible and in accordance with the provisions of the present treaty.

Article 33

In all cases in which the apprehension of the fugitive is allowed, notification shall be given, within twenty-four hours, both of his case and of the fact that he may avail himself of the right accorded him by the following article.

Article 34

The accused shall, during a period limited to three days and beginning with the day following that on which he receives the notification, be privileged to object to the extradition, alleging:

1. That he is not the person whose extradition is demanded.
2. The defects of form which may exist in the documents presented;
3. The illegal grounds of the demand for extradition.

Article 35

In cases in which proof of the alleged acts is necessary, incidental proceedings to prove them shall be entered into, and shall be governed, with respect both to the proof itself and the methods of procedure, by the provisions of the laws regarding court proceedings, in the State receiving the request for extradition.

Article 36

Once the proofs have been presented, the case shall be passed upon, within a period of ten days, no other steps being required; and a declaration shall be made as to whether or not the case calls for extradition.

It shall be possible to appeal from such a decision within a period of three days, to the proper tribunal, which will give its verdict within a period of five days.

Article 37

If the sentence should be favorable to the request for extradition, the tribunal that pronounced the verdict shall immediately make this fact known to the Executive Authority, so that the latter may make the necessary provisions for the surrender of the delinquent.

If the sentence should be unfavorable, the judge or tribunal in question shall order that the person under arrest be set free at once, and shall notify the Executive Authority of this fact, appending [to the notification], a copy of the sentence, in order that the said authority may call the sentence to the attention of the Government presenting the request.

In those cases in which the claim is denied on the ground of insufficiency of documents, the extradition proceedings must be reopened, provided that the Government making the request has presented a new set of documents, or has brought to completion the set already presented.

Article 38

If the arrested person should state that he is willing to conform to the request for extradition, the judge or tribunal shall prepare a record of the terms in which he has expressed that conformity, and shall declare, without proceeding further, that the extradition is legal.

Article 39

All the objects relating to the crime that leads to the extradition, and found in the possession of the accused, shall be handed over to the State that brought about the extradition.

Those objects which may be found in the possession of third parties, shall not be handed over until their possessors have first been heard and the objections which they may make, have been passed upon.

Article 40

In those cases in which the extradition of the accused is to be effected by a land route, it shall be the duty of the requested State to transport him to the most suitable point on its frontier.

When the transportation of the accused must be effected by sea or stream, he shall be surrendered at the most fitting port of embarkation, to those agents which the requesting country shall appoint.

The requesting State may, in any case, appoint one or more custodians; but their intervention shall be subject to that of the agents or authorities of the requested country or the country through which transit is taking place.

Article 41

When, in order to give up an accused person whose extradition has been agreed to, by one nation in favor of another one, it may be necessary to cross the territory of an intervening State, that passage shall be authorized by the latter, without the imposition of any requirement other than the presentation through diplomatic channels of a certificate in the form of the decree of extradition, to be issued by the Government that agreed to that extradition.

If the transit has been authorized, the provisions of paragraph 3 of the previous article shall go into effect.

Article 42

The expenses in connection with the extradition of the accused shall be charged to the requested State up to the moment of his surrender, and to the requesting Government from that time on.

Article 43

When the extradition has been agreed to, and the case concerns an indicted person, the Government which has procured the extradition shall inform the Government which has granted the request, of the final sentence pronounced in the case that led to the extradition.

3. TREATY FOR THE EXTRADITION OF CRIMINALS AND FOR PROTECTION AGAINST ANARCHISM¹

Signed at Mexico, January 28, 1902

Their Excellencies the Presidents of the Argentine Republic, Bolivia, Colombia, Costa Rica, Chili, the Dominican Republic, Ecuador, El Salvador, the United States of America, Guatemala, Haiti, Honduras, the United Mexican States, Nicaragua, Paraguay, Peru and Uruguay.

Desiring that their respective countries should be represented at the Second International American Conference, sent thereto duly authorized to approve the recommendations, resolutions, conventions and treaties that they might deem convenient for the interests of America, the following Delegates:

[Here follow the names of the delegates.]

Who, after having communicated to each other their respective full powers and found them to be in due and proper form, excepting those presented by the representatives of their Excellencies the Presidents of the United States of America, Nicaragua and Paraguay, who act "*ad referendum*," have agreed to enter into a Treaty for the extradition of criminals and for protection against anarchism, in the following terms.

ARTICLE 1. The High Contracting Parties agree reciprocally to surrender persons accused or sentenced by the proper authorities whenever the following circumstances occur.

I. That the demanding State shall have jurisdiction to commit the delinquent who is the cause of the demand of extradition.

II. That the perpetration of a crime or offence of the common order which the laws of the demanding and requiring States punish with the penalty of not less than two years imprisonment, be duly invoked.

III. If by reason of the Federal form of Government of some of the High Contracting

¹ 6 Martens, *Nouveau Recueil Général de Traités* (3d sér.), p. 185; Scott, *The International Conferences of American States* (1931), pp. 83-88.

Parties, it shall not be possible to determine the punishment corresponding to a crime for which extradition has been demanded, the following list of crimes shall be taken as a basis for the demand:

1. Murder, comprehending the crime known as parricide, assassination, poisoning and infanticide.
2. Rape.
3. Bigamy.
4. Arson.
5. Crimes committed at sea, to wit:
 - a) Piracy, as commonly known and defined by the Law of nations.
 - b) Destruction or loss of a vessel, caused intentionally; or conspiracy and attempt to bring about such destruction or loss, when committed by any person or persons on board of said vessel on the high seas.
 - c) Mutiny or conspiracy by two or more members of the crew, or other persons, on board of a vessel on the high seas, for the purpose of rebelling against the authority of the captain or commander of such vessel, or by fraud, or by violence, taking possession of such vessel.
6. Burglary, defined to be the act of breaking and entering into the house of another in the night time, with intent to commit a felony therein.
7. The act of breaking into and entering public offices, or the offices of banks, banking houses, savings banks, trust companies, or insurance companies, with intent to commit theft therein, and also the thefts resulting from such acts.
8. Robbery, defined to be the felonious and forcible taking from the person of another of goods or money, by violence or putting the person in fear.
9. Forgery or the utterance of forged papers.
10. The forgery, or falsification of the official acts of the Government or public authority, including courts of justice, or the utterance or fraudulent use of any of the same.
11. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, or other instruments of public credit; of counterfeit seals, bank notes, stamps, dies, and marks of State, or public administration, and the utterance, circulation, or fraudulent use of any of the above mentioned objects.
12. The introduction of instruments for the fabrication of counterfeit coin or bank notes or other paper current as money.
13. Embezzlement or malversation of public funds committed within the jurisdiction of either party by public officers or depositaries.
14. Embezzlement of funds of a bank of deposit, or savings bank, or trust company, chartered under the laws.
15. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when the crime is subject to punishment by the laws of the place where it was committed.
16. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons in order to exact money from them for their ransom or for any other unlawful end.
17. Mayhem and other wilful mutilation causing disability or death.
18. The malicious and unlawful destruction or attempted destruction of railways, trains, bridges, vehicles, vessels and other means of travel, or of public edifices and private dwellings, when the act committed shall endanger human life.
19. Obtaining by threats of injury, or by false devices, money, valuables or other personal property, and the purchase of the same with the knowledge that they have been so obtained, when such crimes or offences are punishable by imprisonment or other corporal punishment by the laws of both countries.
20. Larceny, defined to be the theft or [of] effects, personal property, horses, cattle, live

stock, or money, of the value of at least twenty-five dollars, or receiving stolen property, of that value knowing it to be stolen.

21. Extradition shall also be granted for the attempt to commit any of the crimes and offences above enumerated, when such attempt is punishable with prison or other corporal penalty by the laws of both Contracting parties.

IV. That the demanding State present documents which, according to its laws, authorize the provisional arrest and the legal commitment of the offender.

V. That either the offence or penalty has not prescribed, in conformity with the respective laws of both countries.

VI. That the offender, if already sentenced, has not served his sentence.

ART. 2. Extradition shall not be granted for political offences or for deeds connected therewith. There shall not be considered as political offences acts which may be classified as pertaining to anarchism, by the legislation of both the demanding country and the country from whom the demand is made.

ART. 3. In no case can the nationality of the person accused prevent his or her surrender under the conditions stipulated by the present treaty, but no Government shall be bound to grant the extradition of its own citizens, reserving to itself the right to surrender them when in its judgment it is proper to do so.

ART. 4. If the person whose extradition is demanded is subject to penal proceedings, or is detained for having committed an offence in the country where he has sought refuge, his delivery shall be delayed until the end of the proceedings, or until he has served his sentence.

Civil obligations contracted by the accused in the country of refuge shall not be an obstacle to his delivery.

ART. 5. Extradition, when granted, does not authorize the trial and punishment of the party surrendered, for a crime different from the one that may have served as ground for the corresponding demand; unless it has connection therewith and is founded upon the same proof as that of the demand.

This stipulation is not applicable to crimes or felonies committed after extradition.

ART. 6. If another State or States, by virtue of stipulations in treaties, demand the surrender of the same individual by reason of different felonies, preference shall be given to the demand of the State in whose territory the greatest offence has been committed in the judgment of the State upon which the requisition has been made. If the felonies should be considered of the same degree, preference shall be given to the State that may have priority in the demand for extradition, and if all the demands bear the same date, the country upon which the demand is made shall determine the order of surrender.

ART. 7. The requests for extradition shall be presented by the respective diplomatic or consular agents; and, in the absence of these, directly by one Government to another; and they shall be accompanied by the following documents:

I. In regard to alleged delinquents, a legalized copy of the penal law applicable to the offence for which the demand is made, and of the commitment and other requisites referred to in Clause IV of Article 1st, shall be furnished.

II. With regard to those already sentenced, a legalized copy of the final sentence of condemnation.

All data and antecedents necessary to prove the identity of the person whose surrender is asked for, shall also accompany the demand.

ART. 8. In cases of urgency, the provisional detention of the individual asked for may be granted on a telegraphic request, from the demanding Government to the Minister of Foreign Affairs, or to the proper authority of the country upon which the demand shall be made, and wherein a promise shall be made of sending the documents mentioned in the foregoing article, but the person detained shall be set free, if such documents are not presented within the terms that may be designated by the nation on which the demand has been made, provided such term shall not exceed three months, to be counted from the date of the detention.

ART. 9. The demand for extradition, in so far as the procedure is concerned, the determination of the genuineness of its origin, the admission and competency of the exception with which they can be opposed by the criminal or fugitive demanded, shall be submitted, whenever they do not conflict with the prescriptions of this Treaty, to the decision of the competent authorities of the country of refuge, which shall proceed in accordance with the legal provisions and practices established for such a case in said country. The fugitive criminal is guaranteed the right of habeas corpus, or the protection (*recurso de amparo*) of his individual guarantees.

ART. 10. All property which may be found in the possession of the accused, should he have obtained it through the perpetration of the act of which he is accused, which may serve as a proof of the crime for which his extradition is asked, shall be confiscated and delivered up with his person. Nevertheless, due recognition shall be given to the rights of third parties to the confiscated articles, provided they are not implicated in the accusation.

ART. 11. The transit through the territory of one of the Contracting States of any individual delivered by a third country to another State not belonging to the country of transit, shall be granted on the simple presentation, either of the original or of a legalized copy of the resolution granting the extradition by the Government of the country of refuge.

ART. 12. All expenses connected with the extradition of the fugitive shall be for the account of the demanding State, with the exception of the compensation to the public functionaries who receive a fixed salary.

ART. 13. The extradition of any individual guilty of acts of anarchism can be demanded whenever the legislation of the demanding State and of that on which the demand is made has established penalties for such acts. In such case it shall be granted, although the individual whose extradition be demanded may be liable to imprisonment of less than two years.

ART. 14. The Contracting Governments agree to submit to arbitration all controversies which may arise out of the interpretation or carrying into effect of this Treaty, when all means for a direct settlement by friendly agreements shall have failed.

Each Contracting Party shall name an arbitrator, and the two shall name an umpire, in case of dispute. The Committee of Arbitrators shall adopt the rules for the arbitration proceedings in every case.

ART. 15. The present Treaty shall remain in force for five years from the day on which the last exchange of ratifications shall have been made and shall remain in force for another term of five years, if it should not have been denounced twelve months before the expiration of that period. In case any Government or Governments should denounce it, it shall remain in force among the other Contracting Parties. This Treaty shall be ratified, and the ratifications shall be exchanged in the city of Mexico, within one year from the time of its being signed.

ART. 16. If any of the High Contracting Parties should have concluded treaties of extradition among themselves, such treaties shall be amended only in the part modified or altered by the provisions of the present Treaty.

TRANSITORY ARTICLE

The representatives of Costa Rica, Ecuador, Honduras and Nicaragua sign this Treaty with the reserve that their respective Governments shall not deliver the culprit who deserves the death penalty, according to the legislation of the demanding countries, except under the promise that such penalty shall be commuted for the one next below in severity.

If the Governments of the above mentioned Delegates sustain the same reserve on ratifying the present Treaty, the latter will only bind them with those Governments which accept the conditions referred to.

In Testimony whereof the Plenipotentiaries and Delegates sign the present Treaty and set thereto the Seal of the Second International American Conference;

Made in the City of Mexico, on the twenty-eighth day of January nineteen hundred and

two, in three copies written in Spanish, English and French respectively which shall be deposited at the Department of Foreign Relations of the Government of the Mexican United States, so that certified copies thereof may be made, in order to send them through the diplomatic channel to the signatory States.

[Signed by the delegates for: Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Paraguay, Peru, El Salvador, United States of America, Uruguay.]

4. AGREEMENT ON EXTRADITION¹

Signed at Caracas, July 18, 1911, by Ecuador, Peru, Colombia, Bolivia and Venezuela

The undersigned Plenipotentiaries of the Republics of Ecuador, Bolivia, Peru, Colombia and Venezuela, subsequent to the exchange of their respective Plenary Powers, agree upon the following:

ARTICLE 1. The contracting States agree to deliver mutually to one another, in accordance with the stipulations in this Agreement, those persons who, having been prosecuted or condemned by the judicial authorities of any one of the contracting States as authors, accomplices or harborers in regard to one or any of the crimes or transgressions specified in Article II, seek refuge or are located within the territory of one of them. In order that extradition may be effected, proofs of the crime must be such that the laws of the place where the fugitive or condemned man is located would justify his detention or delivery to justice if the actual committing of, attempt at, or frustration of the crime or transgression had taken place in it.

ART. 2. Extradition will be permitted for the following crimes and transgressions:

1. Homicide, including cases of parricide, infanticide, assassination, poisoning and abortion.

2. Wounds or lesions caused intentionally which produce death unintentionally, a mental or bodily infirmity which is really or apparently incurable, permanent incapacity for work, the loss or depriving of total use of sight or of a member necessary for self-defense or protection, or a serious mutilation.

3. Intentional incendiarism.

4. Rape, violation of the body and other attacks against pudicity.

5. Child abandonment.

6. The removal, concealment, hiding, substitution or replacing of children.

7. The associating together of malefactors, with proved criminal intent, in regard to the crimes which occasion extradition.

8. Bigamy and polygamy.

9. Robbery, theft of money or personal property.

10. Fraud, constituting trickery or deceit.

11. Rapine or extortion duly condemned by the courts of justice in accordance with the respective laws of the countries.

12. Abuse of confidence.

13. The falsification of papers or the emission of falsified papers; falsification of official Government documents, of public authorities or of courts of justice or their emission.

14. The counterfeiting or alteration of money either coin or paper, or of titles of debt created by the National Governments, the provincial or municipal States, or of coupons of these titles, or of bank notes, or the emission or circulation of them.

15. The counterfeiting or alteration of seals, stamps, dies, postage stamps, and tokens of the respective Governments, of the authorities and of public administration; and the use, circulation and fraudulent expenditure of the foregoing.

¹ *Tratados Vigentes* (1925, Bolivia), Tomo II, pp. 778-790; *Tratados Públicos de Venezuela*, Vol. II, p. 435. Unofficial translation.

16. Malversation committed by public officers, malversation committed by employed or salaried persons to the detriment of those who employ them.

17. Bribery and graft.

18. The false testimony or false declarations of witnesses and experts, or the bribing of witnesses, experts or interpreters.

19. Bankruptcy or fraudulent insolvency and frauds committed in insolvency.

20. The intentional and illegal destruction or obstruction of railroads, placing the lives of individuals in danger.

21. Inundations and other ravagings.

22. Crimes committed on the high seas.

a) Piracy, whether that defined by municipal law or by the law of nations.

b) Mutiny or conspiracy to engage in mutiny, on the part of two or more persons on board a boat, on the high seas, against the authority of the captain or his representative.

c) Criminal sinking or destruction of a ship on the seas.

d) An attack committed on board a ship on the high seas with the intention of causing serious bodily damage.

e) Desertion from the navy and army. Criminal destruction of artillery or provision enclosures on land or on sea.

23. Crimes and transgressions against the laws of the contracting parties which are directed toward the suppression of slavery and the slave trade.

24. Offences against individual liberty and the inviolability of the home, committed by individuals.

ART. 3. When the crime or transgression which is the motive of the extradition has been committed, or attempted or frustrated, outside the State which makes the request for extradition, the request shall be considered only when the laws of the surrendering State authorize the judicial examination of such crimes when they are committed outside their jurisdiction.

ART. 4. The extradition of a criminal fugitive will not be granted if the act for which he is sought is considered in the surrendering State as a political crime or an act connected with it, and no person surrendered by any one of the contracting States to the other shall be judged or punished for any political crime or offence, or for any act in connection with it, committed before his extradition, if the person for whom the extradition is asked proves that this is being done for the purpose of trying him or punishing him for a political offence or an act in connection with it.

An attack on the life of a Chief of State will not be considered a political offence or an act in connection with it.

If any question should arise as to whether a case is comprised within the provisions of this article, the decision of the authorities of the surrendering State shall be final.

ART. 5. Extradition will not be granted in the following cases:

a) If according to the laws of either State the maximum penalty which may be imposed on the person whose extradition is demanded, for the deed for which extradition is asked, does not exceed six months of imprisonment.

b) When according to the laws of the State to which the request for extradition is directed the act or penalty to which the accused or condemned man was subjected has been outlawed by the statute of limitations.

c) If the individual whose extradition is sought has already been tried and set free or has completed his sentence, or if the acts imputed to him have been the object of an amnesty or pardon.

ART. 6. The request for extradition must be made necessarily through diplomatic channels.

ART. 7. When the person whose extradition is requested shall be under indictment or sentenced by the surrendering State, the surrender, when matters shall have proceeded to this point, will only take place when the person demanded has been absolved or pardoned or has completed his sentence, or when in some way he has been released by the courts.

ART. 8. The request for extradition shall be accompanied by the sentence of condemnation if the fugitive has been tried and sentenced; or the order for detention issued by the proper court, with the exact designation of the offence or crime which motivated the order, and of the date of its commission, as well as the declarations or other proofs by virtue of which the order for detention was issued, in case the fugitive has only been indicted.

These documents shall be presented in their original or in a copy duly authenticated, and to them there shall be attached a copy of the text of the law applicable to the case, and as far as possible a description of the person requested.

The extradition of fugitives by virtue of the stipulations of the present treaty will take place in conformity with the extradition laws of the surrendering State.

In no case will extradition take effect if a similar crime is not punishable by the law of the surrendering nation.

ART. 9. Provisional detention of the fugitive will be made if there is produced, through diplomatic channels, an order for detention sent by the proper court. Provisional detention will likewise be made if it is requested through a notice sent even by telegraph, through diplomatic channels, to the Secretary of Foreign Relations of the surrendering State, of the fact that an order for detention exists. In urgent cases, especially when the escape of the culprit is feared, provisional detention, directly requested by a judicial official, may be granted by a police authority or by a judge of the local court (*Juez de Instrucción*) of the place where the fugitive is located.

Provisional detention will cease if, within a period of time determined by the distance involved, the request for extradition is not made in due form in accordance with the stipulations in Article 8.

ART. 10. The death penalty shall not be given an offender unless it is permitted in the surrendering State.

ART. 11. The extradited person cannot be tried or punished in the demanding State except for the offences mentioned in the request for extradition, nor can he be handed over to another nation unless in either case he has been free to leave the State for one month after having been sentenced, after having served his sentence, or after having been pardoned. In all these cases the extradited person must be warned of the consequences to which his stay within the boundaries of the nation would expose him.

ART. 12. All objects which constitute the accessories of the crime, those which proceed from it or have served for committing it, as well as any other elements for conviction which might be found in the fugitive's possession, shall, after the decision of the proper authorities, be delivered to the demanding State, as far as this is practicable and in conformity with the laws of the respective nations.

However, the rights of the third party in regard to such objects shall be respected.

ART. 13. When the extradition of a person is requested by several States, priority of request shall determine the preference, unless the surrendering nation is obligated by a prior treaty to give preference in a different manner.

ART. 14. If the demanding State shall not have taken charge of the person whose extradition is requested within a period of three months, counting from the day when he is placed at the State's disposition, the prisoner shall be set at liberty and he can not be held again for the same motive.

ART. 15. The expenses incurred by the arrest, detention, examination and surrender of fugitives, by virtue of this agreement, shall be charged to the account of the State which asks for the extradition; and the person who is to be extradited shall be conducted to the port of the surrendering State, which port the demanding Government shall indicate to its diplomatic agent, at whose expense he shall be embarked.

ART. 16. If the accused shall request it, the Superior Court of Justice of the surrendering nation shall decide whether or not the crime for which his extradition is demanded is to be considered of a political character, or as connected with a political crime.

ART. 17. The duration of the present agreement shall be five years to be counted beginning one month after the exchange of its ratifications, and it shall not be retroactive. When

that time limit shall have passed, the agreement shall be understood as continued until one of the contracting States shall communicate to the others its desire to have it cease, one year after the notification.

ART. 18. Aside from the stipulations of the present agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law.

ART. 19. When, in order to deliver a fugitive whose extradition shall have been granted by one nation to another, it might be necessary to cross the territory of an intermediate State, permission to cross shall be authorized by the latter with no other requisite than the showing, through diplomatic channels, of the legal instrument in the shape of the extradition decree issued by the Government which granted the extradition.

In testimony of which five uniform copies are hereby signed in Caracas, July 18, 1911, by:
(Names of Plenipotentiaries of the five States.)

5. BUSTAMANTE CODE¹

Title III

EXTRADITION

Article 344

In order to render effective the international judicial competence in penal matters each of the contracting States shall accede to the request of any of the others for the delivery of persons convicted or accused of crime, if in conformity with the provisions of this title, subject to the dispositions of the international treaties and conventions containing a list of penal infractions which authorize the extradition.

Article 345

The contracting States are not obliged to hand over their own nationals. The nation which refuses to give up one of its citizens shall try him.

Article 346

Whenever before the receipt of the request, a person accused or convicted has committed an offense in the country from which his delivery is requested, the said delivery may be postponed until he is tried and has served sentence.

Article 347

If various contracting States should request the extradition of a delinquent for the same offense, he should be delivered to that one in whose territory the offense has been committed.

Article 348

In case the extradition is requested for different acts, the preference shall belong to the contracting State in whose territory the most grievous offense has been committed, according to the legislation of the State upon which the request was made.

Article 349

If all the acts imputed should be equally grave, the preference shall be given to the contracting State which first presents the request for extradition. If all have applied simultaneously, the State upon which the request was made shall decide, but the preference should

¹ Code of Private International Law, Annexed to the Convention adopted at Habana, February 20, 1928. *Final Act, Sixth International Conference of American States*, Habana, 1928, pp. 16-88; 86 *League of Nations Treaty Series*, pp. 120, 254; 4 Hudson, *International Legislation*, pp. 2283 to 2354.

Drafted at Rio de Janeiro in 1927 by International Commission of Jurists, *American Journal of International Law, Special Supplement*, Vol. 22 (1928), p. 314.

be given to the State of origin, or in the absence thereof to that of the domicile, of the accused, if such State is among those requesting extradition.

Article 350

The foregoing rules in respect to preference shall not be applicable if the contracting State is obligated toward a third one, by reason of treaties in force prior to the adoption of this code, to establish a different method.

Article 351

In order to grant extradition it is necessary that the offense has been committed in the territory of the State requesting it, or that its penal laws are applicable to it in accordance with the provisions of Book III of this Code.

Article 352

Extradition extends to persons accused or convicted as principals, accomplices or abettors of a consummated offense.

Article 353

It is necessary that the act which gives rise to the extradition be a criminal offense in the legislation of the State making the request and in that upon which it is made.

Article 354

It shall be likewise necessary that the penalty attached to the alleged acts, according to their provisional or final description by the competent judge or court of the State requesting the extradition, is not less than one year of deprivation of liberty, and that the arrest or detention of the accused has been ordered or decided upon, in case final sentence has not been delivered. The sentence should be deprivation of liberty.

Article 355

Political offenses and acts related thereto, as defined by the requested State, are excluded from extradition.

Article 356

Nor shall it be granted, if it is shown that the request for extradition has been in fact made for the purpose of trying or punishing the accused for an offense of a political character in accordance with the same definition.

Article 357

Homicide or murder of the head of a contracting State or of any other person who exercises authority in said State, shall not be deemed a political offense nor an act related thereto.

Article 358

Extradition shall not be granted if the person demanded has already been tried and acquitted, or served his sentence, or is awaiting trial, in the territory of the requested State for the offense upon which the request is based.

Article 359

Nor should extradition be granted if the offense or the penalty is already barred by limitation by the laws of the requesting or requested State.

Article 360

In all cases in which the legislation of the requested State prevents extradition it is an indispensable requirement that such legislation be enacted before the commission of the crime.

Article 361

Consuls general, consuls, vice consuls, or consular agents may request the arrest and delivery on board of a vessel or aircraft of their country of the officers, sailors, or members of the crew of its war or merchant ships or aircraft who may have deserted therefrom.

Article 362

For the purposes of the preceding article, they shall exhibit to the proper local authority, delivering also to it an authenticated copy thereof, the register of the ship or aircraft, the crew list, or any other official document upon which the request is founded.

Article 363

In adjoining countries special rules may be agreed upon for extradition in the regions or localities of the boundary.

Article 364

The request for extradition should be made through agents duly authorized for this purpose by the laws of the petitioning State.

Article 365

Together with the final request for extradition the following should be submitted:

1. A sentence of conviction or a warrant or order of arrest or a document of equal force, or one which obliges the interested party to appear periodically before the criminal court, together with such parts of the record in the case as furnish proof or at least some reasonable evidence of the guilt of the person in question.
2. The filiation of the person whose extradition is requested, or such marks or circumstances as may serve to identify him.
3. An authenticated copy of the provisions establishing the legal definition of the act which gives rise to the request for extradition, describing the participation imputed therein to the defendant, and prescribing the penalty applicable.

Article 366

The extradition may be requested by telegraph and, in that case, the documents mentioned in the preceding article shall be presented to the requested country or to its legation or consulate general in the requesting country, within two months following the detention of the accused. Otherwise he shall be set at liberty.

Article 367

Moreover, if the requesting State does not dispose of the person demanded within three months following his being placed at its disposal, he shall be set at liberty.

Article 368

The person detained may use, in the State to which the request for extradition is made, all legal means provided for its nationals for the purpose of regaining their freedom, basing the exercise thereof on the provisions of this code.

Article 369

The person detained may also thereafter use the legal remedies which are considered proper in the State which requests the extradition, against the qualifications and resolutions upon which the latter is founded.

Article 370

The delivery should be made together with all the effects found in the possession of the person demanded, whether as proceeds of the alleged crime, or whether to be used as evi-

dence, in so far as practicable in accordance with the laws of the State effecting the delivery and duly respecting the rights of third persons.

Article 371

The delivery of the effects referred to in the preceding article can be made, if requested by the State requesting the extradition, even though the detained person dies or escapes before it is effected.

Article 372

The expenses of detention and delivery shall be borne by the requesting State, but the latter shall not, in the meanwhile, have to defray any expenses for the services rendered by the public paid employees of the government from which extradition is requested.

Article 373

The charge for the services of such public employees or officers as receive only fees or perquisites shall not exceed their customary fees for their acts or services under the laws of the country in which they reside.

Article 374

All liability arising from the fact of a provisional detention shall rest upon the requesting State.

Article 375

The passage of the extradited person and his custodians through the territory of a third contracting State shall be permitted upon presentation of the original document which allows the extradition, or of an authenticated copy thereof.

Article 376

A State which obtains extradition of an accused who is afterwards acquitted shall be obliged to communicate to the State which granted it an authenticated copy of the judgment.

Article 377

The person delivered can not be detained in prison nor tried by the contracting State to which he is delivered for an offense different from the one giving rise to the extradition and committed prior thereto, unless it is done with the consent of the requested State, or unless the extradited person remains free in the territory of the former for three months after his trial and acquittal for the offense which gave rise to the extradition, or after having served the sentence of deprivation of liberty imposed upon him.

Article 378

In no case shall the death penalty be imposed or executed for the offense upon which the extradition is founded.

Article 379

Whenever allowance for temporary detention is proper, it shall be computed from the time of the detention of the extradited person in the State to which the request was made.

Article 380

The detained person shall be set free if the requesting State does not present the request for extradition in a reasonable period, within the least time possible after temporary arrest, taking into account the distance and facilities of postal communication between the two countries.

Article 381

If the extradition of a person has been refused, a second request on account of the same crime cannot be made.

6. CONVENTION ON EXTRADITION¹

Signed at Montevideo, December 26, 1933

The Governments represented in the Seventh International Conference of American States:

Wishing to conclude a Convention on Extradition, have appointed the following Plenipotentiaries: [Names of Delegates omitted.]

Who, after having exhibited their Full Powers, which were found in good and due form, have agreed upon the following:

Article 1

Each one of the signatory States in harmony with the stipulations of the present convention assumes the obligation of surrendering to any one of the States which may make the requisition, the persons who may be in their territory and who are accused or under sentence. This right shall be claimed only under the following circumstances:

a) That the demanding State have the jurisdiction to try and to punish the delinquency which is attributed to the individual whom it desires to extradite.

b) That the act for which extradition is sought constitutes a crime and is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year.

Article 2

When the person whose extradition is sought is a citizen of the country to which the requisition is addressed, his delivery may or may not be made, as the legislation or circumstances of the case may, in the judgment of the surrendering State, determine. If the accused is not surrendered, the latter State is obliged to bring action against him for the crime with which he is accused, if such crime meets the conditions established in sub-article (b) of the previous article. The sentence pronounced shall be communicated to the demanding State.

Article 3

Extradition will not be granted:

a) When, previous to the arrest of the accused person, the penal action or sentence has expired according to the laws of the demanding or the surrendering State.

b) When the accused has served his sentence in the country where the crime was committed or when he may have been pardoned or granted an amnesty.

c) When the accused has been or is being tried by the State to which the requisition was directed for the act with which he is charged and on which the petition of extradition is based.

d) When the accused must appear before any extraordinary tribunal or court of the demanding State (*tribunal o juzgado de excepción del estado requiriente*). Military courts will not be considered as such tribunals.

e) When the offense is of a political nature or of a character related thereto. An attempt against the life or person of the Chief of State or members of his family, shall not be deemed to be a political offense.

f) When the offense is purely military or directed against religion.

Article 4

The determination of whether or not the exceptions referred to in the previous article are applicable shall belong exclusively to the State to which the request for extradition is addressed.

Article 5

A request for extradition should be formulated by the respective diplomatic representative. When no such representative is available, consular agents may serve, or the governments

¹ *Final Act, Seventh International Conference of American States, Montevideo, 1933, pp. 155-167. See Dept. of State Treaty Information Bulletin No. 54, March, 1934, p. 35.*

may communicate directly with one another. The following documents in the language of the country to which the request for extradition is directed, shall accompany every such request:

a) An authentic copy of the sentence, when the accused has been tried and condemned by the courts of the demanding State.

b) When the person is only under accusation, an authentic copy of the order of detention issued by the competent judge, with a precise description of the imputed offense, a copy of the penal laws applicable thereto, and a copy of the laws referring to the prescription of the action or the penalty.

c) In the case of an individual under accusation as also of an individual already condemned, there shall be furnished all possible information of a personal character which may help to identify the individual whose extradition is sought.

Article 6

When a person whose extradition is sought shall be under trial or shall be already condemned in the State from which it is sought to extradite him, for an offense committed prior to the request for extradition, said extradition shall be granted at once, but the surrender of the accused to the demanding State shall be deferred until his trial ends or his sentence is served.

Article 7

When the extradition of a person is sought by several States for the same offense, preference will be given to the State in whose territory said offense was committed. If he is sought for several offenses, preference will be given to the State within whose bounds shall have been committed the offense which has the greatest penalty according to the law of the surrendering State.

If the case is one of different acts which the State from which extradition is sought esteems of equal gravity, the preference will be determined by the priority of the request.

Article 8

The request for extradition shall be determined in accordance with the domestic legislation of the surrendering State and the individual whose extradition is sought shall have the right to use all the remedies and resources authorized by such legislation, either before the judiciary or the administrative authorities as may be provided for by the aforesaid legislation.

Article 9

Once a request for extradition in the form indicated in Article 5 has been received, the State from which the extradition is sought will exhaust all necessary measures for the capture of the person whose extradition is requested.

Article 10

The requesting State may ask, by any means of communication, the provisional or preventive detention of a person, if there is, at least, an order by some court for his detention and if the State at the same time offers to request extradition in due course. The State from which the extradition is sought will order the immediate arrest of the accused. If within a maximum period of two months after the requesting State has been notified of the arrest of the person, said State has not formally applied for extradition, the detained person will be set at liberty and his extradition may not again be requested except in the way established by Article 5.

The demanding State is exclusively liable for any damages which might arise from the provisional or preventive detention of a person.

Article 11

Extradition having been granted and the person requested put at the disposition of the diplomatic agent of the demanding State, then, if, within two months from the time when

said agent is notified of same, the person has not been sent to his destination, he will be set at liberty, and he cannot again be detained for the same cause.

The period of two months will be reduced to forty days when the countries concerned are conterminous.

Article 12

Once extradition of a person has been refused, application may not again be made for the same alleged act.

Article 13

The State requesting the extradition may designate one or more guards for the purpose of taking charge of the person extradited, but said guards will be subject to the orders of the police or other authorities of the State granting the extradition or of the States in transit.

Article 14

The surrender of the person extradited to the requesting State will be done at the most appropriate point on the frontier or in the most accessible port, if the transfer is to be made by water.

Article 15

The objects found in the possession of the person extradited, obtained by the perpetration of the illegal act for which extradition is requested, or which might be useful as evidence of same, will be confiscated and handed over to the demanding country, notwithstanding it might not be possible to surrender the accused because of some unusual situation such as his escape or death.

Article 16

The costs of arrest, custody, maintenance, and transportation of the person as well as of the objects referred to in the preceding article, will be borne by the State granting the extradition up to the moment of surrender and from thereon they will be borne by the demanding State.

Article 17

Once the extradition is granted, the demanding State undertakes:

- a) Not to try nor to punish the person for a common offense which was committed previous to the request for extradition and which has not been included in said request, except only if the interested party expressly consents.
- b) Not to try nor to punish the person for a political offense, or for an offense connected with a political offense, committed previous to the request for extradition.
- c) To apply to the accused the punishment of next lesser degree than death if according to the legislation of the country of refuge, the death penalty would not be applicable.
- d) To furnish to the State granting the extradition an authentic copy of the sentence pronounced.

Article 18

The signatory States undertake to permit the transit through their respective territories of any person whose extradition has been granted by another State in favor of a third, requiring only the original or an authentic copy of the agreement by which the country of refuge granted the extradition.

Article 19

No request for extradition may be based upon the stipulations of this Convention if the offense in question has been committed before the ratification of the Convention is deposited.

Article 20

The present Convention will be ratified by means of the legal forms in common use in each of the signatory States, and will come into force, for each of them, thirty days after the deposit of the respective ratification.

The Minister of Foreign Affairs of the Republic of Uruguay shall transmit authentic certified copies to the governments for the aforementioned purpose of ratification. The instrument of ratification shall be deposited in the archives of the Pan-American Union in Washington, which shall notify the signatory governments of said deposit. Such notification shall be considered as an exchange of ratifications.

Article 21

The present Convention does not abrogate or modify the bilateral or collective treaties, which at the present date are in force between the signatory States. Nevertheless, if any of said treaties lapse, the present Convention will take effect and become applicable immediately among the respective States, if each of them has fulfilled the stipulations of the preceding article.

Article 22

The present Convention shall remain in force indefinitely but may be denounced by means of one year's notice given to the Pan-American Union, which shall transmit it to the other signatory governments. After the expiration of this period the Convention shall cease in its effects as regards the party which denounces but shall remain in effect for the remaining High Contracting Parties.

Article 23

The present Convention shall be open for the adherence and accession of the States which are not signatories. The corresponding instruments shall be deposited in the archives of the Pan-American Union, which shall communicate them to the other High Contracting Parties.

In witness whereof, the following Plenipotentiaries have signed this convention in Spanish, English, Portuguese and French and hereunto affix their respective seals in the city of Montevideo, Republic of Uruguay, this 26th day of December, 1933.

[Signatures omitted.]

RESERVATIONS

The Delegation of the United States of America, in signing the present Extradition Convention, reserves the following articles:

Article 2 (second sentence, English text);

Article 3, paragraph d;

Articles 12, 15, 16 and 18.

Reservation to the effect that El Salvador, although it accepts in general principle Article 18 of the Inter-American Treaty of Extradition, concretely stipulates the exception that it cannot coöperate in the surrender of its own nationals, prohibited by its Political Constitution, by permitting the transit through its territory of said nationals when one foreign State surrenders them to another.

Mexico signs the Convention on Extradition with the declaration with respect to Article 3, paragraph (f), that the internal legislation of Mexico does not recognize offenses against religion. It will not sign the Optional Clause of this convention.

The Delegation from Ecuador, in dealing with the nations with which Ecuador has signed Conventions on Extraditions, accepts the stipulations herein established in all respects which are not contrary to said Conventions.

[Signatures omitted]

OPTIONAL CLAUSE

The States signing this clause, notwithstanding Article 2 of the preceding Convention on Extradition, agree among themselves that in no case will the nationality of the criminal be permitted to impede his extradition.

The present clause is open to those States signing said Treaty of Extradition, which desire

to be ruled by it in the future, for which purpose it will be sufficient to communicate their adherence to the Pan American Union.

[Signatures omitted.]

7. CENTRAL AMERICAN EXTRADITION CONVENTION¹

Signed at Guatemala, April 12, 1934

The Governments of the Republics of Guatemala, Costa Rica, Honduras, Nicaragua and El Salvador, desiring to confirm their friendly relations and to promote the cause of justice, have resolved to celebrate a Convention for the Extradition of Fugitives from Justice, and, to that end, have named as delegates [names of delegates omitted]: who, after having communicated to one another their respective full powers which were found to be in good and due form have agreed to carry out the said purpose in the following manner:

ARTICLE I

The Contracting Republics agree to deliver up reciprocally the individuals who may take refuge in the territory of one of them and who in the other may have been condemned, as authors, accomplices, or abettors of a crime, to not less than two years of deprivation of their liberty, or who may have been indicted for a crime which, in accordance with the laws of the country seeking the extradition, carries a penalty equal to or greater than that above stated.

ARTICLE II

Extradition shall not be granted in any of the following cases:

1. When the evidence or criminality presented by the country seeking extradition would not have been sufficient to justify, according to the laws of the place where the accused fugitive from justice is found, his apprehension and commitment for trial, if the offense had been committed there.
2. When the offense is of a political character, or, being a common crime, is connected therewith.
3. When under the laws of the country seeking extradition or of that of asylum, the action or the penalty has been barred.
4. If the accused demanded should have already been tried and sentenced for the same offense in the Republic wherein he resides.
5. If the accused should have served the sentence which may have been imposed upon him for the same crime in any other country.
6. If in that country, the act for which extradition is asked, is not considered a crime.
7. When the penalty corresponding to the crime for which extradition is requested shall be that of death, unless the Government seeking extradition binds itself to apply the next lower penalty.

ARTICLE III

The person whose extradition is conceded, because of one of the crimes mentioned in Article I, shall in no case be tried and punished in the country to which he is surrendered for a political crime committed before his extradition nor for an act which may have connection with a political crime. Attempts against the life of the head of a government or public functionaries and anarchistic attacks shall not be considered political crimes, provided that the law of the country seeking extradition and of the country of which extradition is requested shall have fixed a penalty for said acts. In that case extradition shall be granted, even when the crime in question shall carry a penalty of less than two years of deprivation of liberty.

ARTICLE IV

The Contracting Parties shall not be obliged to deliver their nationals; but they must try them for the infractions of the Penal Code committed in any of the other Republics. The

¹ *Bulletin of the Pan American Union*, June, 1934, Vol. 68, No. 6., p. 416. See also Dept. of State, *Treaty Information Bulletin*, No. 56, May, 1934, p. 38.

respective Governments must communicate the corresponding proceedings, information and documents, and deliver the articles which constitute the corpus delicti, furnishing everything that may contribute to the lucidation needed for the expedition of the trial. This having been done, the case shall be prosecuted until its determination, and the Government of the country of the trial shall inform the other of the final result.

ARTICLE V

If the individual whose extradition is sought should have been indicted or should have been found guilty in the country of his asylum for a crime committed therein, he shall not be delivered except after having been acquitted by a final judgment, and in case of his conviction after he has served the sentence or has been pardoned.

ARTICLE VI

If the fugitive whose extradition is requested by one of the Contracting Parties should also be sought by one or more Governments he shall be delivered in preference to the one first making the requisition.

ARTICLE VII

Request for the delivery of fugitives shall be made by the respective diplomatic agents of the Contracting Parties and, in default of the latter, by consular officers.

In urgent cases the provisional detention of the accused may be requested by means of telegraphic or postal communication, addressed to the Ministry of Foreign Affairs, or through the respective diplomatic agent, or in his absence, through the consul. The provisional arrest shall be made according to the rules established by the laws of the country of which extradition is requested; but shall cease if the request for extradition has not been formally presented within the term of one month following the arrest.

ARTICLE VIII

The request for extradition shall specify the proof or presumptive evidence which, by the laws of the country wherein the crime has been committed, shall be sufficient to justify the apprehension and commitment of the accused. The judgment, indictment, warrant of arrest, or any other equivalent document shall also accompany the same; and the nature and gravity of the acts charged and the provisions of the penal codes which are applicable thereto must be indicated. In case of flight after having been found guilty and before serving the entire sentence, the request for extradition shall express the circumstance and shall be accompanied only by the judgment.

ARTICLE IX

The proper authority shall apprehend the fugitive, in order that he may be brought before the competent Judicial authority for examination. Should it be decided, according to the laws and the evidence presented, that the surrender can be carried out in conformity with this Convention, the fugitive shall be delivered in the manner prescribed by law in such cases.

The country seeking extradition shall take the necessary measures to receive the accused within one month from the date when the latter shall have been placed at its disposal, and if said Government should fail to do so, the aforesaid accused may be released.

ARTICLE X

The person delivered cannot be tried nor punished in the country to which his extradition has been granted, nor delivered to a third country, for a crime not included in this Convention, and committed before his surrender, unless the Government which makes the surrender consents to the trial, or to the delivery to said third nation.

Nevertheless this consent shall not be necessary:

1. When the accused may voluntarily have requested that he be tried or delivered to the third nation;

2. When he may have been at liberty to leave the country for thirty days after his release, on the ground of the lack of foundation in the charge for which he was surrendered, or, in case of conviction, a term of thirty days after serving his sentence or obtaining a pardon.

ARTICLE XI

The expenses of arrest, maintenance, and travel of the extradited person, as well as of the delivery and transportation of the articles which, because of their connection with the crime, have to be returned or forwarded, shall be borne by the Government seeking extradition.

ARTICLE XII

All the objects found in the possession of the accused and obtained through the commission of the act of which he is accused, or that may serve as evidence of the crime on account of which extradition is requested, shall be confiscated and delivered with his person upon order of competent authority of the Country from which extradition is sought. Nevertheless the rights of third parties concerning these articles shall be respected, and delivery thereof shall not be made until the question of ownership has been determined.

ARTICLE XIII

In all cases of detention the fugitive shall be acquainted within the term of twenty-four hours with the cause thereof, and notified that he may, within a period not to exceed three days counted from the one following that of the notification, oppose extradition, by alleging:

1. That he is not the person claimed;
2. Substantial defects in the documents presented; and
3. The inadmissibility of the request of extradition.

ARTICLE XIV

In cases where it is necessary to prove the facts alleged, evidence shall be taken, in full observance of the provisions of the law of procedure of the Republic of which extradition is requested. The evidence having been produced, the matter shall be decided without further steps, within the period of ten days, and it shall be declared whether or not the extradition shall be granted. Against such a decision, and within three days following notification thereof, the legal remedies of the Country of asylum may be invoked.

ARTICLE XV

The present Convention shall take effect with respect to the Parties that have ratified it, from the date of its ratification by at least three of the Signatory States.

ARTICLE XVI

The present Convention shall remain in force until the first of January, nineteen hundred and forty-five, regardless of any prior denunciation, or any other cause. From the first of January, nineteen hundred and forty-five, it shall continue in force until one year after the date on which one of the Parties bound thereby notifies the others of its intention to denounce it. The denunciation of this Convention by one or two of said Contracting Parties shall leave it in force for those Parties which have ratified it and have not denounced it, provided that these be no less than three in number. Should two or three states bound by this Convention form a single political entity, the same Convention shall be in force as between the new entity and the Republics bound thereby which have remained separate, provided these be no less than two in number. Any of the Republics of Central America which should fail to ratify this Convention, shall have the right to adhere to it while it is in force.

ARTICLE XVII

The exchange of ratifications of the present Convention shall be made through communications addressed by the Governments to the Government of Guatemala in order that the

latter may inform the other Contracting States. If the Government of Guatemala should ratify the Convention, notice of said ratification shall also be communicated to the others.

ARTICLE XVIII

When the present Convention becomes effective the one celebrated in the City of Washington on February 7, 1923, on the same subject will cease to be in effect.

Signed in the City of Guatemala on the 12th day of April 1934.

[Signatures omitted.]

APPENDIX IV

DRAFTS AND PROJECTS

1. FIELD'S OUTLINES OF AN INTERNATIONAL CODE, 1876¹

EXTRADITION OF CRIMINALS

Duty of extradition

210. Each nation, on demand made by another nation, through its supreme executive authority, in the manner provided in this Section, and at the expense of the demanding nation, must deliver up to justice persons who being accused of any of the crimes enumerated in article 214, committed within the jurisdiction of the latter, are found within the jurisdiction of the former.

The requisition

211. Except in the cases provided for in the next two articles, a requisition for extradition must be made through the public minister of the demanding nation: or, in his absence from the country or its seat of government, through other agencies of international intercourse, and must be addressed to the officers who, by articles 229, 230 and 231, are empowered to make the surrender.

Requisition in case of offense committed on the frontier

212. In the case of an offense within the jurisdiction of a State or Territory, being part of a nation, and lying along the boundary between two contiguous nations, a requisition may be made, either as provided in the last article, or through the chief civil authority of the frontier State or Territory; or, when, from any cause, the civil authority of such State or Territory is suspended, through the chief military officer in command thereof.

Requisition in case of offense within a colony

213. In the case of an offense within the jurisdiction of a colonial government, the demand for extradition may be made, either as provided in article 211, or by the governor, or chief executive officer of the colony.

What criminals are subject to extradition

214. The person to be surrendered, on the demand for extradition, according to the provisions of this Section, must have been convicted, or charged, before the courts, tribunals or criminal magistrates of the demanding nation, with one or more of the following crimes, as now defined in the penal Code of the demanding nation:

- Abortion;
- Arson;
- Barratry;
- Bigamy;
- Burglary;
- Counterfeiting;
- Crime against nature;

¹ 2nd ed., 1876, pp. 90 to 127.

Embezzlement;
 False pretenses or false tokens;
 Forgery;
 Kidnapping;
 Larceny; punishable by the law of the demanding nation by imprisonment exceeding one year;
 Maiming;
 Manslaughter;
 Murder;
 Perjury;
 Piracy;
 Rape;
 Robbery, with violence or intimidation;
 Slave trading;

Or convicted or charged in like manner with an offense against a provision of this Code, the violation of which is declared to be a public offense.

Exception of certain offenses

215. The provisions of this Section do not apply in any manner to cases in any of the following classes:

1. Crimes or offenses of a purely political character;
2. Any offense committed in furthering civil war, insurrection or political commotion, which, if committed between belligerents, would not be a crime;
3. Desertions from, or evasions of, military or naval service;
4. Offenses committed before this Section took effect; and,
5. Offenses which, by reason of the lapse of time, or any other cause, the demanding nation cannot lawfully punish.

Order of arrest

216. The executive authority of a nation upon which a requisition is made, accompanied by due proof of a foreign conviction or warrant of arrest, or other presumptive evidence that the case is one within the provisions of this Section, must direct the arrest of the accused for examination by the proper judicial authority.

Arrest in anticipation of requisition

217. Upon presumptive evidence of an offense, within the provisions of this Section, the local tribunals, which would have cognizance of it, if committed within their jurisdiction, may arrest the person accused, and detain him for a reasonable time, to afford the foreign government opportunity to make requisition for his surrender. But the evidence must be sufficient to commit for trial, if the offense were committed within the local jurisdiction; and if no requisition be made within one month thereafter, the accused will be entitled to his discharge.

Preliminary investigation

218. Before making the surrender or arrest of an alleged fugitive from justice, the nation from which it is asked may determine for itself, upon a preliminary investigation, whether it is presumptively established that the person charged has committed the offense, as defined by this Code; or, in the case of a convict, that he has wrongfully escaped punishment.

Rules for conducting investigation

219. The proceedings for the arrest of an alleged fugitive from justice, and the judicial investigation of the charge, must be conducted according to the rules established for similar preliminary proceedings, before the same courts or magistrates, in the case of a person charged with the commission of a like offense within the country.

Documentary evidence

220. Evidence of the commission of a crime by the accused may consist, either wholly or in part, of original depositions, properly authenticated, conformably to the laws of the country where they were made, so as to entitle them to be received for similar purposes by the tribunals or magistrates of such country; or, of exemplified copies, certified by the foreign court or magistrate, or proved, by oath, to be true copies of original depositions.

Such depositions or copies must be certified, as provided in Part VI of this Code, entitled Administration of Justice, or by the minister of justice or chief executive officer of the demanding nation, or by the principal diplomatic or consular office of the nation upon which the demand is made, resident in such foreign country: to be legally authenticated according to the laws of the demanding nation, in the manner which would entitle them to be received in evidence, for similar purposes, by its tribunals or magistrates.

Necessary proof of guilt

221. The extradition of an alleged fugitive from justice, under this Section, can be made only when the fact of his commission of the offense is so far established that the laws of the country making the extradition would justify apprehension and commitment for trial, if the crime had been there committed.

Evidence in case of convicted criminals

222. In case sentence or judgment of guilt has been pronounced in the country making the requisition, surrender shall not be obligatory, except on presentation to the authorities of the nation on which the requisition is made, of the original sentence or judgment establishing the guilt of the accused, properly authenticated, or of an exemplified copy thereof, as prescribed in article 220.

Inquiry as to real motive of demand

223. A nation upon which a demand for extradition is made, under this Section, may protect its right to give asylum, by looking behind the mere formal proofs presented in support of the demand, to see that it is not made for a purpose to which this Section does not apply; and, if satisfied that such is the case, may refuse the demand.

Conflicting claims

224. In case two or more nations claim a person, upon a charge of violating a provision of this Code, the nation within which the offense was committed has the prior right, unless proceedings upon the charge have already been commenced by the other nation.

Surrender of those under arrest for local offenses may be deferred

225. The surrender of a person claimed under this Section, who has been previously arrested for the commission of an offense against the laws of the country where he is found, or who has been there convicted of such an offense, may be deferred until he shall have been acquitted or punished therefor.

Surrender, notwithstanding civil arrest

226. If the person claimed is under arrest in the country where he is found, on account of civil obligations, his surrender may be made notwithstanding, but upon condition that the right of the person concerned to pursue his remedy before the competent tribunals, is preserved.

Conditional extradition

227. A nation upon which a demand for extradition is made under this Section, may impose conditions in reference to the treatment of the person surrendered.

Member of a third nation

228. If the person whose surrender is demanded be a member of a third nation, which is a party to this Code, the surrender may be deferred until his nation has been informed of the proceeding, and invited to state objections, if any, to the extradition.

In such event, if a case for extradition be established, the nation on which the demand is made may deliver the person accused either to his own nation or to that making the demand.

Surrender, by whom made

229. Except as provided in articles 230 and 231, a surrender is to be made only by authority of the proper executive officer of the nation upon which the demand is made.

Surrender in case of offenses committed on the frontier

230. In the case of persons found in a frontier State or Territory of one nation, lying along the boundary between it and a contiguous nation, the surrender demanded by such contiguous nation, or its frontier State or Territory, may be made either as provided in the last article, or by the chief civil authority of the frontier State or Territory in which the person is found, or by such chief civil or judicial authority of the district or country bordering on that frontier, as may for this purpose be duly authorized by the civil authority of such frontier State or Territory; or, when from any cause the civil authority of such State or Territory is suspended, by the chief military officer in command of such State or Territory.

Surrender by colonial government

231. In the case of a person found within the territorial jurisdiction of a colonial government, the surrender may be made either as provided in article 229, or by the Governor or executive officer of the colony.

Such officer may either make the surrender demanded of him, or may refer the question to the government of the nation to which he belongs.

Things in prisoner's possession

232. All articles in the possession of the prisoner at the time of his arrest, and taken with him, must be delivered up on making the surrender, including not only articles stolen, but all those which can serve as evidence of guilt.

Second arrest

233. The discharge of a person arrested under the provisions of this Section, does not preclude a second arrest under a new complaint relating to the same offense, except where he is entitled to a discharge by reason of the lapse of time.

Custody of the prisoner

234. Any person duly appointed, by the nation demanding the extradition, as its agent to receive the surrender, is entitled to the same protection, in the execution of his duties, within the jurisdiction of the nation making the surrender, as is given by its laws to its own officers in the exercise of similar functions; and the obstruction of such agent, or the rescue or attempted rescue of the person from his custody, is punishable in the local tribunals, in the same manner as in the case of obstruction to, or rescue from, the local officers.

Discharge in case of delay of extradition

235. A person surrendered under this Section must be conveyed out of the country making the surrender, within two months after his commitment for extradition, and in default thereof, shall be discharged.

Limitations of time extended in certain cases

236. The time necessary to allow the intervention of the nation to which a colony belongs, according to article 213, or of that to which a foreigner whose extradition is demanded belongs, according to article 228, is not to be computed as a part of any of the times limited by the provisions of this Section for the arrest or extradition of an alleged fugitive from justice.

Restrictions as to punishment

237. No person surrendered under the provisions of this Section shall be prosecuted or punished, in the nation to which he is surrendered, for any offense committed previous to

that for which his surrender was demanded, nor for any offense which was not mentioned in the demand, or which is of the classes mentioned in article 215, committed before the extradition.

Necessary legislation to be provided

238. Each nation which requires a judicial investigation before surrendering in extradition, must provide by law the necessary judicial power to carry into effect the provisions of this Section.

2. RESOLUTION ADOPTED BY THE INSTITUTE OF INTERNATIONAL LAW¹

Oxford, September 9, 1880

EXTRADITION

1. Extradition is an international act in conformity with justice and the interests of States, since it tends to prevent and check effectively violations of penal law.

2. Extradition is effected in a sure and regular manner only pursuant to treaty, and it is desirable that treaties become more and more numerous.

3. Nevertheless it is not treaties alone that make extradition an act in conformity with right, and it may be effected even in the absence of any contractual tie.

4. It is desirable that in every country a law regulate the procedure on the subject as well as the conditions under which individuals demanded as offenders shall be surrendered to the governments with which no treaty exists.

5. The condition of reciprocity in this matter may be required by policy; it is not required by justice.

6. Between countries whose criminal legislations rest upon similar bases and which have mutual confidence in their judicial institutions, extradition of nationals would be a means of assuring good administration of penal justice because it should be considered as desirable that the jurisdiction of the *forum delicti commissi* be so far as possible called upon to render judgment.

7. Even admitting the present practice which withdraws nationals from extradition, no account should be taken of a nationality acquired only since the perpetration of the act for which extradition is asked.

8. The competence of the requesting State should be supported by its own law; it should not be in contradiction with the law of the country of refuge.

9. If there are several requests for extradition for the same act, preference should be given to the State upon whose territory the offense was committed.

10. If the same person is demanded by several States by reason of different offenses, the requested State will in general have regard to the relative gravity of these offenses.

In case of doubt concerning the relative gravity of the offenses, the requested State will take into account priority of demand.

11. As a rule, it should be required that the acts to which extradition applies be punishable by the legislation of the two countries, except in cases where by reason of particular institutions or of the geographical situation of the country of refuge the actual circumstances constituting the offense cannot exist.

12. Extradition being always a grave measure ought to be applied only to offenses of some importance. Treaties should enumerate them with precision; their provisions on this subject naturally vary according to the respective situation of the contracting countries.

13. Extradition cannot take place for political acts.

14. It is for the requested State to decide whether in the circumstances the act on account of which extradition is demanded has a political character.

In considering this question it should be guided by the two following ideas:

(a) Acts combining all the characteristics of crimes at common law (murders, arsons,

¹ *Annuaire de l'Institut de Droit International* (1880), V, p. 127. Translation from Scott's *Resolutions of the Institute of International Law* (1916), pp. 42-45.

thefts) should not be excepted from extradition by reason only of the political purpose of their authors;

(b) In passing upon acts committed during a political rebellion, an insurrection, or a civil war, it is necessary to inquire whether they are excused by the customs of war.

15. In any case, extradition for crimes having the characters both of political and common law crime ought not to be granted unless the requesting State gives the assurance that the person surrendered shall not be tried by extraordinary courts.

16. Extradition ought not to be applied to the desertion of military persons belonging either to the land or to the sea forces, nor to purely military offenses.

The adoption of this rule does not prevent handing over sailors belonging either to the service of the State or to the merchant marine.

17. A law or treaty of extradition may be applied to acts committed before it came into force.

18. Extradition should be effected through the diplomatic channel.

19. It is desirable that the judicial authority in the country of refuge should be invoked to pass upon the request for extradition after hearing both sides.

20. The requested State should not grant extradition if, according to its public law, the judicial authority has decided that the request should not be allowed.

21. The examination should have for its object the general conditions of the extradition and the probability of the accusation.

22. The government which has obtained an extradition for a given act is bound, in the absence of a treaty to the contrary, not to allow the surrendered person to be tried or punished except for that act.

23. The government which has granted an extradition can afterwards consent to the trial of the surrendered person for acts other than that for which he was surrendered, if they are such as might support extradition.

24. The government which has a person in its power in consequence of an extradition cannot deliver him to another government without the consent of that which surrendered him to it.

25. The act issued by the judicial authority declaring extradition admissible must set out the circumstances under which extradition shall take place and the acts for which it has been granted.

26. The person extradited should be allowed to claim, as a preliminary exception before the tribunal called upon to give final judgment, the irregularity of the conditions under which his extradition has been granted.

3. PROJECT FOR AN AMERICAN EXTRADITION CONVENTION¹

Drafted by the International Commission of Jurists at Rio de Janeiro, 1912

The American Republics . . . desiring to strengthen their friendly relations and promote the cause of law, have resolved to conclude the following convention for the extradition of fugitives who may be found within their respective jurisdictions:

Article 1

Extradition between the American Republics is obligatory.

Article 2

In order that extradition may be granted it shall be necessary—

(a) That the claimant nation have jurisdiction to prosecute and try the act on which the extradition is based.

(b) That the persons demanded be guilty, as principal or accomplice, of a violation of a penal law punishable in both nations with a penalty not under two years of imprisonment.

(c) That the demanding nation present documents which, in accordance with its laws, warrant the imprisonment of the person in question (Art. 13).

¹ *American Journal of International Law, Special Supplement*, Vol. 20 (1926), pp. 331–335.

(d) That the violation or penalty be not barred by limitation according to the laws of one or the other nations.

(e) That the fugitive, if he has already been convicted, shall not yet have served his penalty.

Article 3

If the offense has been committed outside the territory of the demanding nation, the extradition shall not be granted unless the law of the nation of refuge authorizes, under identical conditions, punishment of the same offense when committed outside its territory.

Article 4

Extradition shall not be permitted—

(a) When the person whose extradition is requested is under prosecution or has already been tried or pardoned in the nation of refuge for the same offense.

(b) When it is a question of political crimes or others connected therewith (excepting the murder of heads of nations), or of crimes against religion, or of purely military offenses.

1. It shall be the duty of the requested nation to decide as to the political nature of an offense, taking into account the law which is most favorable to the fugitive.

2. Acts characterized as anarchy by the laws of both nations shall not be considered political crimes.

3. The surrender of naval or land deserters shall be optional, but it shall not be permissible for any nation to enlist the deserters from other nations in its armed forces, army, navy, or police.

Article 5

The nationality of the fugitive shall never constitute a hindrance to extradition. A nation which refuses to deliver up one of its citizens shall be obliged to prosecute and try him on its own territory, in accordance with its own law, and on the basis of such evidence as may be furnished it for this purpose by the demanding nation.

Article 6

The surrender of the fugitive shall be delayed as long as he is under penal prosecution for another cause in the nation of which the extradition is requested, but this fact shall not interfere with the progress of the extradition proceedings.

Article 7

Any civil obligations contracted by a person whose extradition is requested toward the nation of refuge shall not interfere with his surrender.

Article 8

If the act committed by a person demanded is subject to the death penalty, the nation of refuge may, before granting the extradition, demand that this penalty be commuted to that next below.

Article 9

When the extradition has been obtained the demanding nation shall not be allowed to hold the guilty party responsible for any other act than that on which his surrender was based, unless the demanded nation has previously consented to his being tried for other offenses, or unless it is a case of an offense connected therewith and based on the same evidence as that of the request.

Article 10

The provision of the foregoing article shall not comprise the case in which the extradited party himself freely and expressly consents to being tried for another act, or, after being set at absolute liberty, remains within the territory of the nation for a period exceeding one month, nor the case in which it is a question of offenses committed subsequently to the extradition.

Article 11

The demanding nation shall not, without the consent of the nation of refuge, deliver up the extradited party to a third nation demanding him, except in the cases contemplated in the foregoing article.

Article 12

If several nations request the extradition of the same person for the same act, the nation in whose territory the offense has been committed shall be given preferential attention; if the extradition is requested for different acts, the nation to be given preference shall be the one in which the gravest offense has been committed, in the opinion of the nation of refuge; or, if the acts are of equal gravity, the first nation to request extradition shall be given the preference. When all the requests are presented on the same day, that of prior date shall prevail; if all are of equal date, the nation requested shall determine the order to be followed. In all the cases contemplated by this article, except the first, the reextradition of the offender may be stipulated so that he may be subsequently delivered up to the other requesting nations.

Article 13

The extradition shall be requested through the diplomatic officers, and in the absence of the latter, through the consuls, or directly from government to government, the request being accompanied—

(a) By a copy of authentic transcript of the final sentence, together with proof that the criminal was summoned and represented at the trial or declared legally in default; or, if it is not a case of a convicted party, by a writ instituting criminal proceedings, issued by a judge or competent authority and formally decreeing or *ipso facto* effecting the subjection of the accused party to trial and substantiated by an authentic copy of the penal law applicable to the offense on which the request is based.

(b) By all the data and facts necessary in order to establish the identity of the person whose extradition is demanded. The documents required under (a) shall be issued in the form prescribed by the legislation of the demanding nation, and shall contain an accurate statement of the acts charged and of the place and date at which it was committed.

Article 14

In urgent cases the fugitive may, even by virtue of a telegraphic request, be placed under provisional arrest until the demanding nation presents to the requested nation, within the period to be fixed by the latter, and which shall not exceed two months, the formal request duly substantiated. All responsibility arising from the provisional detention shall be borne by the nation requesting the latter.

Article 15

When the documents accompanying the request are deemed insufficient or irregular, owing to form, the requested government shall return them in order that the deficiencies may be supplied or the defects corrected, and the party, if under arrest, shall remain under arrest until the period referred to in the foregoing article has expired.

Article 16

The request for extradition, as regards the formalities connected with it, the decision as to whether it shall be admitted, and the admission and weighing of any defense which may be made against it, shall, as far as is not contrary to the provisions of this code, be subject to the decision of the competent authorities of the nation of refuge, in accordance with the legislation of that nation. The right of the individual demanded to utilize the remedy of *habeas corpus* or *amparo* shall be guaranteed in all cases, as shall also the right to demand release on bail, provided the conditions prescribed by the law of the demanding nation are fulfilled.

Article 17

Together with the person claimed, or even subsequently, there shall be seized and delivered all articles found in his possession or deposited or hidden in the nation of refuge and

which may have served in the perpetration of the punishable act or which may have been obtained by means of this act, as well as those which may serve as convicting evidence.

1. These articles shall be delivered up, even though because of the death or flight of the fugitive the extradition does not take place, provided it has already been granted. If it has not yet been granted, the proceedings shall continue for that purpose.

2. Articles seized and which are in the possession of third parties, or in the hands of the offender but belonging to third parties, shall not be surrendered unless the latter are heard and state whatever objections they may have, and the articles shall be restored to them, if they are entitled thereto, without any expense, upon the termination of the proceedings.

Article 18

The fugitive shall be taken by agents of the requested nation to the frontier of the latter, or to the port which is most appropriate for embarkation, and he shall there be delivered to the agents of the requesting nation.

Article 19

The transit of the extradited party through the territory of a third nation shall be permitted upon the mere exhibition of the original copy or an authentic transcript of the document granting the extradition, provided the offense is also punishable according to the laws of such third nation.

1. If the extradited party is a citizen of the third nation, the granting of the passage shall be optional.

2. The transit shall take place under the escort of agents of the third nation.

Article 20

The expenses of the extradition shall be borne by each nation within the limits of its territory. Those of transportation through intervening nations, or by sea, shall be borne by the requesting nation.

Article 21

A nation which secures the extradition of a person who has not been convicted shall be obliged to communicate the final sentence to the nation granting extradition, as rendered in the trial for which the extradition was requested.

Article 22

The extradition of persons accused of acts of anarchy may be requested, provided the legislation of both nations punishes such acts. In this case the extradition shall be granted, even if the penalty prescribed is less than two years of imprisonment.

Article 23

The person demanded may be restored to liberty and shall not be again arrested for the same cause if, after the extradition has been granted, the proper diplomatic or consular officer fails to send him to his destination within 20 days from the date on which he was placed at his disposal.

Article 24

Existing treaties shall remain in force so far as they are not contrary to the foregoing principles or afford greater facilities for extradition, especially as regards offenses which warrant extradition and as regards the preference in granting it when it is requested by several nations on the same date.

The nations may likewise conclude new agreements on extradition, provided they observe these conditions.

4. TRAVERS' PROJECT FOR AN EXTRADITION TREATY, 1922¹

ARTICLE 1. Any act regarded as a crime by the Penal Law of the requesting State may serve as a basis for a request for extradition.² There shall alone be excepted the infractions of the nature . . .³

ART. 2. Nationals of the requested State shall be surrendered unless the requested state prefers to punish them itself. In such case the requesting State shall undertake to transmit all the evidence which it can collect⁴ or (another kind of provision), the nationals of the requested State shall be surrendered.

ART. 3. Existence in the requested State of prosecution tending to repress the act which serves as a basis for a requisition for extradition or pronouncement in that State of a sentence for that act shall constitute the reason⁵ for refusal of extradition or (another version is to be adopted if the maxim *non bis in idem* is not extended by the interested States to their international intercourse) shall justify its postponement but not its refusal. The penalty imposed in the requested State shall be always deducted from that inflicted by the requesting State.⁶

ART. 4. If the person claimed is subjected within the territory of the requested State to a criminal prosecution or is serving his sentence for acts other than those which are referred to in the requisition, extradition shall be deferred until the termination of the prosecution or fulfillment of the sentence. However, the requested State shall, providing that the interests of the investigation do not oppose it, hand over temporarily to the requesting State upon its request the person claimed on the condition that he will immediately be sent back so that the requesting State might either simply effect the measures of investigation or have the judgment passed.⁷

ART. 5. In the case of concurring requisitions for extradition presented: one by a State party to this treaty, and another or others by third States, the requested State shall control the order of surrender in such manner that the surrender of the person claimed to the State party to this convention will be assured.⁸

ART. 6. Requisitions for extradition shall be transmitted either through diplomatic channels or presented by the consuls of career to the judges in charge of investigation in the

¹ Travers, *Le Droit Pénal International* (1922), Tome V, pp. 526-530. This draft does not seem intended primarily as the basis of multipartite action, but might be used for that purpose, and seems of sufficient interest to include here.

² See Travers, *op. cit.*, par. 2740, p. 519, Art. 8 [of a proposed Code of Criminal Procedure].

³ In a footnote to this article Travers suggests that fiscal, military, political and religious offences shall or shall not be mentioned in this clause according to identity or divergence of the conceptions of these offences in the legislation of the contracting States. The conditions of punishability of such crimes under the law of the requested State shall not appear in a treaty, as the legislation of the contracting States must be known to each other. Reference is made to Art. 8 of a proposed Code of Criminal Procedure, referred to in the next preceding note.

⁴ In a footnote to this article the author of the project refers to the principle of *non bis in idem*, and suggests that a requested State shall insist on withdrawal of prosecution of its nationals by the requesting State when it undertakes their prosecution itself. In connection with a case when a lighter penalty imposed for the same crime shall be deducted from a more severe one, he refers to paragraphs 28 and 1544 of his *Droit Pénal International* (*op. cit.*, *supra*, I, p. 31 and III, p. 413).

⁵ The requested State may, however, realize that it is not in a position to render a sound judgment, terminate the prosecution in progress and consent to the solicited extradition. (Travers.)

⁶ In connection with the maxim *non bis in idem*, Travers refers to his (*op. cit.*, *supra*), pars. 28, 1544, also to 2740, Art. 9 and footnotes.

⁷ Cf. Travers (*op. cit.*, *supra*), par. 2740, Art. 16, p. 523.

⁸ Cf. Travers (*op. cit.*, *supra*), par. 2740, Art. 15, p. 522. No more precise rule can be embodied in a treaty; otherwise the different agreements may come into conflict and the requested State will lose part of its freedom of action in dealing with the States not signatories to the convention.

court (*chefs de parquet de la cour*) in that district where the person claimed is likely to be found.¹

The requisition shall contain description of the person sought, indication of the incriminating acts, their dates, a copy of the text of the law under which they are punishable in the requesting State, a copy of the warrant of arrest issued in the requesting State, as well as, if the circumstances demand it, a copy of the sentence. They can be always completed or rectified by subsequent documents. The requisitions as well as all the annexed documents shall be transmitted together with a translation.

ART. 7. The requisitions for a provisional arrest shall be transmitted either in the same way as the requisitions for extradition or directly, even by telegraph or telephone, from the one judge in charge of investigation (*chef de parquet*) to another.

Each requisition shall lay before the requested authority the necessary information for the arrest, indication of the incriminated act, its date, the law applicable to it in the requesting State and the warrant of arrest issued in the requesting State.

All requisitions transmitted by telephone must be confirmed without delay by telegraph and shall be, in the absence of such confirmation within 24 hours, considered as not received.

The provisional arrest is compulsory only when it is requested in the way which is used for requisitions for extradition themselves.

ART. 8. The extradition procedure shall take place in conformity with the law of the requested State, but the requesting government shall never be bound to establish culpability, even *prima facie*.

The person claimed shall be permitted to prove that . . .²

ART. 9. The requested government may,³ without recourse on the part of the requesting State, set the person claimed at liberty either when a request for a provisional arrest has not been followed within fifteen days from its receipt by a requisition for extradition, or when the person has not been taken over within one month following the day when the representative accredited in the requested State was notified that the extradition had been granted.

A new arrest for the same reason shall be always possible.

ART. 10. A requisition for a provisional arrest and requisition for extradition justify an order to proceed to all necessary seizures even from third persons.

Delivery of objects and articles seized shall be effected even when extradition is not taking place, on the condition that the rules regulating the matters of *commission rogatoire* do not oppose it.⁴

ART. 11. Extradition in transit shall be granted by one contracting State to another on the condition that either extradition would have been granted⁵ or *commission rogatoire* would have been possible to prove the incriminated act.

ART. 12. The effects of extradition are limited to the infractions for which the requested State has granted it.

They may be modified, not by consent of the extradited person, but by an agreement of the high contracting parties.

Any contradictory criminal prosecution, investigation of the rights of the prosecuted person, personal restriction and judgment in connection with any act not contained in the requisition for extradition, and previous to the delivery of the extradited person, shall be

¹ Travers (footnote to this article) denies the expedience of a direct communication of the requisition for extradition from the judicial officials of the requesting State to those of the requested State. On the other hand, he insists on the consul having the qualities of the *consul de carrière* as a guaranty of authority.

² The person claimed shall be permitted to prove that the acts and circumstances are, according to Articles I, II, III of the treaty, of such nature as to preclude the extradition.

³ The requested government must have simple discretion on this point.

⁴ See Travers, *op. cit.*, *supra*, par. 2740, p. 523, Art. 17.

⁵ Extradition is so broadly provided for in our conception that extradition in transit may be assimilated to it.

possible after the latter is found within the territory of the requesting state more than five days after his final liberation.¹

ART. 13. The State to which the person has been delivered may not give him up to another State without consent of the other high contracting party. This restriction ceases to have effect when five days have passed since the final liberation ordered by the authorities of the requesting State.²

ART. 14. The requested State shall not demand of the other high contracting party reimbursement of the expenses incurred by it in its territory.

5. DRAFT EXTRADITION CONVENTION

Approved by the International Law Association in 1928³

(Translation of final French text incorporating alterations made as and when first English text was discussed.)

ART. 1. It is agreed that the H. C. P., on request, shall deliver up to each other under the circumstances, and subject to the conditions and exceptions contained in the present Convention any persons who, having been accused or convicted, as principals or accessories, of any of the crimes hereinafter specified committed within the territory of the requiring Party, are found within the territory of the required Party.

ART. 2. Extraditable crimes (to be more particularly described by each of the H. C. P. in accordance with the local law, in schedules provided for by Art. 17) are as follows:

1. Homicide.
2. Any act done with intent to endanger human life.
3. Wilfully wounding or inflicting grievous bodily harm.
4. Illegal abortion.
5. Rape.
6. Carnal knowledge of a girl under 15 years of age.
7. Indecent assault with violence.
8. Indecent assault without violence on a child under 15 years of age.
9. Abduction of minors.
10. Procuration.
11. Child stealing.
12. Substitution of children or false imputation of paternity.
13. Unlawful detention and false imprisonment.
14. Bigamy aggravated by deceit.
15. Larceny and robbery with violence.
16. Breaking into or entering a building by day or night with intent to steal or commit any other extraditable act.
17. Conversion.
18. Receiving.
19. Obtaining money by false pretences.
20. Breach of trust.
21. Menaces of fraudulent means to extort money or valuable securities.
22. Arson.
23. Making, introducing, issuing or uttering counterfeit coin, or paper money, or other public securities.
24. Counterfeiting or altering money.
25. Knowingly making any instrument, tool, or engine adapted and intended for counterfeiting money.

¹ See Travers, *op. cit.*, *supra*, par. 2740, p. 524, Art. 21 and footnote.

² Cf. Travers, *op. cit.*, *supra*, par. 2740, p. 525, Art. 22.

³ *International Law Association, Report of the Thirty-fifth Conference (1928)*, pp. 324-329;
⁴ *Transactions of the Grotius Society (1929)*, pp. 108-112.

26. Forgery or falsification or uttering or using forged or falsified documents.
27. Perjury.
28. Subornation of witnesses, experts or interpreters.
29. Crimes against bankruptcy law.
30. Piracy.
31. Mutiny on the high seas.
32. Unlawfully sinking or destroying a vessel at sea (barratry).
33. Trafficking in slaves, women or children.
34. Trafficking in narcotics.
35. Illegal possession of explosives; including any attempt or conspiracy to commit the above acts.

ART. 3. None of the H. C. P. shall be obliged to extradite its own subjects or citizens, but the required Party undertakes to bring such persons to trial where, but for this provision, extradition could have been accorded.

ART. 4. Extradition shall not take place if the fugitive has already been charged and acquitted, or tried and discharged, or tried, condemned and punished in the territory of the required Party for the crime for which his extradition is demanded.

If the fugitive should be under examination, trial or punishment for any other crime in the territory of the required Party, his extradition may, in the discretion of the required Party, be deferred until the conclusion of the trial and the full execution of any punishment awarded.

ART. 5. Extradition may be refused if exemption from prosecution or punishment would have been acquired by prescription according to the laws of the required Party.

ART. 6. A person surrendered can in no case be kept in custody or be brought to trial or condemned in the territory of the requiring Party for any crime or on account of any other matter than that for which the extradition shall have taken place.

This stipulation does not apply to crimes committed after the extradition.

ART. 7. No person shall be surrendered if the crime alleged is of a political character, or if he proves or the required party decides that the request for his surrender has in fact been made with a view to try or punish him for a crime of a political character.

Nevertheless the extradition of a person accused or convicted of a crime involving the loss of human life or grievous bodily harm under circumstances which, in the opinion of the judicial authority of the required party would admit of extradition shall be accorded notwithstanding the political character of the crime alleged.

ART. 8. The request for extradition shall be made through diplomatic channels. It shall be accompanied by a warrant of arrest issued by the competent authority of the requiring Party and by such evidence as may be required by the laws of the required Party in order to examine the admissibility of the request.

Any request which relates to a person already convicted shall be accompanied by the record of conviction passed by the competent authority of the requiring Party.

A fugitive against whom sentence has been passed in his absence shall be treated as an accused but not as a convicted person.

ART. 9. If the request for extradition be in accordance with the foregoing stipulations, the competent authority of the required Party shall take the necessary steps to ensure extradition of the fugitive.

ART. 10. If after the expiration of two months from the date of arrest of the fugitive sufficient grounds as defined above justifying the extradition are not furnished, the fugitive shall be released.

ART. 11. The fugitive may, in case of urgency, be arrested by virtue of a request addressed by the competent authority of the requiring Party to the competent authority of the required Party.

This request must be based on a warrant of arrest. It can be transmitted through any channels permitting of verification.

The fugitive shall be released if, within a time to be fixed by the required Party, a formal request for extradition has not been received through diplomatic channels.

ART. 12. Extradition may be refused if, according to the laws of the required Party, the committal for trial of the fugitive would not have been justified in the case of a similar crime committed on the territory of the said Party.

No fugitive shall be delivered up until fifteen days have expired since the date of his arrest.

ART. 13. In the examination which it shall make in accordance with the foregoing stipulations, the competent authority of the required Party shall admit as evidence the sworn depositions or the solemn declarations of witnesses taken in the territory of the requiring Party, or copies thereof, as also the warrant and record of conviction issued therein, or copies thereof, provided that all such documents are authenticated and duly certified by the competent authority of the requiring Party and certified by the competent consul of the required Party in the territory of the requiring Party.

ART. 14. If a fugitive is claimed by one or more of the H. C. P. and should be also claimed by another or by others of the H. C. P. at the same time, on account of crimes committed on their respective territories, his extradition shall be granted according to the discretion of the required Party.

ART. 15. Any object found in the possession of the fugitive at the time of his arrest, together with any object which may serve as evidence to establish the crime alleged, shall be handed over to the representative of the requiring Party at the time of the extradition.

The rights of third parties with regard to the said property or articles are nevertheless reserved.

ART. 16. Each of the H. C. P. shall bear the costs occasioned by the arrest on its territory, the detention and the transport to the frontier or seaport of persons whom they shall have consented to extradite, in execution of the present Convention.

ART. 17. The H. C. P. undertake to furnish each other, before ratification or adherence with schedules of crimes, the object of which shall be to define, in accordance with national penal legislation, crimes of a kind as specified under Art. 2, also with documents specifying the nature of the proofs required under Art. 8 (1) as also with definitions of legal notions and terms of respective legislations.

The charge shall be in terms of the law of the required party.

ART. 18. For the purposes of the text of this Convention, the following terms shall have the meanings respectively assigned to them:

Competent authority means the authority which has the power within its jurisdiction to perform any of the acts specified in this Convention.

Crime means any extraditable act under this Convention.

Fugitive means the person whose extradition is required.

Requiring party means the H. C. P. who makes a request for extradition.

Required party means the H. C. P. to whom a request for extradition is made.

Territory includes ships and aircraft on the high seas.

6. MODEL DRAFT OF AN EXTRADITION TREATY¹

By a Sub-Commission of the International Penal and Prison Commission, 1931

The Contracting Parties engage to deliver up persons to each other, on request, for the purpose of penal prosecution and proceedings with a view to preventive measures and for the purpose of executing punishments and preventive measures in accordance with the provisions contained in the following articles.

A. EXTRADITION CONDITIONS

General Foundation of the obligations to effect extradition

ARTICLE 1. Persons may be subject to extradition only if they are staying in the territory of the State applied to and are being prosecuted by the competent authorities of the other

¹ *Recueil de Documents en Matière Pénale et Penitenciaire*, Vol. I., p. 478 (1931).

State for an act which is punishable under the laws of both States and which may be punished, under the law of the State making the application, by imprisonment for one year or more, or if they have been validly condemned by a court of the State making the application to imprisonment for a term of three months or more;

or if preventive proceedings have been instituted against them by the competent authority of the State making the application for acts which are punishable under the laws of both States or if the competent authority of the State making the application has validly pronounced a preventive measure against them consisting of deprivation of liberty.

ART. 2. The provisions of Article 1 shall also apply to attempts and participation.

ART. 3. The requirement that the act shall also be punishable in the State applied to shall not be applicable if the laws of that State do not provide for that act merely on account of special external circumstances.

LIMITATIONS OF THE OBLIGATIONS TO EXTRADITE

a) *Place where the act is committed*

ART. 4. If the punishable act is committed in a place situated in the territory of the State applied to according to its laws, extradition shall as a rule not be granted.

b) *Nationals*

ART. 5. Nationals shall not be surrendered except in the case of criminals constituting a special public danger. The State applied to shall decide alone whether this is the case.

c) *Political Offences*

ART. 6. Extradition shall not be granted for political offences unless, under the existing circumstances, they principally form a common offence. The decision on this subject shall be taken solely by the State applied to.

Murder, or attempted murder, of the Head of a State shall never be regarded as a political crime; murder and attempted murder of other persons shall also not be so regarded if they are committed with special barbarity or cruelty.

All crimes directed not against a definite State authority but against all State authority shall also be regarded as common crimes.

If extradition is granted, the political nature of the act shall not be taken into consideration either in the prosecution or in the punishment.

d) *Military Offences*

ART. 7. Extradition shall not be granted for punishable acts consisting solely of the contravention of military duties.

e) *Fiscal Offences*

ART. 8. Extradition shall only be granted for fiscal offences if they are punishable under the laws of the State making the application by imprisonment for a term of 5 years or more, if a sentence of imprisonment of two years or more has been validly pronounced, or if the offender has acted out of base motives.

The decision regarding the nature of the motives shall be taken exclusively by the State applied to.

f) *General provision for military and fiscal offences*

ART. 9. In the case of a common punishable act, which is at the same time a contravention of military duties or an offence against fiscal laws which does not call for extradition, extradition shall only be granted provided the military or fiscal nature of the act is not taken into consideration either in the prosecution or penalty.

g) *Prescription*

ART. 10. Extradition shall not be granted if exemption from prosecution or punishment has been acquired by lapse of time under the laws of the State making the application.

h) *Internal Procedure*

ART. 11. Extradition shall not be granted if the person claimed is being tried or a judgment has been pronounced for the same act in the State applied to.

CIVIL OBLIGATIONS

ART. 12. Any obligations of a civil or other nature on the part of the persons to be surrendered shall not prevent their extradition. Persons entitled thereto shall retain the right to assert their claims on the competent authorities.

APPLICATIONS FOR EXTRADITION FROM SEVERAL STATES

ART. 13. Should several States demand the extradition of a person, either for the same or for different acts, the State applied to shall decide at its discretion which application shall rank first. In this case it shall be taken into consideration that preference is usually given in the first place to the State where the crime or offence is committed and in the second place to the application in respect of a crime or offence liable to a more severe punishment.

If an application is made to surrender a person who is not a national either of the State or of one of the States making the application, the State applied to may in the first place notify the State of which the person is a national, and if this State does not demand the extradition, the State applied to shall decide at its discretion to which State it shall grant the extradition.

PRIVATE PROSECUTIONS

ART. 14. Extradition may be granted not only in respect of crimes or offences prosecuted officially, but also in respect of those prosecuted on the demand of an injured party (private plaint, application). The absence of a private application to prosecute shall not prevent extradition if this application is required by the laws of the State from whom extradition is demanded but not of the country demanding it.

PRINCIPLE OF THE SPECIFIC CRIME OR OFFENCE

ART. 15. As a rule a person surrendered may not be prosecuted or punished or subject to preventive proceedings or measures in the State to which he has been extradited in respect of any other act committed before extradition than that for which he has been surrendered.

Should the legal view of the act be changed during the course of the trial, the surrendered person shall not be punished if extradition would have been inadmissible from the point of view of the fresh judgment.

The principle of the first paragraph shall not apply if the surrendered person has remained in the State to which he has been surrendered 14 days after the valid end of the trial or after the punishment or preventive measures have been completed, although he has not been prevented from leaving it, or if he has voluntarily returned to that State.

In accordance with the principle of the first paragraph, the State to whom a person is surrendered may not surrender this person to another State without the permission of the State that granted the first extradition. In the cases referred to in paragraph 3, such permission shall not be required.

DEATH PENALTY

ART. 16. If the act for which extradition is demanded is punishable with the death penalty by the laws of the State making the application, and this penalty is not provided for by the legislation of the State applied to, the latter may accompany the extradition with the urgent recommendation that the death penalty may be replaced by the penalty which approaches most closely thereto under the laws of the State making the application and is also admitted under the laws of the State applied to.

PROSECUTION OF NATIONALS

ART. 17. If an application for extradition is refused because the person claimed is a national of the State applied to, that State must take proceedings at the request of the State making the application. The latter must send documents and evidence to the State applied

to. The result of the proceedings and the execution of any penalty or preventive measure shall be communicated to the State making the application. The decision, which forms a valid termination of the proceedings, must be forwarded to it in original or in a certified copy.

A fresh trial shall not take place in the State making the application if the accused has been acquitted or the valid penalty or the properly pronounced preventive measures have been executed or have expired through lapse of time.

EXTRADITION IN TRANSIT

ART. 18. If one of the Contracting States grants extradition to a third State or if a person is to be surrendered to one of the Contracting States by a third State, the other Contracting State shall permit the extradition in transit through its territory, provided the crime or offence is one for which extradition is provided under the present Treaty.

If the person to be extradited in transit is a national of the transit State, Art. 5 shall apply *mutatis mutandis*.

SURRENDER OF ARTICLES

ART. 19.

a) Articles which may serve as proof in criminal proceedings or in proceedings with a view to preventive measures in the other Contracting State;

b) Articles which may be confiscated or declared forfeit in such proceedings, and lastly,

c) Articles which are found in possession of a person to be surrendered and which he or a participant has acquired by means of an act on which the request for extradition is based or as compensation for such articles,

Shall be seized and surrendered on request in connection with the extradition of the person or independently thereof. In the latter case the trial in the other State must be based on an act on account of which extradition is provided in accordance with the present Treaty.

If a person is to be surrendered, money and other valuables belonging to the person shall be seized and surrendered to such an extent as to cover any possible costs of the proceedings and to compensate the injured party.

If the extradition of a person is granted in transit the articles handed over at the same time by the extraditing State shall also be sent in transit.

ART. 20. The State making the application shall return the articles mentioned in Art. 19, paragraph 1a, as soon as they are no longer required for the purposes of the trial.

A reservation is made regarding the articles mentioned in Art. 19, paragraph 1 b and c, in favour of the rights of third parties to them in the State applied to, provided they are not confiscated or declared forfeit. In this case they shall be returned after the conclusion of the trial.

The articles mentioned in Art. 19, paragraph 1 c, and in Art. 19, paragraph 2, shall only be surrendered if third persons have not established rights against the wanted person in the State applied to.

B. EXTRADITION PROCEDURE

Direct Communication

ART. 21. The request for extradition is made by the Ministry of Justice (Supreme judicial authority or similar department) of the State making the application direct to the Ministry of Justice of the State applied to.

In the further course of the extradition procedure (including the surrender of articles) and in the procedure for extradition in transit and for prosecution in the country of nationality (Art. 17) of persons that are not surrendered, the Ministries of Justice shall communicate direct with each other.

REQUISITION FOR SURRENDER

ART. 22. The requisition for extradition shall be made in writing and shall state the reason for surrender (criminal proceedings including proceedings with a view to preventive measures, the execution of penalties and preventive measures.)

The requisition for extradition shall be accompanied by a warrant of arrest or an equivalent decision, or the verdict or decision to apply preventive measures. These documents shall be made out in accordance with the provisions of the State making the application and shall be enclosed in original or certified copy.

In the documents or in a special annex the persons to be surrendered must be designated and described as exactly as possible, together with the act (acts) with which they are charged; further the legal designation of the crime or offence and finally the penal provisions shall be stated which are to be applied in accordance with the law of the State making the application.

The requisition for extradition of a person includes the request to seize and surrender articles of importance for the trial or for execution of the sentence in the State making the application (Art. 19).

SUPPLEMENTARY INFORMATION

ART. 23. The State applied to may obtain supplementary information from the State making the application if it considers this necessary in order to decide on the requisition. If the supplementary information does not arrive within a reasonable time (4 weeks after the despatch of the request), the person to be surrendered shall be freed from any arrest or other preventive measure.

The applying State may bring forward the requisition for extradition while reserving the right to produce supplementary information. If this information does not arrive within the time fixed in the first paragraph, counting from the despatch of the requisition for extradition, the application may be decided on without further formalities.

WITHDRAWAL OF THE REQUISITION FOR EXTRADITION

ART. 24. So long as the State making the application has not been informed of the decision taken on the requisition for extradition, it may withdraw the requisition, but must state the reasons for withdrawal and must refund any expenses incurred in connection with the requisition by the State applied to.

If the withdrawal of the requisition reaches the State applied to at a time when the extradition has been already granted, the withdrawal shall be regarded as not having taken place, unless the reasons for withdrawal show that the extradition was inadmissible. In such cases the grant of extradition shall be cancelled.

SECURING THE PERSON AFTER THE REQUISITION FOR EXTRADITION

ART. 25. If a preliminary investigation of the requisition for surrender, which must be instituted immediately, does not show that the application cannot be granted, the State applied to must take steps without delay to prevent the person escaping from extradition.

SECURING THE PERSON BEFORE THE REQUISITION FOR EXTRADITION

ART. 26. In urgent cases either Contracting State, before making a requisition for extradition, may request that a person whose surrender is to be applied for be provisionally secured.

The request may be forwarded by any competent authority of one State directly to an authority competent to order arrests in the other State, either by post or by any other form of communication which leaves traces in writing. When an application is sent by telephone or wireless telegraphy, the authority to whom it is made must ascertain by independent inquiry that it is authentic.

The Ministry of Justice of the applying State shall bring the request without delay to the knowledge of the Ministry of Justice of the State applied to.

ART. 27. Any request for provisionally securing a person must refer to a warrant of arrest, an order of equal value or to a valid penal judgment or a sentence regarding the application of preventive measures, must state the nature of the punishable act and the circumstances in which it was committed, must enclose as accurate a description of the person as possible and must intimate that a formal requisition for extradition will follow.

The request for provisionally securing a person includes the request for provisional seizure

of articles of importance for the trial or for execution of the judgment in the State applied to (Art. 19).

ART. 28. The authority applied to, in whose territory the person designated in the requisition is found, shall immediately establish his identity and examine him regarding the act with which he is charged. If the authority hesitates to secure the person, it shall immediately inform the Ministry of Justice of the applying State and communicate the reasons.

ART. 29. If a person has been provisionally secured, the requisition for surrender must reach the State applied to within 14 days from the date of arrest, otherwise the detention shall be cancelled.

If the State applied to requires supplementary information (Art. 23), it must arrive at such a time that the provisional detention does not exceed twice the time limit mentioned in paragraph 1. Otherwise the detention must be cancelled.

If a purely provisional detention has been cancelled because the State making the application has not kept one of the time limits provided in the foregoing articles, this shall not prevent the requisition for surrender being granted.

GENERAL PROVISION FOR SECURING THE PERSON

ART. 30. A person shall be secured in accordance with the laws of the country applied to. As soon as this measure has been ordered it shall be communicated as expeditiously as possible to the authority making the application.

LEGISLATION APPLICABLE TO THE PROCEDURE

ART. 31. Unless otherwise provided in the agreement, the legislation of the State applied to shall be applicable to the extradition procedure.

EXAMINATION OF THE PERSON TO BE SURRENDERED

ART. 32. The competent authority of the State applied to shall examine the person to be surrendered before a decision is taken on the requisition for extradition and it may refuse extradition if the person on examination proves facts which, if they had been known, would have made it impossible to apply for extradition.

SURRENDER OF ARTICLES

ART. 33. The decision regarding extradition shall also extend to the question whether and to what extent articles are to be surrendered.

The articles shall be surrendered as far as possible together with the person.

DECISION REGARDING REQUISITIONS FOR EXTRADITION

ART. 34. The State applied to shall communicate as soon as possible its decision regarding the requisition for extradition to the State making the application. Reasons must be given for an entirely or partially negative decision. Otherwise a proposal shall be made regarding the place and time of surrendering the person.

If the person has been in custody the exact duration of the imprisonment shall be stated.

EXECUTION OF THE EXTRADITION

ART. 35. The State applying for extradition shall take over the person at the place and time agreed upon.

If the person to be surrendered is not taken over within the proper period (6 weeks after extradition has been granted), the detention is to be cancelled.

If the State applying for extradition delays taking over for a further period (three months), the grant expires with the effect that extradition can no longer be claimed for the same crime or offence.

POSTPONEMENT OF EXTRADITION

ART. 36. If there is an insuperable obstacle to the delivery or taking over in due time of the surrendered person, especially if this involves danger to his life or serious risk to his

health, the execution of the extradition shall be postponed if possible for a definite period or otherwise until the obstacle has disappeared.

COMMUNICATION TO THE FRONTIER AUTHORITIES

ART. 37. Each of the States concerned shall inform its frontier authority in good time of the impending execution of the extradition. The same shall apply in case of postponement.

PROVISIONAL EXTRADITION

ART. 38. If the person to be surrendered is prosecuted or condemned in the State applied to for a crime or offence to which the requisition for extradition does not apply, the extradition may, in specially urgent cases, be made subject to the condition that the surrendered person shall be returned to the State applied to immediately after the end of the proceedings in the State applying for extradition.

EXPENSES

ART. 39. Subject to the provisions of Art. 24, the State applied to shall not claim compensation for the expenses of extradition. It shall, however, inform the State applying for extradition of the amount of the expenses involved by the extradition procedure and surrender, on account of the possible recovery of the expenses from the surrendered person. The amounts recovered shall be payable on demand to the State applied to.

In the case of provisional extradition the State making the application shall refund to the State applied to any expenses involved by the surrender and return of the person.

The expenses of extradition in transit (conveyance, guarding and maintenance) shall be refunded by the State making the application to the State through whose territory the surrendered person is forwarded.

DELIVERY OF ARTICLES AND EXTRADITION IN TRANSIT

ART. 40. In proceedings regarding the separate delivery of articles the provisions of Arts. 22, 23, para. 1, sentence 1, and para. 2, Arts. 24, 25, 26, paras. 1 and 2, Art. 27, para. 1, Arts. 31, 34, 36, 37, and 39, para. 1, sentence 1, shall apply *mutatis mutandis*.

In proceedings for extradition in transit, Art. 22 shall apply *mutatis mutandis* and with the proviso that the documents mentioned in para. 2 shall be replaced by the proof that the State applied to has granted the extradition. Further the provisions of Art. 23, para. 1, sentence 1, and para. 2, Arts. 24, 31, 34, para. 1, Art. 35, para. 1, Arts. 36 and 37, shall apply *mutatis mutandis*.

COMPENSATION

ART. 41. Any claims for compensation by a surrendered person who has not been condemned or subjected to preventive measures, can only be made against the State applying for extradition, which shall decide the claims in accordance with its laws.

If a person has been arrested as a consequence of a request for provisional detention or for extradition, but has not been surrendered either because the State making the application has withdrawn one or other request or because the requisition for surrender has been refused, the claim for compensation for pecuniary damage arising out of the arrest shall be transmitted for decision to the Ministry of Justice of the State applied to. The decision shall be taken in accordance with the provisions of the laws in the State making the application, or, if they do not provide for compensation for imprisonment pending trial, then by the provisions of the laws of the State applied to.

A negative decision shall be final. If the authority finds that the claim is justified, it shall enter into negotiations in the first place with the Ministry of Justice of the State making the application. If an agreement is reached, the State making the application shall transmit the amount of compensation to the State applied to, which shall pay it to the person claiming compensation. If no agreement is reached, the provisions of the agreement regarding the arbitral settlement of disputes shall be applied.¹

¹ For States which have not concluded an arbitral agreement: "the arbitral settlement shall be regulated by a special agreement."

APPENDIX V

TYPICAL BIPARTITE TREATIES OF RECENT DATE

1. UNITED STATES OF AMERICA AND GREAT BRITAIN¹

December 22, 1931

ARTICLE 1

The High Contracting Parties engage to deliver up to each other, under certain circumstances and conditions stated in the present Treaty, those persons who, being accused or convicted of any of the crimes or offences enumerated in Article 3, committed within the jurisdiction of the one Party, shall be found within the territory of the other Party.

ARTICLE 2

For the purposes of the present Treaty the territory of His Britannic Majesty shall be deemed to be Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, and all parts of His Britannic Majesty's dominions overseas other than those enumerated in Article 14, together with the territories enumerated in Article 16 and any territories to which it may be extended under Article 17. It is understood that in respect of all territory of His Britannic Majesty as above defined other than Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, the present Treaty shall be applied so far as the laws permit.

For the purposes of the present Treaty the territory of the United States shall be deemed to be all territory wherever situated belonging to the United States, including its dependencies and all other territories under its exclusive administration or control.

ARTICLE 3

Extradition shall be reciprocally granted for the following crimes or offences:

1. Murder (including assassination, parricide, infanticide, poisoning), or attempt or conspiracy to murder.
2. Manslaughter.
3. Administering drugs or using instruments with intent to procure the miscarriage of women.
4. Rape.
5. Unlawful carnal knowledge, or any attempt to have unlawful carnal knowledge, of a girl under 16 years of age.
6. Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.
7. Kidnapping or false imprisonment.
8. Child stealing, including abandoning, exposing or unlawfully detaining.
9. Abduction.
10. Procuration: that is to say the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats, or compulsion, for such purposes with a view in either case to gratifying the passions of another person provided that such crime or offence is punishable by imprisonment for at least one year or by more severe punishment.
11. Bigamy.
12. Maliciously wounding or inflicting grievous bodily harm.
13. Threats, by letter or otherwise, with intent to extort money or other things of value.
14. Perjury, or subornation of perjury.

¹ *U. S. Treaty Series*, No. 849. The entry into force of this treaty depends upon its publication under Art. 18.

15. Arson.
16. Burglary or housebreaking, robbery with violence, larceny or embezzlement.
17. Fraud by a bailee, banker, agent, factor, trustee, director, member, or public officer of any company, or fraudulent conversion.
18. Obtaining money, valuable security, or goods, by false pretences; receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained.
19. (a) Counterfeiting or altering money, or bringing into circulation counterfeited or altered money.
(b) Knowingly and without lawful authority making or having in possession any instrument, tool, or engine adapted and intended for the counterfeiting of coin.
20. Forgery, or uttering what is forged.
21. Crimes or offences against bankruptcy law.
22. Bribery, defined to be the offering, giving or receiving of bribes.
23. Any malicious act done with intent to endanger the safety of any persons travelling or being upon a railway.
24. Crimes or offences or attempted crimes or offences in connection with the traffic in dangerous drugs.
25. Malicious injury to property, if such crime or offence be indictable.
26. (a) Piracy by the law of nations.
(b) Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.
27. Dealing in slaves.

Extradition is also to be granted for participation in any of the aforesaid crimes or offences, provided that such participation be punishable by the laws of both High Contracting Parties.

ARTICLE 4

The extradition shall not take place if the person claimed has already been tried and discharged or punished, or is still under trial in the territories of the High Contracting Party applied to, for the crime or offence for which his extradition is demanded.

If the person claimed should be under examination or under punishment in the territories of the High Contracting Party applied to for any other crime or offence, his extradition shall be deferred until the conclusion of the trial and the full execution of any punishment awarded to him.

ARTICLE 5

The extradition shall not take place if, subsequently to the commission of the crime or offence or the institution of the penal prosecution or the conviction thereon, exemption from prosecution or punishment has been acquired by lapse of time, according to the laws of the High Contracting Party applying or applied to.

ARTICLE 6

A fugitive criminal shall not be surrendered if the crime or offence in respect of which his surrender is demanded is one of a political character, or if he proves that the requisition for his surrender has, in fact, been made with a view to try or punish him for a crime or offence of a political character.

ARTICLE 7

A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition

shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition.

ARTICLE 8

The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.

ARTICLE 9

The extradition shall take place only if the evidence be found sufficient, according to the laws of the High Contracting Party applied to, either to justify the committal of the prisoner for trial, in case the crime or offence had been committed in the territory of such High Contracting Party, or to prove that the prisoner is the identical person convicted by the courts of the High Contracting Party who makes the requisition, and that the crime or offence of which he has been convicted is one in respect of which extradition could, at the time of such conviction, have been granted by the High Contracting Party applied to.

ARTICLE 10

If the individual claimed by one of the High Contracting Parties in pursuance of the present Treaty should be also claimed by one or several other Powers on account of other crimes or offences committed within their respective jurisdictions, his extradition shall be granted to the Power whose claim is earliest in date, unless such claim is waived.

ARTICLE 11

If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, or within such further time as the High Contracting Party applied to, or the proper tribunal of such High Contracting Party, shall direct, the fugitive shall be set at liberty.

ARTICLE 12

All articles seized which were in the possession of the person to be surrendered at the time of his apprehension, and any articles that may serve as a proof of the crime or offence shall be given up when the extradition takes place, in so far as this may be permitted by the law of the High Contracting Party granting the extradition.

ARTICLE 13

All expenses connected with the extradition shall be borne by the High Contracting Party making the application.

ARTICLE 14

His Britannic Majesty may accede to the present Treaty on behalf of any of his Dominions hereafter named—that is to say, the Dominion of Canada, the Commonwealth of Australia (including for this purpose Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland—and India. Such accession shall be effected by a notice to that effect given by the appropriate diplomatic representative of His Majesty at Washington which shall specify the authority to which the requisition for the surrender of a fugitive criminal who has taken refuge in the Dominion concerned, or India, as the case may be, shall be addressed. From the date when such notice comes into effect the territory of the Dominion concerned, or of India, shall be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty.

The requisition for the surrender of a fugitive criminal who has taken refuge in any of the above-mentioned Dominions or India, on behalf of which His Britannic Majesty has ac-

ceded, shall be made by the appropriate diplomatic or consular officer of the United States of America.

Either High Contracting Party may terminate this Treaty separately in respect of any of the above-mentioned Dominions or India. Such termination shall be effected by a notice given in accordance with the provisions of Article 18.

Any notice given under the first paragraph of this Article in respect of one of His Britannic Majesty's Dominions may include any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, and which is being administered by the Government of the Dominion concerned; such territory shall, if so included, be deemed to be territory of His Britannic Majesty for the purposes of the present Treaty. Any notice given under the third paragraph of this Article shall be applicable to such mandated territory.

ARTICLE 15

The requisition for the surrender of a fugitive criminal who has taken refuge in any territory of His Britannic Majesty other than Great Britain and Northern Ireland, the Channel Islands, or the Isle of Man, or the Dominions or India mentioned in Article 14, shall be made to the Governor, or chief authority, of such territory by the appropriate consular officer of the United States of America.

Such requisition shall be dealt with by the competent authorities of such territory: provided, nevertheless, that if an order for the committal of the fugitive criminal to prison await surrender shall be made, the said Governor or chief authority may, instead of issuing a warrant for the surrender of such fugitive, refer the matter to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

ARTICLE 16

This Treaty shall apply in the same manner as if they were Possessions of His Britannic Majesty to the following British Protectorates, that is to say, the Bechuanaland Protectorate, Gambia Protectorate, Kenya Protectorate, Nigeria Protectorate, Northern Rhodesia, Northern Territories of the Gold Coast, Nyasaland, Sierra Leone Protectorate, Solomon Islands Protectorate, Somaliland Protectorate, Swaziland, Uganda Protectorate and Zanzibar, and to the following territories in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, that is to say, Cameroons under British mandate, Togoland under British mandate, and the Tanganyika Territory.

ARTICLE 17

If after the signature of the present Treaty it is considered advisable to extend its provisions to any British Protectorates other than those mentioned in the preceding Article or to any British-protected State, or to any territory in respect of which a mandate on behalf of the League of Nations has been accepted by His Britannic Majesty, other than those mandated territories mentioned in Articles 14 and 16, the stipulations of Articles 14 and 15 shall be deemed to apply to such Protectorates or States or mandated territories from the date and in the manner prescribed in the notes to be exchanged for the purpose of effecting such extension.

ARTICLE 18

The present Treaty shall come into force ten days after its publication, in conformity with the forms prescribed by the laws of the High Contracting Parties. It may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months.

In the absence of an express provision to that effect, a notice given under the first paragraph of this Article shall not affect the operation of the Treaty as between the United States of America and any territory in respect of which notice of accession has been given under Article 14.

The present Treaty shall be ratified, and the ratifications shall be exchanged at London as soon as possible.

On the coming into force of the present treaty the provisions of Article 10 of the treaty of the 9th August, 1842, of the Convention of the 12th July, 1889, of the supplementary Convention of the 13th December, 1900, and of the supplementary Convention of the 12th April, 1905, relative to extradition, shall cease to have effect, save that in the case of each of the Dominions and India, mentioned in Article 14, those provisions shall remain in force until such Dominion or India shall have acceded to the present treaty in accordance with Article 14 or until replaced by other treaty arrangements.

2. UNITED STATES OF AMERICA AND AUSTRIA¹

January 31, 1930

The United States of America and Austria desiring to promote the cause of justice, have resolved to conclude a treaty for the extradition of fugitives from justice, between the two countries and have appointed for that purpose the following Plenipotentiaries:

The President of the United States of America:

Mr. Albert Henry Washburn, Envoy Extraordinary and Minister Plenipotentiary to Austria, and

The Federal President of the Republic of Austria:

Mr. Johann Schober, Federal Chancellor,

who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed upon and concluded the following articles:

Article I. It is agreed that the Government of the United States and the Federal Government of Austria shall, upon requisition duly made as herein provided, deliver up to justice any person, who may be charged with, or may have been convicted of any of the offenses specified in Article II of the present Treaty which are designated in the laws of the surrendering state as crimes other than misdemeanors and which were committed within the jurisdiction of one of the High Contracting Parties, whenever such person shall seek an asylum or shall be found within the territories of the other; provided that such surrender shall take place only upon such evidence of criminality, as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the offense had been there committed.

Article II. Persons shall be delivered up according to the provisions of the present Treaty, who shall have been charged with or convicted of any of the following offenses:

1. Murder, comprehending the crimes designated by the term parricide, assassination, manslaughter when voluntary, poisoning or infanticide.
2. Rape, abortion, carnal knowledge of children under the age of fourteen years.
3. Abduction or detention of women or girls for immoral purposes.
4. Bigamy.
5. Arson.
6. Wilful and unlawful destruction or obstruction of railroads, which endangers human life.
7. Crimes committed at sea:
 - a Piracy, as commonly known and defined by the law of nations, or by statute.
 - b Wrongfully sinking or destroying a vessel at sea.
 - c Mutiny or conspiracy of two or more members of the crew or other persons on board of a vessel on the high seas, for the purpose of rebelling against the authority of the Captain or Commander of such vessel, or by fraud or violence taking possession of such vessel.
 - d Assault on board ship upon the high seas with intent to do bodily harm.

¹ *U. S. Treaty Series*, No. 822; *106 League of Nations Treaty Series*, p. 379. The exchange of ratifications took place at Vienna, August 12, 1930.

8. Burglary, defined to be the act of breaking into and entering the house of another in the night time with intent to commit a felony therein.
9. The act of breaking into and entering the office of the Government and public authorities or the offices of banks, banking houses, savings-banks, trust-companies, insurance and other companies, or other buildings not dwellings with intent to commit a felony therein.
10. Robbery, defined to be the act of feloniously and forcibly taking from the person of another goods or money by violence or by putting him in fear.
11. Forgery or the utterance of forged papers.
12. The forgery or falsification of the official acts of the Governments, or public authority, including Courts of Justice, or the uttering or fraudulent use of any of the same.
13. The fabrication of counterfeit money, whether coin or paper, counterfeit titles or coupons of public debt, created by National, State, Provincial, Territorial, Local or Municipal Governments, bank notes or other instruments of public credit, counterfeit seals, stamps, dies and marks of State or public administrations, and the utterance, circulation or fraudulent use of the above mentioned objects.
14. Embezzlement or criminal malversation committed within the jurisdiction of one or the other party by public officers or depositaries, where the amount embezzled exceeds one hundred dollars or the Austrian equivalent.
15. Embezzlement by any person or persons, hired, salaried or employed, to the detriment of their employers or principals, when the crime is punishable by imprisonment or other corporal punishment by the laws of both countries, and where the amount embezzled exceeds one hundred dollars or the Austrian equivalent.
16. Kidnapping of minors or adults, defined to be the abduction or detention of a person or persons, in order to exact money from them, their families or any other person or persons, or for any other unlawful end.
17. Larceny, defined to be the theft of effects, personal property, or money, of the value of one hundred dollars or more or the Austrian equivalent.
18. Obtaining money, valuable securities or other property by false pretences or receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained, where the amount of money or the value of the property so obtained or received exceeds one hundred dollars or the Austrian equivalent.
19. Perjury or subornation of perjury.
20. Fraud or breach of trust by a bailee, banker, agent, factor, trustee, executor, administrator, guardian, director or officer of any company or corporation, or by any one in any fiduciary position, where the amount of money or the value of the property misappropriated exceeds one hundred dollars or the Austrian equivalent.
21. Crimes against the laws of both countries for the suppression of slavery and slave trading.
22. Wilful desertion or wilful non-support of minor or dependent children.

The extradition is also to take place for participation in any of the aforesaid crimes as an accessory before or after the fact or for any attempt to commit any of the aforesaid crimes; provided such participation or attempt be punishable by imprisonment by the laws of both Contracting Parties.

Article III. The provisions of the present Treaty shall not import a claim of extradition for any offense of a political character, nor for acts connected with such offenses; and no person surrendered by or to either of the High Contracting Parties in virtue of this Treaty shall be tried or punished for a political offense committed before his extradition.

The State applied to or Courts of that State shall decide whether the offense is of a political character or not.

When the offense charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offense was committed or attempted against the life of the Sovereign or Head of any State or against the life of any member of his

family, shall not be deemed sufficient to sustain that such offense was of a political character; or was an act connected with offenses of a political character.

Article IV. No person, except with the approval of the surrendering State, shall be tried for any crime committed before his extradition other than that for which he was surrendered, unless he has been at liberty for one month after having been tried for that offense, to leave the country, or, in case of conviction, for one month after having suffered his punishment or having been pardoned.

Article V. A fugitive criminal shall not be surrendered under the provisions hereof, when, from lapse of time or other lawful cause, either according to the laws of the country within the jurisdiction of which the crime was committed or according to the laws of the surrendering State, the criminal is exempt from prosecution or punishment for the offense for which the surrender is asked.

Article VI. If the person whose extradition has been requested, pursuant to the stipulations of this Convention, be actually under prosecution for a crime in the country where he has sought asylum, or shall have been convicted thereof, his extradition may be deferred until such proceedings be terminated, or until such criminal shall be set at liberty in due course of law.

Article VII. If a fugitive criminal claimed by one of the parties hereto, shall be also claimed by one or more powers pursuant to treaty provisions, on account of offenses committed within their jurisdiction, such criminal shall be delivered to that State whose demand is first received, unless its demand is waived. This Article shall not affect such treaties as have already previously been concluded by one of the Contracting Parties with other States.

Article VIII. Under the stipulations of this Treaty, neither of the High Contracting Parties shall be bound to deliver up its own citizens.

Article IX. The expense of transportation of the accused shall be paid by the Government which has preferred the demand for extradition. No claim other than for the board and lodging of an accused prior to his surrender arising out of the arrest, detention, examination and surrender of fugitives under this Treaty shall be made against the Government demanding the extradition; provided, however, that any officer or officers of the surrendering Government, who shall in the course of their duty, receive no salary or compensation other than specific fees for services performed, shall be entitled to receive from the Government demanding the extradition the customary fees for the acts or services performed by them, in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

These claims for board and lodging and for fees are to be submitted through the intermediary of the respective Government.

Article X. Everything found in the possession of the fugitive criminal at the time of his arrest, whether being the proceeds of the crime, or which may be material as evidence in making proof of the crime, shall so far as practicable, according to the laws of either of the High Contracting Parties, be delivered up with his person at the time of surrender. Nevertheless, the rights of a third party with regard to the articles referred to, shall be duly respected.

Article XI. The stipulations of the present Treaty shall be applicable to all territory wherever situated, belonging to either of the High Contracting Parties or in the occupancy and under the control of either of them, during such occupancy or control.

Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the High Contracting Parties. In the event of the absence of such agents from the country or its seat of Government, or where extradition is sought from territory included in the preceding paragraph, other than the United States or Austria, requisitions may be made by superior consular officers. Requisitions for surrender with accompanying documentary proofs shall be required to be translated by the Government which has preferred the demand for extradition into the language of the surrendering Government.

The arrest and detention of a fugitive may be applied for on information, even by telegraph, of the existence of a judgment of conviction or of a warrant of arrest.

In Austria, the application for arrest and detention shall be addressed to the Federal Chancellor, who will transmit it to the proper department.

In the United States, the application for arrest and detention shall be addressed to the Secretary of State, who shall deliver a mandate certifying that the application is regularly made and requesting the competent authorities to take action thereon in conformity to statute.

In case of urgency, the application for arrest and detention may be addressed directly to the competent magistrate in conformity to the statutes in force.

The person provisionally arrested shall be released, unless within three months from the date of commitment in the United States—or from the date of arrest in Austria, the formal requisition for surrender, with the documentary proofs hereinafter described, be made as aforesaid by the diplomatic agent of the demanding Government, or in his absence, by a consular officer thereof.

If the fugitive criminal shall have been convicted of the crime for which his extradition is asked, a copy of the sentence of the court before which such conviction took place, duly authenticated, shall be produced. If, however, the fugitive is merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced, with such other evidence or proof as may be deemed competent in the case.

Article XII. In every case of a request made by either of the High Contracting Parties, for the arrest, detention or extradition of fugitive criminals, the appropriate legal officers of the country where the proceedings of extradition are had, shall assist the officers of the Government demanding the extradition before the respective judges and magistrates, by every appropriate legal means within their power.

Article XIII. The present Convention shall be ratified by the High Contracting Parties, in accordance with their respective constitutional methods and shall take effect on the thirtieth day after the date of the exchange of ratifications, which shall take place at Vienna as soon as possible, but it shall not operate retroactively.

On the day when the present Convention takes effect, the Convention of July 3, 1856 shall cease to be in force except as to crimes therein enumerated and committed prior to the date first mentioned.

The present Convention shall remain in force for a period of six months after either of the two Governments shall have given notice of a purpose to terminate it.

In witness whereof the above-named Plenipotentiaries have signed the present Treaty and have hereunto affixed their seals.

Done in duplicate at Vienna this 31st day of January nineteen hundred and thirty.

ALBERT HENRY WASHBURN
SCHOBER

3. GERMANY AND TURKEY¹

September 3, 1930

The German Reich and the Turkish Republic agree to regulate by means of a Treaty the extradition of persons liable to punishment for criminal offenses and the rendering of other legal assistance in matters of criminal law.

For that purpose they have appointed as their Plenipotentiaries:

The President of the German Reich:

Dr. Bernhard W. von Bülow, Secretary of State for Foreign Affairs; and

Dr. Wolfgang Mettgenberg, Ministerial Counsellor at the Ministry of Justice;

¹ 133 *League of Nations Treaty Series*, p. 321.

The President of the Turkish Republic:

Menemenli Numan Bey, Minister Plenipotentiary and Under-Secretary of State at the Ministry of Foreign Affairs of the Turkish Republic;

Who, having communicated to each other their full powers, found in good and due form, have agreed upon the following provisions:

CHAPTER I

GENERAL PROVISIONS

Article 1

EXTENT OF LEGAL ASSISTANCE

The Contracting Parties undertake, in accordance with the provisions of the following Articles:

(1) Subject to reciprocity, to accord one another legal assistance through their courts of law and administrative authorities in criminal cases of every kind, whether before the judicial or the administrative authorities, on receipt of an application to be made through the diplomatic channel, by:

(a) Extraditing offenders directly or in transit;

(b) Delivering up articles;

(c) Serving writs and making preliminary investigations, in so far as legal assistance may also be granted to their own authorities;

(2) To communicate to one another sentences passed upon their nationals which have acquired the force of law.

CHAPTER II

EXTRADITION DIRECT AND IN TRANSIT

Article 2

PERSONS TO BE EXTRADITED

The Contracting Parties undertake to surrender to one another on application, with a view to proceedings at criminal law or the execution of a sentence, persons, other than their respective nationals, against whom proceedings have been taken or who have been sentenced for a criminal offence by the authorities of the applicant Party and who are in the territory of the Party applied to.

Article 3

EXTRADITABLE OFFENCES

1. The Contracting Parties undertake, in cases of extradition with a view to proceedings at criminal law, to grant extradition if the offence in respect of which extradition has been applied for is punishable, according to the law of both Parties, by imprisonment for at least one year or by a severer penalty than imprisonment. In the case of extradition with a view to the execution of a sentence, extradition shall be granted if the offence in respect of which extradition has been applied for is punishable, according to the law of both Parties, by imprisonment for at least one year or by a severer penalty than imprisonment, and if the sentence which has been pronounced and has acquired the force of law entails at least six months' imprisonment.

2. The obligation to accord extradition with a view to proceedings at criminal law shall also lie in respect of an attempt to commit an extraditable offence or in respect of complicity of any kind in such offence, when the attempt or complicity is punishable according to the law of both Parties. The same provision shall apply to the concealment of and to aiding and abetting an extraditable offence. Extradition with a view to the execution of a sentence shall be granted if the penalty imposed entails at least six months' imprisonment.

3. The obligation to grant extradition shall also lie if the offence for which extradition is granted has been committed by an official in or during the execution of his duties.

Article 4

POLITICAL OFFENCES

1. The Contracting Parties shall not be bound to grant extradition for a political offence or an offence connected with a political offence and committed with a view to preparing for, ensuring the commission of, concealing or preventing such an offence.

2. On the other hand, the obligation to grant extradition shall lie in the case of any act constituting a premeditated capital offence, including an attempt to commit such an offence and complicity therein, unless such act has been committed in "open combat". In virtue of the present provision, an attack on the Head of the State or of the Government shall be an extraditable offence.

Article 5

NON-EXTRADITABLE OFFENCES

The obligation to grant extradition shall not lie:

- (1) In respect of an offence which is punishable only under military law;
- (2) In respect of an offence which is punishable only in virtue of the laws relating to the press;
- (3) In respect of an offence which is punishable only in virtue of the fiscal laws.

Article 6

OTHER CASES IN WHICH EXTRADITION IS NOT OBLIGATORY

The obligation to grant extradition shall not lie:

- (1) If the offence has been committed wholly on the territory of the Party applied to;
- (2) When the courts of law of the Party applied to are shown to have jurisdiction and there are preponderating considerations at criminal law in favour of the exercise of the jurisdiction of the Party applied to, in particular when sentence has been passed against the accused by the authorities of the Party applied to or when those authorities have decided not to take proceedings against the accused before a court of law;
- (3) When the offence has been committed in the territory of a third State and the law of the Party applied to does not allow criminal proceedings to be taken in respect of such an act committed outside its territory;
- (4) When proceedings at criminal law or the execution of a sentence passed in a criminal case for the offence in question are barred by the law of one of the Contracting Parties, for example on the ground that immunity has been acquired through limitation or amnesty, or that the requisite indictment has not been lodged.

Article 7

POSTPONEMENT OF THE PROCEDURE OF EXTRADITION

When the wanted person has been prosecuted or convicted by the authorities of the State applied to for a criminal offence other than that forming the subject of the application for extradition, or if such person is in custody there for other reasons, his extradition may be postponed without prejudice to any decision which it may be necessary to take immediately with regard to the application for extradition, until the proceedings have been concluded, or the sentence has been executed, finally remitted or served.

Article 8

PLURALITY OF APPLICATIONS FOR EXTRADITION

1. When more than one Government has applied for extradition, the Party applied to may decide at its discretion to which application for extradition it will give preference;

2. It is understood that extradition will be granted in the interests of the administration of justice.

Article 9

PROVISIONAL DETENTION WITH A VIEW TO EXTRADITION

1. The Contracting Parties agree to take into custody persons whose extradition is to be applied for, even before the application for extradition has been received, if the competent authority of the Party has sent a request to do so accompanied by a statement of the facts and in particular the time and place of the offence for which extradition is requested and if the competent authorities of the Party applied to order provisional detention in virtue of the legal provisions. The decision as to the request, and in particular as to the time when provisional detention begins, shall be communicated to the authority which has requested such detention;

2. The request for provisional detention shall be submitted through the diplomatic channel;

3. The wanted person may be released if the application for extradition is not submitted, together with the justificatory documents prescribed by the present Treaty within eight weeks from the date when detention began. If in any particular case this period proves insufficient, the Contracting Parties undertake, on request, to approach the competent authorities with a view to an extension of the period of provisional detention for one month.

Article 10

JUSTIFICATORY DOCUMENTS REQUIRED IN RESPECT OF A REQUEST FOR EXTRADITION

1. An application for extradition must be accompanied by a warrant of arrest or other equivalent document or by an enforceable judgment passed upon the accused by a competent authority of the applicant Party in respect of the act in question.

2. If the information contained in the documents communicated is insufficient to enable the wanted person to be identified or to establish the circumstances of the offence with which he is charged or the wording of the penal provisions applicable to the case or any other circumstances required to be known for the consideration of the application for extradition, such information shall immediately be supplemented on request.

Article 11

PRINCIPLE OF THE SPECIFIC CHARGE

The person extradited may not, without the consent of the Party applied to, be prosecuted, punished or re-extradited to a third country for any offence committed before the extradition for which extradition was not granted, or restricted in his personal liberty for any legal cause which arose before his extradition, unless he has failed to leave the territory of the applicant Government within one month after his release or unless he returns to it after he has left it or has been extradited anew by the Government of a third country.

Article 12

EXTRADITION IN TRANSIT

1. The Contracting Parties undertake to convey through their territory offenders who are extradited by the Government of a third country to the other Party, if extradition would have had to be granted by them under the provisions of the present Treaty.

2. The conveyance of any person coming under paragraph 1 over the high seas by a ship or an aircraft belonging to one of the Contracting Parties shall be regarded as equivalent to extradition in transit.

3. Extradition in transit shall be effected by the authorities of the Party applied to in such manner and by such route as may seem to them most suitable.

Article 13

EXECUTION OF EXTRADITION, DIRECT AND IN TRANSIT

The Contracting Parties undertake to convey the wanted person whose extradition, direct or in transit, is to be effected to the agreed frontier station of the third country which is to provide for the extradition in transit, if he is to be conveyed by land from the territory of the Party applied to, or to convey him to the port of the Party applied to where he is to embark, if he is to be conveyed by sea.

CHAPTER III

DELIVERY OF ARTICLES

Article 14

ARTICLES TO BE DELIVERED UP

The Contracting Parties undertake, provided that the competent authorities have no objection, to deliver up:

1. Articles in the possession of the wanted person which may be of importance as evidence or which the said person or an accomplice abroad may have obtained through the commission of the offence for which he is prosecuted or articles obtained in exchange for them;
2. Articles taken with the extradited person at the time of his extradition in transit.

Article 15

CONDITIONS ON WHICH ARTICLES ARE DELIVERED UP

The Contracting Parties undertake to respect the rights of third parties over articles delivered up and to return such articles immediately on request, if a stipulation to that effect has been made at the time of the delivery of the articles.

Article 16

DELIVERY OF THE ARTICLES

1. Articles shall whenever possible be delivered up at the time when the person to be extradited direct or in transit [is] surrendered.
2. Articles shall be delivered up when direct extradition or extradition in transit is permissible, but cannot be carried out owing to the death or flight of the accused.

CHAPTER IV

OTHER FORMS OF LEGAL ASSISTANCE IN CRIMINAL MATTERS

Article 17

SERVICE OF WRITS

1. The Contracting Parties undertake to serve documents relating to criminal proceedings and, in particular, summonses.
2. When a summons is served, the authorities of the Party applied to shall obtain from the person concerned a declaration to the effect that he intends to comply with the summons, and the declaration shall be brought to the knowledge of the applicant Party.
3. No witness or expert who shall voluntarily appear before the authorities of the applicant Party in response to a summons served upon him by the authorities of the Party applied to, may, whatever his nationality, be prosecuted or punished as principal author of or as an accessory to or as having concealed or as an accomplice in an offence in respect of which preliminary investigations are being taken or any other offence committed before the person summoned left the territory of the Party applied to, nor shall he be restricted in his personal

liberty for any other legal cause arising previously, unless he fails to leave the territory of the applicant Party within a week after the date on which he is discharged and is free to leave the country.

Article 18

PRELIMINARY INVESTIGATIONS

The Contracting Parties agree to make preliminary investigations, and in particular to interrogate accused persons, witnesses and experts, execute searches and seizures and carry out judicial inspections at the place where the crime was committed.

Article 19

CASES IN WHICH LEGAL ASSISTANCE MAY BE REFUSED

1. There is no obligation to accord the legal assistance provided for in Articles 17 and 18 if, in the criminal procedure in respect of which such assistance is granted, the accused would not be extraditable under Articles 3, 4, 5 or 6, or if proceedings at criminal law are taken against a national of the Party applied to who is outside the territory of the applicant Party, or if the Party applied to is of opinion that the granting of legal assistance might compromise its own sovereignty or safety.

2. An application for the serving of a summons may also be refused when the person concerned is threatened with measures of coercion or any other prejudicial consequences in the event of his failing to comply with the summons.

Article 20

EXECUTION OF LEGAL ASSISTANCE

The Contracting Parties undertake to comply with requests for legal assistance made in virtue of Articles 17 and 18 by the authorities of the Party applied to who according to its legislation are empowered to take official proceedings in matters of criminal law in their own country. In so doing the said authorities shall comply with the forms prescribed for such official proceedings and shall apply the proper measures of coercion.

CHAPTER V

COMMUNICATION OF SENTENCES

Article 21

1. The Contracting Parties undertake to inform one another of all penal sentences that have acquired force of law, passed by the authorities of one Party upon nationals of the other Party. If records of criminal cases are kept by the Contracting Parties, such sentences shall be communicated as must be included in the records under the regulations of the Party by whose authorities such sentences have been passed. Sentences for political offences shall not be communicated.

2. Communication shall be made by the despatch of a copy of the sentence or of the entry made in the criminal records. Communications shall be exchanged through the Reich Minister of Justice at Berlin and the Turkish Minister of Justice at Ankara.

CHAPTER VI

FINAL PROVISIONS

Article 22

COSTS OF LEGAL ASSISTANCE

1. Costs incurred by the authorities of the Party applied to on account of the examination of applications and the granting of legal assistance under the provisions of the present Treaty shall be borne by the Party applied to.

2. Costs occasioned by extradition in transit, conveyance by sea or requests for experts' reports shall be borne by the applicant Party.

Article 23

TRANSLATIONS AND AUTHENTICATIONS

1. Requests for legal assistance and their enclosures shall, if not worded in the language of the Party applied to, be accompanied by a translation in the language of that Party, certified correct by a diplomatic or consular representative or by a sworn translator of the applicant Party or of the Party applied to.

2. Communications made under Article 21 need not be accompanied by a translation.

3. Documents accompanying requests for legal assistance shall, where not otherwise agreed, be authenticated by the competent diplomatic or consular authorities of the applicant Party.

Article 24

RATIFICATION, ENTRY INTO FORCE AND DENUNCIATION

1. The present Treaty is drawn up in the German and Turkish languages, both texts being equally authentic. It shall be ratified and the documents of ratification shall be exchanged as soon as possible at Ankara.

2. The Treaty shall come into force one month after the date on which the instruments of ratification have been exchanged.

3. It shall remain in force for six months from the date on which it shall have been denounced by one of the two Parties.

In faith whereof the Plenipotentiaries have signed the present Treaty.

Done, in duplicate, at Berlin, September 3, 1930.

BERNHARD W. VON BÜLOW
WOLFGANG METTGENBERG
W. NUMAN

FINAL PROTOCOL

At the time of signing the Extradition Treaty of September 3, 1930, between the German Reich and the Turkish Republic, the undersigned Plenipotentiaries attest, on behalf of their Governments, their agreement upon the following points:

Ad Article 8

In the interests of the administration of justice, the State granting extradition shall, at its discretion, give the preference in principle to the State of which the wanted person is a national.

Ad Article 21

Sentences shall be communicated at intervals of three months.

BERLIN, *September 3, 1930*

BERNHARD W. VON BÜLOW
WOLFGANG METTGENBERG
M. NUMAN

4. BRAZIL AND ITALY ¹

November 28, 1931

His Majesty the King of Italy and His Excellency the Head of the Provisional Government of the Republic of the United States of Brazil, being desirous of rendering more effective the assistance which the two countries invariably accord to each other in the punishment

¹ 132 *League of Nations Treaty Series*, p. 355.

of offences, have decided to conclude a Treaty for the extradition of offenders and have for that purpose appointed as their Plenipotentiaries:

His Majesty the King of Italy:

M. Vittorio Cerruti, Cavaliere di Gran Croce, His Ambassador Extraordinary and Plenipotentiary in Brazil;

His Excellency the Head of the Provisional Government of the Republic of the United States of Brazil:

Dr. Afranio de Mello Franco, Minister for Foreign Affairs;

who, having communicated their full powers, found in good and due form, have agreed on the following Articles:

Article I

The High Contracting Parties undertake, in conformity with the present Treaty and with the laws in force in each of the two States, to arrest and surrender to each other any persons who are being proceeded against or have been convicted by the judicial authorities of one of the two countries and who may be in the territory of the other Party.

Article II

Extradition shall be granted in the case of principals, partners and accessories in the commission of, or an attempt to commit, offences against the ordinary law of the land, provided that, under the laws of the State applied to, such offences are punishable with imprisonment in any form for a term of not less than one year.

Article III

When the offence was committed outside the territory of the High Contracting Parties, the requisition for extradition may be complied with if the laws of the applicant State authorise prosecution for offences committed abroad.

Article IV

The High Contracting Parties shall grant the extradition of their own nationals in the cases provided for in the present Treaty.

Article V

Extradition shall not be granted:

- (1) For unpremediated offences;
- (2) For acts that are offences under the press laws only;
- (3) For purely military offences, that is to say, acts which are not punishable except under military law;
- (4) For offences against the free practice of any form of public worship;
- (5) For political offences or acts accessory thereto, except where the act in respect of which proceedings are instituted is primarily an offence under the ordinary criminal law. In this case, when extradition has been granted, the surrender of the person concerned shall be subject to an undertaking by the applicant State that the political object or motive shall not entail any increase in the penalty.

The authorities of the State applied to shall alone be competent to judge of the political nature of offences.

Article VI

Extradition shall moreover not be granted:

- (a) If, under the laws of the applicant State, exemption from prosecution or punishment has been acquired through limitation;
- (b) If the accused person has to be tried in the applicant country by any but an ordinary Court or judge;

- (c) If, in respect of the offence which gave rise to the requisition for extradition, the person whose extradition is requested has already been proceeded against and convicted or acquitted by the judicial authority of the State applied to.

Article VII

Extradition may be refused if the authorities of the State applied to are competent under their own laws to try the offence.

Should the person whose extradition is requested be liable, under the laws of the applicant State, to the death penalty, extradition shall be granted solely on condition that such penalty shall be commuted to that of imprisonment.

If the person whose extradition is requested is being proceeded against or is serving a sentence for another offence committed in the State applied to, his extradition may be granted but his surrender shall be deferred until the conclusion of the proceedings or until he has fully served his sentence.

Article VIII

No person whose extradition has been granted may be tried or punished for any other offence committed prior to the requisition unless either the applicant State seeks and obtains the consent of the State applied to or, when he has served his sentence or been acquitted in respect of the offence for which he was extradited, the person in question remains for more than thirty days within the territory of the applicant State or returns thereto.

Moreover, no person who has been extradited may, without the consent of the State applied to, be surrendered to any third State which may claim him.

Article IX

Requisitions for extradition shall be made through the diplomatic channel and shall be accompanied:

- (1) By a certified copy or transcription of the sentence of conviction, even if the person was convicted by default, or of the warrant of arrest or any other document connected with the criminal proceedings and issued by the competent judge and which has the effect of a warrant; this document must state exactly the nature and gravity of the alleged offence and the place where and date when the offence was committed;
- (2) By a copy of the text of the laws that have been or may be applied in the case, including the laws relating to exemption from prosecution and from punishment through limitation;
- (3) If possible, by a description and photograph of the person whose extradition is requested and any other particulars which might assist in establishing his identity.

The requisition and the documents relating thereto shall be drawn up in the official language of the applicant State but may be accompanied by a duly certified translation in the language of the State applied to.

Article X

The requisition for extradition, duly accompanied by the documents in support thereof, must be complied with as soon as it is received by the State applied to.

A person who is arrested for the purpose of being extradited shall remain in custody until a decision has been reached concerning the request for his extradition and, if the request is granted, until he is surrendered to the authorities of the applicant State.

In urgent cases, the State applied to may allow provisional arrest on receipt of a request, if necessary telegraphic, from the competent authority of the applicant State or from the diplomatic agents of that State; the request must also contain a declaration certifying the existence of one of the documents mentioned in paragraph (1) of the preceding Article.

In such cases the person placed under provisional arrest shall be released if the State applied to has not received the request and the relevant documents within sixty days following the date of arrest.

The expiry of the period of provisional arrest shall not prevent the extradition proceedings taking their course if the request and the relevant documents are received subsequently.

Article XI

If the extradition of a person is requested by several States and if the requisitions relate to the same offence, the extradition shall be granted to the State in whose territory the offence was committed.

If several States have requested the extradition of the same person in respect of different offences, preference shall be given to the State in whose territory the offence which the State applied to considers to be the most serious was committed.

In the case of offences of equal gravity, preference shall be determined by priority of requisition.

The State applied to may, when granting extradition, stipulate that the person claimed shall, on the expiration of his penalty or on his acquittal, be surrendered to another State.

These rules concerning preference shall not be followed if the State applied to is bound under the terms of an earlier treaty to observe a different order of preference.

In every case the authorities of the two High Contracting Parties shall decide in what port of embarkation the surrender of the person whose extradition is requested shall take place.

Article XII

When extradition has been granted, if, within twenty days after being notified that the person whose extradition is requested is at the disposal of the applicant State, the diplomatic agent of that State has not made arrangements for the person in question to be taken in charge, that person shall be released and may not be arrested again on the same grounds.

Article XIII

All money and effects found at the time of arrest in the possession of the person whose extradition is requested shall be seized and surrendered to the applicant State at the same time as the person whose extradition is requested. Money and effects of which the arrested person was legitimately in possession shall be handed over, should they come into the hands of the authorities after the arrest, even if they were in the possession of third parties. These effects shall be delivered up even if, owing to the escape or death of the offender, extradition cannot take place.

The rights of third parties not implicated in the offence on account of which extradition was requested over any of the confiscated articles shall be reserved; these articles must, with the agreement of the authorities of the Party applied to, be restored to them on the conclusion of the proceedings, or even earlier if the course of the proceedings so permits.

Article XIV

Permission for the transit across the territory of the High Contracting Parties of persons who are being surrendered by another State shall be granted immediately on receipt of a request submitted in accordance with Article 9 of the present Treaty.

Such permission shall be given, without any judicial formality by the competent Ministry of the country of transit, provided that the offence is not one of those referred to in Articles 5 and 6, and that no serious reasons of public order form an obstacle.

The person under arrest shall be conveyed under the escort of agents of the country of transit.

Article XV

All expenses occasioned by the requisition for extradition in the territory of the State applied to shall be borne by that State. All transit expenses shall be borne by the applicant State.

Article XVI

The present Treaty is drawn up in two originals, one in the Italian language and the other in the Portuguese language, both texts being equally authentic.

Article XVII

The present Treaty shall be ratified and the instruments of ratification shall be exchanged at Rome as soon as possible.

It shall enter into force on the first day of the month following that in which the exchange of ratifications takes place.

Either High Contracting Party may denounce it at any time; in such case it shall cease to be in force six months after the day on which it was denounced.

In faith whereof, the Plenipotentiaries have signed the present Treaty and have thereto affixed their seals.

Done at Rio de Janeiro on the twenty-eighth day of November, one thousand nine hundred and thirty-one.

(L. S.) V. CERRUTI

(L. S.) AFRANIO DE MELLO FRANCO

5. FRANCE AND CZECHOSLOVAKIA ¹

May 7, 1928

The President of the French Republic and the President of the Czechoslovak Republic¹ being desirous of concluding a Convention to regulate the extradition of criminals and judicial assistance in criminal matters, have appointed as their Plenipotentiaries:

The President of the French Republic:

M. Briand, Deputy, Minister for Foreign Affairs;

The President of the Czechoslovak Republic:

M. Stefan Osusky, Envoy Extraordinary and Minister Plenipotentiary of the Czechoslovak Republic in Paris;

M. Emil Spira, Head of Department in the Ministry of Justice;

M. Karel Halfar, Head of the International Treaties Department in the Ministry of Foreign Affairs;

who, having communicated their full powers, found in good and due form, have agreed on the following provisions:

Article 1

EXTRADITION OF CRIMINALS

Each of the two High Contracting Parties undertakes to deliver up to the other, in the circumstances and under the conditions laid down in the present Convention, all persons who, being proceeded against or having been convicted by the judicial authorities of the one Party for any offence enumerated in Article 2, shall be found within the home territory or the territory of the colonies and possessions or within the consular jurisdiction of the other Party, provided that under the laws of the two States, even if these are applicable to part of their territories only, such offence constitutes a crime or delict.

Should the offence giving rise to the requisition for extradition have been committed outside any of the above-mentioned territories or areas, extradition shall be granted if the laws of the State to which application is made authorise prosecution for the same offences when committed outside its territory.

Article 2

OFFENCES FOR WHICH EXTRADITION SHALL BE GRANTED

Extradition shall be granted for the following offences:

- (1) Wilful homicide, including assassination, murder, parricide, infanticide and poisoning;
- (2) Wilful assault causing bodily injury, either premeditated or resulting in disable-

¹ 114 *League of Nations Treaty Series*, p. 132.

ment or permanent incapacity for work, loss or deprivation of the use of a limb or any other organ, or death, without there having been intention to cause death;

- (3) Abortion;
- (4) Bigamy;
- (5) Rape, indecent assault with violence, indecent assault without violence upon children under the age laid down in the criminal laws of the two countries;
- (6) Offences against morals:
 - (a) By procuring, enticing or leading away for immoral purposes, in order to gratify the passions of another person, a female minor whether married or unmarried, even with her consent;
 - (b) By procuring, enticing or leading away a woman or girl over age for immoral purposes, in order to gratify the passions of another person, by fraud or by means of violence, threats, abuse of authority or any other method of compulsion;
- (7) Abduction of minors, abandonment and exposure of children, concealment and substitution of children, or false attribution of maternity;
- (8) Extortion, threats of attack on persons or property, attacks attempted or carried out by private persons against individual liberty or the inviolability of the dwellings;
- (9) Thefts of all kinds;
- (10) Forgery or falsification of documents, whether public, or commercial, or private, falsification of telegrams, employment of forgeries or falsified documents.
Falsification or fraudulent alteration of official documents emanating from the Government or the public authorities, fraudulent use of documents thus altered or forged. Perjury, false swearing, subornation of witnesses, experts or interpreters;
- (11) Fraudulent bankruptcy;
- (12) Manufacture of counterfeit currency, forgery or alteration of public debt bonds and coupons, national or foreign bank-notes, paper money or other public securities, seals, stamps, dies, marks belonging to the States or to the public administrations, the putting into circulation or fraudulent use of the above-named altered or forged objects;
- (13) Swindling (breach of trust, improper use of an uncompleted signed instrument);
- (14) Arson;
- (15) Malicious destruction of or interference with a railway track, or telegraphic or telephonic (including wireless) communications; wilful or malicious destruction of or damage to movable or immovable property; destruction of buildings and steam engines; destruction of or damage to crops, plants, trees, or grafts; destruction of agricultural implements; destruction or poisoning of cattle or other animals; wilful interference with the movement of railway trains;
- (16) Wilful unlawful stranding, sinking or destruction of a ship by the captain or officers and crew;

Abandonment of a merchant or fishing vessel by the captain in cases other than those authorised by the laws of the two States;

Misappropriation of a merchant or fishing vessel by the captain; unnecessary jettisoning or destruction of the whole or part of the cargo, victuals or effects on board; taking a wrong course; borrowing without cause on the hull, stores or gear of the ship, or pledging or sale of the merchandise or victuals, or fraudulent entry in the accounts of damages or expenses; sale of the ship, without special authority, except in the case of unseaworthiness; theft on board ship; adulteration on board ship of victuals or merchandise by the admixture of harmful substances; attacks upon or resistance to the captain, accompanied by violence, by more than one third of the crew; refusal, accompanied by assault causing bodily harm, to obey orders given by the captain or officer in charge with a view to ensuring the safety of the ship or cargo; conspiracy against the safety, liberty or authority of the captain; seizure of the ship by the crew or passengers by means of fraud or violence directed against the captain;

- (17) Embezzlement of public moneys by public employees or trustees; bribery of officials, peculation;
- (18) Slave-trading.

Extradition shall also be granted for complicity in or attempts to commit any of the aforesaid offences, or for receiving in connection therewith, provided that such acts are punishable under the laws of both States.

It is understood that the foregoing list of acts may be modified or supplemented by declarations of the two Governments acting in agreement.

Article 3

NON-EXTRADITION AND PROSECUTION OF NATIONALS

The Contracting Parties shall not surrender their own nationals.

Each of the High Contracting Parties undertakes that, whenever extradition cannot be granted by reason of the stipulations of the preceding paragraph, it will proceed against and try under its own law any of its nationals who have committed offences against the laws of the other State, provided that such offences are mentioned in Article 2 of the present Convention.

A State desiring to apply the provisions of the preceding paragraph shall forward a request, together with all necessary articles, records, documents and information, through the diplomatic channel.

Article 4

CASES IN WHICH EXTRADITION SHALL NOT BE GRANTED

Extradition shall not take place:

- (1) If the offence was committed in the territory of the State applied to or if, under the laws of the latter, its own authorities are competent to prosecute and cannot waive their rights in favour of the authorities of the State making the requisition.
- (2) If the Party applied to considers the offence for which extradition is demanded to be a political offence or an act connected with such an offence. An offence committed or attempted against the person of a Head of State shall not be regarded as a political offence or as an act connected with a political offence when it constitutes assassination, poisoning or murder.
- (3) If under the laws of the State making the requisition, or of the State applied to, or of the State in which the offence was committed, exemption from prosecution or punishment has been acquired by lapse of time before the requisition provided for in Articles 6 and 7 reaches the State applied to.
- (4) If in respect of the same act the person claimed has been convicted, acquitted or discharged, or if he has undergone punishment or been pardoned in the State applied to.

Article 5

CASES IN WHICH EXTRADITION MAY BE REFUSED

Extradition may be refused if by the law of the State applied to, the latter's authorities are competent to prosecute and have already instituted proceedings.

Article 6

REQUISITION FOR EXTRADITION

Requisitions for extradition shall be forwarded through the diplomatic channel.

Article 7

DOCUMENTS WHICH MUST ACCOMPANY REQUISITIONS FOR EXTRADITION

Extradition shall only be granted on production of the following documents:

- (1) A warrant of arrest or any other legal document of like character or a sentence of conviction; the documents produced shall be either originals or certified copies;

- (2) An exact statement of the alleged offences when this information is not given in the documents mentioned in the preceding paragraph, and in the case of offences against property, the amount of the damage which the accused has caused or attempted to cause shall also be indicated as far as possible;
- (3) The description of the person claimed, a photograph, and all information which may assist in establishing his identity;
- (4) The text of the criminal laws of the State making the requisition which are applicable to the alleged offence, with a statement of the penalty involved;

The documents mentioned above shall be drawn up in the official language of the State making the requisition, in the form required by its laws and shall bear its official seal. The authorities of the State applied to shall be responsible for the translation of these documents into its official language.

Article 8

MEASURES TO ENSURE EXTRADITION

On receipt of the requisition for extradition, together with the documents mentioned in the preceding Article, the State applied to shall take all necessary steps under the laws in force in its territory to trace the person claimed and, if necessary, to take him into custody.

Article 9

PROVISIONAL ARREST

In urgent cases provisional arrest may be effected, even before receipt of the formal requisition for extradition, at the request, directly transmitted by post or telegraph, of the judicial authorities of the applicant State; such request shall certify the existence of a warrant of arrest or of one of the documents mentioned in Article 7, and indicate the nature of the offence. If necessary, the State applied to shall verify the authenticity of such request.

The applicant authority shall at once be notified of the provisional arrest of the person claimed and of the place in which he is being held in custody.

Within eight days of the despatch of the request for provisional arrest mentioned in the first paragraph, the State applied to shall be notified through the diplomatic channel that extradition is being applied for. The documents shall be produced within a month at latest of the despatch of the request for provisional arrest.

Article 10

ADDITIONAL INFORMATION

If the State applied to thinks it necessary to obtain additional information to enable it to decide as to the requisition for extradition, such information shall be supplied to it within one month of the date on which the diplomatic agent of the State making the requisition is requested to obtain the said additional particulars. This period may be extended by a second month on the receipt, before its expiry, of an application indicating the reasons which make such an extension necessary.

If this information is not received within the period specified, the person arrested shall not be held in custody on account of the requisition for extradition in respect of which he was arrested.

Article 11

REQUISITION FOR EXTRADITION BY MORE THAN ONE STATE

Should the same person be claimed by several States for different offences, the decision as to which shall have priority shall be taken by the State applied to on the basis of the gravity of the alleged offences under its own laws.

If the requisitions refer to offences of equal gravity or to one and the same offence, the State applied to shall, in reaching a decision, take into account, first, the place in which the

offence was committed; secondly, the nationality of the person claimed, and lastly the order in which the requisitions were received.

The provisions of this Article shall not affect obligations arising out of treaties with third States, concluded prior to the present Convention by either of the High Contracting Parties.

Article 12

POSTPONEMENT OF EXTRADITION

If the person claimed is being proceeded against or has been convicted in the State applied to for an offence other than that giving rise to the requisition for extradition, the latter State shall nevertheless decide as to the requisition for extradition. The surrender of the accused person shall, however, be postponed until the proceedings are abandoned or he has been acquitted or discharged, or until he has served his sentence or been pardoned, or, if he is being held in custody on other grounds, until such time as he is released.

Nevertheless the foregoing provision shall not prevent the alien being temporarily sent to appear before the judicial authorities of the State making the requisition, on the express condition that he shall be sent back as soon as these authorities shall have come to a decision on the offence which gave rise to the requisition for extradition.

Article 13

LIMITS TO THE RIGHT OF EXTRADITION

A person who has been surrendered may not be proceeded against or sentenced in the State making the requisition for an offence other than that for which his extradition has been granted.

A person who has been surrendered may only be proceeded against, punished or delivered up to a third State in respect of offences committed before his extradition if:

- (a) The State which granted extradition consents thereto; the request for such consent shall be made in the form laid down for requisitions for extradition and shall be accompanied by the documents enumerated in Article 7;
- (b) The person aforesaid remains of his own free will in the territory of the State to which he was surrendered for more than one month after his trial or, in the event of conviction, after his release from prison, or if, after having left the territory of the State to which he was surrendered, he subsequently returns there of his own accord.

If the State which has given its consent in conformity with paragraph (a) so request, the other State shall inform it of the final result of the proceedings and transmit to it a certified copy of the judgment.

Article 14

LIMITATION OF THE VALIDITY OF EXTRADITION

If the State making the requisition has not had the person claimed transferred to the custody of its own officers within six weeks of the date on which it was informed that extradition had been granted, the said person shall be released and shall cease to be liable to extradition for the same offence.

Article 15

SUMMARY EXTRADITION

An offender who, after extradition, succeeds in escaping from custody and again takes refuge in the territory of the State applied to, or at least passes through such territory, shall be arrested at the request of the competent authorities, whether made direct or through the diplomatic channel, and shall be surrendered without further formalities.

Article 16

CONVEYANCE IN TRANSIT OF SURRENDERED PERSONS

The conveyance in transit through the territory of either High Contracting Party of a person surrendered to the other Party by a third State shall be at once authorised on production of the original or a certified copy of any one of the documents mentioned in Article 7, provided that the offence in respect of which the said authorisation is requested is one of those enumerated in Article 2 of the present Convention.

The provisions relating to extradition shall apply to conveyance in transit.

Conveyance in transit shall be effected by the agents of the State applied to, under such conditions and by such means as it shall determine.

Article 17

SERVICE OF DOCUMENTS IN CRIMINAL MATTERS

When, in criminal matters, it is deemed necessary to serve a writ issued by the authorities of either High Contracting Party upon a person residing in the territory of the other State, the document shall be transmitted to the State applied to through the diplomatic channel.

In his request for service the diplomatic agent of the State making application shall name the authority by which the document was issued, the address of the person on whom it is to be served, the nature of the document, and the criminal proceedings to which it refers.

Nationals of either High Contracting Party shall not, however, be notified of judgments against them and writs to appear in answer to a criminal charge delivered or issued by the judicial authorities of the other State.

As a general rule the State applied to shall limit its action to effective service by the transmission of the document to the recipient if he is willing to accept it.

Proof of service shall be furnished either by a receipt dated and signed by the addressee, or by a certificate from the authority of the State applied to, setting forth the fact, the manner and the date of such service. If the document to be served has been transmitted in duplicate, the receipt or certificate may appear on one of the duplicate copies, which copy shall be returned.

Should the addressee refuse to accept the document voluntarily, the latter shall, at the express request of the diplomatic agent of the applicant State, be served on the addressee in a manner authorised by the laws of the State applied to.

Documents certifying the execution of the request shall be sent untranslated to the diplomatic agent of the applicant State.

Article 18

COMMISSIONS ROGATOIRES

If, in the course of criminal proceedings, the hearing of persons who happen to be in one of the two States or any other act connected with the preliminary legal proceedings is deemed to be necessary, a *commission rogatoire* emanating from the judicial authorities shall be sent for this purpose through the diplomatic channel. *Commissions rogatoires* shall be executed in the manner laid down by the laws of the State applied to.

Documents relating to the execution of *commissions rogatoires* shall be sent untranslated to the diplomatic agent of the applicant State.

Article 19

SUMMONING AND ATTENDANCE OF PERSONS RESIDING IN THE OTHER STATE

Should it be considered necessary or desirable in a criminal case pending before the Courts of one of the two Contracting States to secure the attendance in Court of a witness or expert who is in the territory of the other Contracting State, the authorities of the latter shall call

upon such person to comply with the subpoena addressed to him through their intermediary by the Courts of the first State.

The expenses connected with the attendance in Court of a witness or expert shall be borne by the applicant State and the subpoena shall indicate the sum to be allocated to the witness or expert by way of travelling expenses and subsistence allowance; it shall also indicate the sum which may be advanced to him by the State applied to, provided the applicant State repays these sums as soon as the person summoned has declared his willingness to comply with the subpoena.

No witness or expert, whatever his nationality, who, when summoned in the manner laid down in the first paragraph, voluntarily appears before the Courts of the other Party, may be prosecuted or detained in the territory of the latter for previous offences or convictions, or on the ground of complicity in the offence forming the subject of the case in which he is asked to appear.

Such persons shall, however, forfeit the above privilege should they fail to leave the territory of the applicant State of their own free will within five days of the date on which their attendance in court ceases to be necessary.

Should the person whose attendance is required be in custody in the territory of the State applied to, a request may be made for his attendance in Court if assurances are given that he will be sent back at the earliest possible date. A request of this kind may only be refused for special reasons, more particularly if the person in custody who has been summoned expressly declares that he is opposed to such a proceeding.

Similarly, the conveyance and return through the territory of either High Contracting Party of a person in custody in a third State shall be granted under the conditions, laid down above for conveyance in transit if the other Contracting Party considers it necessary to confront him with the person who is being prosecuted or to take his evidence as a witness.

Article 20

TRANSMISSION OF RECORDS

If in a criminal case which is being investigated in either country the transmission of any articles, records or documents whatsoever in the possession of the authorities of the other State is deemed to be necessary, a request for the transmission thereof shall be made through the diplomatic channel.

The request shall be granted in the manner laid down by the laws of the State applied to on condition that such articles, records and documents are returned.

Article 21

REFUSAL OF JUDICIAL ASSISTANCE

The legal coöperation in criminal matters described in Articles 17–20 shall be refused if the State applied to considers it such as to affect its sovereignty or safety.

Such assistance may be refused when there is no obligation under the present Convention to grant extradition.

Should judicial assistance be refused, the applicant State shall be informed of such refusal and the reason therefor.

Article 22

HANDING OVER OF ARTICLES SERVING AS PROOF OF THE CRIME

The authorities of either High Contracting Party shall, if they are requested to do so, hand over to the authorities of the other Party the articles which an accused person may have obtained as the result of his offence or which may serve as proof of the offence; this shall apply even when the articles in question are liable to seizure or confiscation.

If these articles are in the possession of the accused at the time of his extradition or conveyance in transit they shall, as far as is practicable, be handed over at the time when ex-

tradition or conveyance in transit takes place. They shall be delivered up even when extradition, though granted, cannot take place owing to the death or escape of the accused. This shall also apply to all articles which the accused may have concealed or deposited in the State granting extradition, and which may be subsequently discovered.

Nevertheless, the rights which third parties may have acquired over these articles shall be reserved, and after the trial such articles shall be returned, as soon as possible, free of charge to the State applied to.

The State which has been asked to deliver up such articles may retain them temporarily for the purpose of a preliminary criminal investigation. It may also hand them over on condition that they are sent back for the same purpose, undertaking in turn to restore them as soon as possible.

Article 23

COMMUNICATION OF CONVICTIONS AND EXTRACTS FROM CRIMINAL RECORDS

The two High Contracting Parties shall communicate to each other half-yearly the extracts from criminal records relating to final convictions (with or without suspension of sentence) pronounced in either State against nationals of the other State, for crimes and delicts under the ordinary (*droit commun*) law.

The authorities of either High Contracting Party responsible for keeping the records of previous convictions or the records of the Courts shall, on receipt of a request through the diplomatic channel, furnish without charge to the authorities of the other Party information based upon the records of previous convictions or the records of the Courts concerning particular cases. Such information shall only be furnished in the event of judicial proceedings against a person not a national of the State applied to.

Article 24

COSTS OF JUDICIAL ASSISTANCE IN CRIMINAL MATTERS

Expenses occasioned by requisitions for extradition or any other form of legal coöperation in criminal matters shall be borne by the Party in whose territory they were incurred.

The authorities of the Party applied to shall, however, inform the applicant Party of the amount of these expenses with a view to their reimbursement by the person liable to pay them. Any sums collected from the latter shall accrue to the State applied to.

Nevertheless, fees paid for expert opinions of any kind and expenses occasioned by the summoning or attendance in Court of persons in custody in the territory of the State applied to shall be exceptions to this rule. These expenses shall be reimbursed by the applicant State. Similarly, the applicant State shall bear the expenses of conveyance in transit and of maintenance during the passage through intermediate territories of persons whose extradition or temporary surrender has been granted.

The applicant State shall also bear the expenses of the temporary surrender and the return of persons claimed.

Article 25

RATIFICATION, COMING INTO FORCE, DENUNCIATION

The present Convention shall be ratified and the instruments of ratification shall be exchanged in Paris as soon as possible.

The present Convention shall come into force one month after the exchange of ratifications and shall continue in force for a period of six months after the date on which either High Contracting Party shall have denounced it.

It shall apply even to offences committed prior to its coming into force.

The French and Czechoslovak texts of the present Convention are both authentic.

In faith whereof the above-named Plenipotentiaries have signed the present Convention and have thereto affixed their seals.

Done in duplicate at Paris, May 7, 1928.

ARISTIDE BRIAND
STEFAN OSUSKY
EMIL SPIRA
KAREL HALFAR

6. BELGIUM AND POLAND ¹

May 13, 1931

The President of the Polish Republic and His Majesty the King of the Belgians, being desirous of regulating the legal relations between the two countries in regard to the extradition and conveyance of criminals and also legal assistance in criminal matters, have decided to conclude a Convention for this purpose, and have appointed as their Plenipotentiaries:

The President of the Polish Republic:

His Excellency M. Tadeusz Jackowski, Doctor of Science, Envoy Extraordinary and Minister Plenipotentiary accredited to His Majesty the King of the Belgians, and

M. Stefan Sieczkowski, Under-Secretary of State at the Ministry of Justice;

His Majesty the King of the Belgians:

M. Paul Emile Janson, His Minister of Justice;

who, having communicated their full powers, found in good and due form, have agreed upon the following provisions:

Article 1

The High Contracting Parties undertake, upon perquisition being made, to surrender to each other, under the conditions laid down in the present Convention, all persons who, being accused or convicted by the Courts of the State making application of an offence committed in the territory of that State shall be found within the territory of the State applied to.

Extradition shall be granted under the same conditions for an offence committed outside the territory of the State making application and that of the State applied to, provided the laws of the State applied to authorise prosecution in respect of such an offence even if committed abroad.

The two Parties shall only surrender persons who have completed their eighteenth year at the time of the offence.

Poland shall surrender neither Polish nationals nor citizens of the Free City of Danzig.

Belgium shall not surrender Belgian nationals.

Whenever in the present Convention reference is made to the laws of Poland, those words shall be understood to mean any legislation which is in force, even if only in one of the provinces of that State.

Article 2

Extradition shall be granted only for the offences mentioned in the present Article and only in so far as, under the laws in force in both States, such offences are regarded as crimes or misdemeanours.

The offences for which extradition shall be granted are as follows:

- (1) Assassination, murder, parricide, infanticide, poisoning;
- (2) Wilful assault which has caused an apparently incurable disease, permanent incapacity for work, loss of the full use of an organ, serious mutilation or unintended death;
- (3) Abortion;
- (4) Rape;

¹ 131 *League of Nations Treaty Series*, p. 126.

- (5) Indecent assault with violence or threats; Indecent assault even without violence or threats, provided that having regard to the sex and age of the person who was the object of the assault and to the other special circumstances of the case, such an assault is punishable as a crime under the laws of both High Contracting Parties;
- (6) Offences committed against morals by encouraging, aiding or abetting, in order to gratify the passions of another, the debauching, corruption or prostitution of a minor of either sex; procuring, enticing or leading away for immoral purposes a woman or girl of full age, when the act was committed by fraud or by violence, threats, abuse of authority or any other means of compulsion, in order to gratify the passions of another; detention of a person in a disorderly house against her will; coercion for immoral purposes of a person of full age;
- (7) Abduction of minors;
- (8) Abduction, receiving, removal, replacement or substitution of a child;
- (9) Bigamy;
- (10) Wilfully exposing or abandoning a child;
- (11) Membership of a band with the object of committing offences against the lives or property of others;
- (12) Larceny, robbery with violence (pillage);
- (13) Extortion;
- (14) Theft, malversation, breach of trust;
- (15) Swindling, fraud, criminal dishonesty in money matters;
- (16) Fraudulent bankruptcy, fraud committed in bankruptcy;
- (17) Threats to commit crimes against the persons or property of others;
- (18) Offences by private persons against personal liberty and inviolability of domicile;
- (19) Forgery of documents or falsification of public, commercial or private documents, falsification of telegraphic messages, use of forgeries;
- (20) Forgery or fraudulent alteration of official documents issued by the Government or by a public authority, fraudulent use of documents so altered or forged;
- (21) Coining of counterfeit money; forging or alteration of certificates or coupons of the public debt, national or foreign banknotes, paper money or other public securities, seals, stamps, dies, marks of the State or public administrations; uttering or fraudulent use of the above-mentioned altered or forged articles;
- (22) False swearing;
- (23) Perjury, false statements by experts or interpreters; subornation of witnesses, experts or interpreters;
- (24) Peculation and embezzlement by public officials; bribery of public officials;
- (25) Arson;
- (26) Wilful destruction of or interference with a railway or telegraphic or telephonic communications;
- (27) Deliberate acts endangering the security of railway traffic;
- (28) Wilful destruction or defacement of buildings or movable objects which is regarded as a crime or misdemeanour under the laws of both High Contracting Parties;
- (29) Abandonment of a merchant or fishing vessel by the captain, except in cases provided for by the laws of the two High Contracting Parties;
- (30) Stranding, loss or destruction by the captain or officers and crew; appropriation of any ship or merchant or fishing vessel by the captain; unnecessary jettisoning or destruction of all or part of the cargo, provisions or effects on board; altering the course; the unnecessary raising of money on the ship or on the ship's provisions or stores; the pledging or sale of merchandise or food and the insertion in the accounts of fictitious damage or expenditure; the sale of the ship without special authority, except in the event of unseaworthiness; pilferage; the adulteration of food or the alteration of merchandise effected on board by admixture of noxious substances; attack upon or resistance to the captain by more than one-third of the crew accompanied by violence or

assault; the refusal to obey orders issued by the captain or officer in command in the interests of the safety of the vessel or cargo, when accompanied by assault; conspiracy against the safety, liberty or authority of the captain; seizure of the vessel by crews or passengers by the use of fraud or violence against the captain;

(31) Traffic in slaves;

(32) Receiving of articles obtained by means of crimes or misdemeanours.

Extradition shall further be granted in cases of complicity in the offences enumerated in the present Article and also in cases of attempts to commit such offences, provided that the said complicity or attempts are punishable under the laws of both Parties.

The list of offences for which extradition may be granted may be modified or added to by mutual agreement, by declarations made by the two Governments.

Article 3

Extradition shall not be granted:

- (1) If, according to the law of the State applied to, the authorities of that State are competent to institute criminal proceedings and cannot waive such competence in favour of the authorities of the applicant State;
- (2) If, under the laws of the State applied to, and in Poland, under the laws in force in all the provinces, exemption from prosecution or punishment has been acquired by lapse of time at the time of extradition;
- (3) If, in the State applied to, judicial proceedings, in respect of the same offence, against the person whose extradition is requested have already been legally concluded; the verdict of acquittal or the abandonment of the prosecution shall not prevent extradition if such acquittal or abandonment occurred solely because the offences were committed in the territory of a foreign State.

Article 4

Extradition may be refused if the person whose extradition is requested is being proceeded against in the State applied to in respect of the offences which constitute the grounds of the requisition for extradition.

Article 5

If the person claimed is being proceeded against or has been convicted in the State applied to for an offence other than that for which extradition is requested, his extradition may be deferred until the conclusion of the proceedings and, in the event of a conviction, until he shall have undergone his sentence or been pardoned.

Should the person claimed be proceeded against or kept in custody in the State applied to by reason of obligations contracted towards private persons, his extradition may take place, subject to the right of such persons to present their claims before the competent authority.

Article 6

Extradition shall not be granted if the offence for which it is requested is regarded by the State applied to as a political offence or as an act connected with such an offence.

An attack made or attempted upon the person of a Head of State or the members of his family shall not be deemed to be a political offence or an act connected with a political offence when it constitutes assassination, murder or poisoning, or an attempt to commit or participation in such an offence.

Article 7

If the extradition of a person is requested simultaneously by more than one State, the State applied to shall decide freely to which State extradition shall be granted.

Article 8

The requisition for extradition, together with the documents in support thereof, must always be transmitted through the diplomatic channel.

Article 9

The requisition for extradition must be accompanied either by the sentence of conviction or by warrant of arrest or any other document issued by the judicial authorities having the same force as the warrant of arrest.

These documents must specify precisely the offence for which extradition is requested and must contain a statement of the acts which constitute the grounds of the requisition, together with a copy of the criminal law provisions that are applicable. In the case of offences against the property of others, the documents shall state the amount of the damage inflicted or intended.

There shall be attached, if possible, a description of the person claimed or any other indications which may serve to establish his identity.

The documents mentioned in the present Article must be submitted either in the original or in certified true copies and must be legalised by the Ministry of Foreign Affairs of the applicant State or by a diplomatic or consular representative of that State.

To the documents mentioned in the present Article must be attached certified true translations in the official language of the applicant State, if the documents are not drawn up in that language. This provision shall also apply to any other correspondence concerning extradition.

The translations shall be legalised in the same way as the documents to which they relate.

The Polish language shall be deemed to be the official language in the case of Poland and the French language the official language in the case of Belgium.

Article 10

In urgent cases, the person wanted for an offence mentioned in Article 2 shall be provisionally arrested on receipt of a request addressed in writing or by telegram to the Ministry of Foreign Affairs of the State applied to by the Ministry of Foreign Affairs of the applicant State or by its diplomatic representative, provided that such a request mentions the existence of one of the documents indicated in Article 9, paragraph 1.

Provisional arrest may also take place if the request by the competent authority of the applicant State has been made direct to a judicial or administrative authority of the State applied to.

Provisional arrest shall take place in the form established by the laws of the State applied to.

The applicant authority must be informed by telegram of the date and place of the provisional arrest.

The State applied to may release the person arrested if, within three weeks from the time at which he was arrested, none of the documents mentioned in Article 9, paragraph 1, has been notified to it.

Article 11

In extradition cases all articles which were obtained as a result of the offence, or which may serve as proof, found in the possession of the person claimed at the time of his arrest or discovered later, shall, in virtue of a decision by the competent authorities of the State applied to, be seized and handed over to the applicant State.

These articles may be handed over, at the request of the applicant State, even if the extradition of the accused person, although admissible, cannot take place owing to his death or escape.

Nevertheless, any rights to the said articles which may have been acquired by third par-

ties, shall be reserved, and such articles must, if necessary, be restored to them free of charge after the conclusion of the criminal proceedings.

The State applied to may provisionally retain such articles if it requires them in connection with criminal proceedings.

Article 12

The person to be surrendered shall be escorted to the port of the State applied to designated by the applicant Government, and shall be placed on board the vessel which is to convey him.

If the applicant State requests that the extradition should be effected by land, the State applied to shall hand over the person surrendered to a third State at the most convenient place on the common frontier, if it is assured that the accused person will be received there for conveyance in transit.

Should conveyance be effected by a vessel belonging to the Party applied to, that Party shall, at the request of the applicant Party, supply an armed escort to watch over the person surrendered until he is conveyed to a specified port in the applicant State or in a third State.

The expenses occasioned in the territory of the State applied to by the arrest, maintenance and conveyance of the person who is being proceeded against, together with the cost of consigning and transporting the articles handed over (Article 11), shall be borne by the Party applied to.

Article 13

The person surrendered may not be proceeded against or punished for an offence committed prior to extradition and other than that for which extradition was granted, except in the following cases:

- (1) If the State which surrendered him consents to the additional proceedings; such consent must be given if the conditions which, according to the present Convention, justify the requisition for extradition are fulfilled;
- (2) If, except in the case of political offences, the person surrendered consents thereto himself and makes a declaration which he signs at the same time as the judge or public prosecutor who receives the declaration; a certified true copy of this declaration must be sent to the State applied to which surrendered the offender.
- (3) If, within one month after the conclusion of the judicial proceedings or, in the event of a conviction, after the execution or remission of the penalty, he has failed to leave the territory of the State to which he was surrendered or if he returns thereto of his own free will.

Re-extradition to a third country shall be subject to the same rules.

Article 14

Extradition in transit, through the territory of either Contracting Party, of a person surrendered to the other Party by a third State, shall be granted in cases in which extradition may be granted; Articles 1, 2, 3, 4, 6, 8, 9, and 12 of the present Convention shall apply.

The cost of transit shall be borne by the applicant State.

Article 15

If, in the prosecution of a criminal case in the territory of either State, the hearing of persons who happen to be in the territory of the other State, or any other act connected with the preliminary legal proceedings, is deemed to be necessary, a "commission rogatoire" shall be sent for this purpose to the judicial authorities of that State.

The State applied to may refuse to execute the "commission rogatoire":

- (1) If it considers that such execution is such as to affect its sovereignty or safety;
- (2) If the offence giving rise to the "commission rogatoire" is not punishable in the State applied to or constitutes either a purely military offence or, subject to the ex-

ception provided for in Article 6, paragraph 2, a political offence or an act connected with such an offence;

- (3) If the accused person is a national of the country applied to and is not in the territory of the applicant State;
- (4) If in the State applied to, the act of which the execution is requested does not come within the competence of the judicial authority;
- (5) If the "commission rogatoire" is for the purpose of effecting a domiciliary search or a seizure in respect of an offence for which extradition may not be granted.

Article 16

The service of judicial documents to a person in the territory of the State applied to shall be effected by the competent authority of that State, and the receipt certifying service shall be sent to the applicant State. Proof of service shall be furnished either by means of a receipt dated and signed by the addressee or by an attestation by the authority of the State applied to, stating the manner and the date of such service.

The State applied to may refuse to serve the summons if it contains any threat of punishment in the event of non-appearance, other than a mere warning that the criminal proceedings will take their course notwithstanding the absence of the person summoned.

Article 17

If a request is made for the purpose, the State in which the witness or expert happens to be shall urge him to comply with the summons to appear in person before the judge or public prosecutor of the other State.

The summons itself shall contain a formal promise that expenses will be refunded. Travelling expenses and subsistence allowance, calculated from the time of his departure, shall be granted to the person summoned, in accordance with the scales and regulations in force in the country in which the hearing is to take place; the judicial authorities of his place of residence may, at his request, advance to him the whole or part of the travelling expenses. This advance shall subsequently be refunded by the applicant State.

No witness or expert, whatever his nationality, who, when summoned, voluntarily appears before the authorities of the applicant State, may there be prosecuted or detained therein for offences or convictions prior to his appearance unless, when the hearing has been concluded, he fails by his own fault to leave the territory of the applicant State within a period of seven days.

Article 18

If, in connection with criminal proceedings instituted in the territory of either Party, it is deemed necessary to obtain articles serving as proof of the crime or documents which are in the territory of the other Party, the Party applied to shall, unless there are special objections thereto, forward them to the applicant Party, subject to the obligation to return such articles and documents.

Article 19

Requests for the service of documents and "commissions rogatoires" must specify exactly the names, surnames and nationality of the persons accused, their place of domicile or residence, the offences for which they are being proceeded against and the provisions of the criminal law which are applicable.

The request must be drawn up in the official language of the applicant State and must bear the official seal; it need not be legalised. If the annexes are not drawn up in the official language of the applicant State or of the State applied to, they must be accompanied by a translation in one of those languages certified correct by the applicant authority or by a sworn translator.

The Polish language shall be deemed to be the official language in the case of Poland and the French language the official language in the case of Belgium.

Article 20

The authority applied to shall discharge the duty requested of it in the manner provided for in its own laws, and shall in that connection apply the same measures of compulsion as in the execution of "commissions rogatoires" issued by its own authorities.

Nevertheless, if the applicant authority requests that a special procedure should be adopted the request shall be complied with, provided that such procedure is not prohibited by the laws of the State applied to.

The reply and the judicial documents drawn up in execution of the request shall be made out in the language of the authority applied to and if, according to the provisions in force, any language other than Polish or French has been used, a translation in one of these languages, certified correct by the authority applied to or by a sworn translator, shall be attached thereto.

Article 21

Expenses incurred within the limits of the State applied to, in execution of Articles 15 to 20, shall be borne by that State and it shall not be entitled to request the refund thereof by the applicant State except in the case of advances made in respect of allowances to witnesses (Article 17, paragraph 2) and the cost of expert enquiries which have occupied more than one sitting.

Article 22

The final sentences of conviction pronounced by the Courts of either State upon nationals of the other State in respect of all crimes and misdemeanours shall be transmitted to that State without special request and without charge, in the form of a bulletin or extract signed by the authority issuing such bulletin or extract.

Article 23

All communications which are to be exchanged between the two Contracting States in application of the present Convention, other than those relating to requests for extradition or for provisional arrest, shall be effected by correspondence direct between the Ministries of Justice of the two States.

Article 24

The present Convention shall not apply to the Colony of the Congo, or to the territories over which Belgium exercises a mandate of the League of Nations.

Article 25

The present Convention, drawn up in the Polish and French languages, both texts being equally authentic, shall be ratified and the instruments of ratification shall be exchanged at Warsaw as soon as possible.

The present Convention shall be published in the manner provided for under the laws of the two Parties and shall enter into force thirty days after the exchange of the instruments of ratification.

Each of the Parties shall have the right to denounce the present Convention but it shall remain in force for six months after such denunciation.

In faith whereof the respective Plenipotentiaries have signed the present Convention and have thereto affixed their seals.

Done in duplicate at Brussels, May 13, 1931.

(Signed) TADEUSZ JACKOWSKI

(Signed) STEFAN SIECKOWSKI

(Signed) P. E. JANSON

7. COLOMBIA AND PANAMA¹

December 24, 1927

His Excellency the President of the Republic of Panama and his Excellency the President of the Republic of Colombia, desiring to ensure the better administration of justice and the prevention of offences in their respective territories, have resolved to conclude an Extradition Treaty and for that purpose the High Contracting Parties have appointed as their Plenipotentiaries the following:

His Excellency the President of the Republic of Panama:

His Excellency Dr. Horacio F. Alfaro, his Secretary for Foreign Affairs,

His Excellency the President of the Republic of Colombia:

His Excellency Dr. Enrique A. de la Vega, his Envoy Extraordinary and Minister Plenipotentiary to the Government of Panama;

who, having communicated their full powers, found in good and due form, have agreed upon the following Articles:

Article I

The Contracting States reciprocally undertake, in conformity with the provisions of the present Treaty, to deliver up fugitives from justice who shall be found within their respective jurisdictions.

Article II

Extradition may be granted provided that:

- (a) The applicant State has jurisdiction to try and to punish the act which gave rise to the requisition;
- (b) The person whose extradition is applied for has been sentenced or is being placed on trial or prosecuted as principal or accomplice in or party to a breach of criminal law punishable in both States by a term of two years' imprisonment;
- (c) Exemption from prosecution or punishment has not been acquired by lapse of time under the laws of either Contracting State;
- (d) The fugitive, if already tried, has not yet served the sentence.

Article III

If the offence was committed outside the territory of the applicant State, extradition shall not be granted unless in like circumstances the State of refuge authorises the punishment of the same offence when committed outside its own territory.

Article IV

Extradition shall not be granted:

- (a) When, for the same offence, the person whose extradition is applied for is being placed on trial or has already been tried or pardoned in the State to which application is made.
- (b) In respect of political offences or acts connected therewith (except offences committed or attempted against the life of the Head of the State, offences against religion and misdemeanours or contraventions of a purely military character).

The question whether or not the offence constitutes a political offence or an act connected therewith shall be decided by the State to which application is made, in accordance with whichever law is more favourable to the fugitive.

Acts defined as anarchical under the laws of both States shall not be deemed to be political offences.

¹ 87 *League of Nations Treaty Series*, p. 414.

Article V

Extradition shall not be granted if the person claimed is a national by birth of the State to which application is made, or if he is a naturalised national thereof, unless, in the latter case, the naturalisation took place after the act which gave rise to the requisition.

When, however, extradition is refused on this account, the State to which application is made shall be bound to try him in accordance with its own laws and upon evidence submitted by the applicant State, together with any evidence which the competent authorities of the State to which application is made think fit to adduce.

Article VI

If, apart from the case referred to in the first paragraph of Article IV, the person whose extradition is applied for has been sentenced or placed on trial by the State to which application is made, he shall not be delivered up until he has served his sentence or has been pardoned, or unless, as a result of a decision that there are no grounds for prosecution, an acquittal, a declaration establishing prescription or other legal means, he cannot be placed on trial.

Article VII

Extradition shall not be barred by reason of the civil obligations of the fugitive towards the State to which application is made or towards private individuals, even if he has been ordered by the court to remain in a certain district.

Article VIII

A person who has been surrendered shall not be placed on trial for an offence other than that which gave rise to the extradition, unless the State which granted the surrender has previously consented thereto, or unless the offence is one connected with the former and is seen to be such from evidence submitted with the requisition.

Article IX

The provisions of the preceding Article shall not apply if the person surrendered freely and expressly consents to be tried for any other offence, or if, after being released, he remains for more than one month in the State; nor shall they apply in the case of offences committed after extradition.

Article X

Except in the cases mentioned in the preceding Article, the applicant State shall not, without the consent of the State to which application is made, deliver up the fugitive whose extradition it has obtained to a third applicant State.

Article XI

If requisitions for extradition are made in respect of the same person by two or more States, preference shall be given to the State making the first requisition.

Article XII

Extradition shall be applied for through diplomatic agents or, failing these, through consular agents, or direct from Government to Government, and the application shall be accompanied by the following:

- (a) A copy or authentic transcription of the final judgment if the fugitive has been sentenced or, if he is being placed on trial or prosecuted, a copy of the warrant of arrest issued by the competent authority;
- (b) An exact account of the acts which gave rise to the requisition for extradition and, when such particulars can be given, a statement as to the time and place at which the said acts were committed;

- (c) All information which is in the possession of the applicant State and which may serve to identify the person for whose extradition application is made;
- (d) An authentic copy of the penal provisions applicable to the case.

The aforementioned documents shall be transmitted in the form prescribed by the laws of the applicant State.

Article XIII

In urgent cases the fugitive may be provisionally detained even if the application is made only by telegraph, but he shall be released if the requisition for extradition has not been formally made within thirty (30) days over and above the time allowed for distance.

All responsibility arising from provisional detention shall be borne by the State applying for it.

Article XIV

If the documents accompanying the application are deemed insufficient by the Government to which application is made, it shall return them in order to enable omissions to be supplied and rectifications to be made, and the person claimed, if under provisional arrest, shall remain in detention until the expiration of the period mentioned in the preceding Article.

Article XV

There shall be delivered up either together with the person claimed or subsequently all objects and articles found in his possession or deposited or concealed in the State of refuge which are connected with the commission of the punishable act or have been obtained by means of that act, and also all articles that may serve as proof of the offence.

These objects and articles shall be delivered up even if, through the death or escape of the fugitive, the extradition which has been granted does not take place.

Even if extradition has not been granted, proceedings shall be continued for the above purpose.

Article XVI

The fugitive shall be taken by agents of the State of refuge as far as the frontier, or as far as the port most suitable for his embarkation, and shall there be delivered up to the agents of the applicant State.

Article XVII

Each State shall defray the expenses of extradition incurred within its own territory.

Article XVIII

The present Treaty shall remain in force for five (5) years, such period to begin one month after the exchange of ratifications. At the expiration of that period, either Contracting State may denounce it by giving notice to the other party one year in advance.

Article XIX

The ratification of the present Treaty shall be effected in each of the Contracting States in accordance with its laws, and the exchange of ratifications shall take place in the city of Panama within one month from the second ratification.

In faith whereof the respective Plenipotentiaries have signed the present Treaty and have thereto affixed their seals.

Done in duplicate in the city of Panama, the capital of the Republic of Panama, on the twenty-fourth day of December, one thousand nine hundred and twenty-seven.

H. F. ALFARO
ENRIQUE DE LA VEGA

8. FINLAND AND THE NETHERLANDS¹

February 21, 1933

Her Majesty the Queen of the Netherlands and the President of the Finnish Republic,
Being jointly resolved to conclude a Convention for the reciprocal extradition of offenders
and for judicial assistance in criminal matters,

Have appointed for this purpose as their Plenipotentiaries:

Her Majesty the Queen of the Netherlands:

Her Chamberlain, Baron Sweerts de Landas Wyborgh,

Her Envoy Extraordinary and Minister Plenipotentiary accredited to the Finnish Republic;

The President of the Finnish Republic:

M. Rafael Waldemar Erich, Finnish Envoy Extraordinary and Minister Plenipotentiary at Stockholm;

Who, having communicated their full powers, found in good and due form, have agreed on the following Articles:

Article 1

The Netherlands Government and the Finnish Government undertake to deliver to one another, on terms of reciprocity, in accordance with the rules laid down in the following Articles, with the exception of their own nationals or subjects of a third State in so far as an exception in regard to these latter may be authorised by international law, persons convicted or accused of one of the acts enumerated in Article 2, committed outside the territory of the State requested to extradite, if the act committed is included also under the law of the State applied to among the punishable acts mentioned hereinafter.

Nevertheless, when the act constituting the ground for the application for extradition has been committed outside the territory of the applicant Government, such application shall not be granted unless the law of the country applied to authorises prosecution for the same offence when committed outside its territory.

Article 2

The following punishable offences may constitute grounds for an application for extradition:

- (1) Attempt on the life of the head of a friendly State;
- (2) Murder or assassination, child murder;
- (3) Procuring of abortion by a woman with child or by others;
- (4) Striking or wounding voluntarily and with malice aforethought, whereby has been caused a disease apparently incurable, permanent inability for personal work, loss of the free use of an organ, serious mutilation or unintentional death;
- (5) Rape;

Immoral acts, including sexual intercourse apart from marriage, committed on the person of a minor of either sex of less than fifteen completed years;

Immoral acts, including sexual intercourse apart from marriage, committed on the person of a minor of either sex between fifteen and sixteen years who has not already been corrupted;

Immoral acts committed on the person of an individual placed under the guardianship or authority of the author, where punishable by the law of both Parties;

Sexual intercourse with a woman or girl who has fainted or is unconscious, where the offender knows that she has fainted or is unconscious;

Immorality by procuring a minor of either sex under sixteen years to commit or

¹ 139 *League of Nations Treaty Series*, p. 365. The exchange of ratifications took place at Stockholm, May 24, 1933.

submit to indecent acts with a third party or apart from marriage to have sexual intercourse with a third party;

Immorality by procuring a minor of either sex over sixteen years to commit or submit to indecent acts with a third party or apart from marriage to have sexual intercourse with a third party, in so far as such acts are punishable by the laws of both Parties;

Engaging, enticing or corrupting a person of either sex under twenty years even with his or her consent with a view to immorality, to satisfy the passions of another;

Engaging, enticing or corrupting a woman or girl who has attained her majority, with a view to immorality, when such act is committed by fraud or violence, threats, abuse of authority, or any other means of compulsion, to satisfy the passions of another;

Detention of a person against their will in a disorderly house;

(6) Bigamy;

(7) Kidnapping, concealment, suppression, substitution or supplanting of a child;

(8) Kidnapping of minors, in so far as the laws of both countries permit extradition on such a charge;

(9) All fraudulent acts of manufacturing or falsification of currency, by whatever means accomplished;

Fraudulent uttering of false currency;

Acts of introducing into the country or of receiving or obtaining false currency with a view to uttering it, knowing it to be false;

Fraudulent acts of manufacturing, receiving or obtaining instruments or other objects serving by their nature for the manufacture of false currency or for the falsification of currency;

In the present Convention the word "currency" means paper currency, including bank-notes, and metallic currency, being legal tender;

(10) Imitation or falsification of Government stamps or marks or stamps assimilated thereto, or of dies, in so far as the laws of both countries permit extradition on such a charge;

(11) Forgery and wilful uttering of forged or falsified documents, in so far as the laws of both countries permit extradition on such a charge;

(12) Perjury by a party, witness or expert; false declaration equivalent to perjury;

(13) Extortion, embezzlement by an official or person deemed to be such;

(14) Wilful setting on fire whereby a common danger to property or danger of death to another may result; setting on fire with a view to obtaining for oneself or another an unlawful profit to the detriment of the insurer or of the lawful holder of a bottomry bond;

(15) Wilful and unlawful destruction of a building or construction, in so far as the laws of both countries permit extradition on such a charge;

(16) Acts of violence committed by more than one person jointly in public against persons or property;

(17) Wilful and unlawful sinking or wrecking of a ship, whereby danger to another may result;

(18) Mutiny or insubordination of the crew of a ship against their superiors, in so far as the laws of both countries permit extradition on such a charge;

(19) Wilful imperilling of a railway train;

(20) Larceny;

(21) Fraud;

(22) Abuse of blank signature;

(23) Embezzlement;

(24) Fraudulent bankruptcy.

Attempts to commit and complicity in the above offences are included when punishable under the laws of the country requested to extradite.

Article 3

When the same person is applied for simultaneously by several States, the State applied to shall be free to decide to which country extradition shall be granted.

Article 4

Extradition shall not take place:

- (1) If since the offence charged, or the latest act of prosecution, or the passing of sentence, the prosecution or the penalty have, at the time when handing over might take place, become the subject of prescription under the law of the country requested to extradite;
- (2) When the grounds for the application are the same as those in respect of which proceedings have been instituted and discontinued against the person claimed, or the said person is being prosecuted, or has already been tried in the country requested to extradite.

Article 5

If the person applied for is prosecuted or sentenced in the country applied to for an offence other than that forming the grounds for the application for extradition, his extradition may be postponed until the end of the prosecution, and if he be convicted, until he has served his sentence or been reprieved. He may, however, be temporarily handed over for the purpose of appearing before the courts of the applicant State, provided he be sent back as soon as the judicial proceedings are terminated.

Article 6

It is expressly stipulated that a person extradited may be neither prosecuted nor punished in the country to which extradition has been granted for any punishable act not covered by the present Convention and committed prior to his extradition; nor may he, without the consent of the Government granting extradition, be prosecuted or punished for an act covered by the present Convention and prior to his extradition other than the act forming the grounds for extradition, or extradited to a third State, unless he has in any case had full liberty for a month from the time of his final discharge to depart again from the aforesaid country.

Article 7

The person handed over by one of the Contracting Parties to the other may not be tried for the offence which forms the grounds for his extradition before a court possessing only exceptional jurisdiction, temporarily or in special circumstances, to try such cases.

Article 8

Extradition shall not be granted for an offence which the Party applied to considers to be of a political nature or connected with such an offence. A person who shall have been extradited for one of the offences under the ordinary law mentioned in Article 2 may therefore in no case be prosecuted or punished in the State to which extradition has been granted by reason of a political offence committed before extradition or an act connected with such a political offence.

Article 9

Extradition shall be applied for through the diplomatic channel and shall only be granted on production of the original or a true copy of a sentence, or of an indictment, or of a **sum-**

mons to appear before the judicial authorities, accompanied by a warrant of arrest, or of a warrant of arrest, which shall be made out in the form prescribed by the law of the applicant State, shall indicate the charge with sufficient clearness to enable the State applied to judge if, under its own law, the case is one covered by the present Convention, and shall mention also the penalty applicable thereto. These documents shall be accompanied by a translation into French.

Article 10

When extradition is to take place, all objects appertaining to the offence or likely to be of use as evidence that are found at the time of arrest in the possession of the person applied for shall, if the competent authority of the State applied to so order, be seized and handed over to the applicant State.

Nevertheless, the rights which third parties may have acquired in respect of such objects are reserved and the objects must, if it so happens, be restored to them free of cost at the end of the proceedings.

Article 11

Before the arrival through the diplomatic channel of the application for extradition, a request may be made for the provisional arrest of the person whose extradition can be claimed under the terms of the present Convention:

On behalf of the Netherlands, by any officer of justice or examining magistrate (*juge commissaire*):

On behalf of Finland, by the Courts and by Prefects of Departments.

Provisional arrest shall be subject to the forms and rules prescribed by law in the country applied to.

Article 12

A foreigner provisionally arrested, under the terms of the preceding Article, shall, unless he is to be kept under arrest for any other reason, be set at liberty if, within twenty days of the date of the provisional warrant of arrest, the application through the diplomatic channel for extradition and the submission of the documents required by the present Convention have not been duly carried out.

Article 13

When extradition has been granted, the applicant Government shall be bound to take over the person applied for within the time-limit fixed by the Government applied to, which limit shall be not less than one month. After this period the person applied for may be set at liberty.

A person to be extradited shall, if need be, be conveyed to the port appointed by the diplomatic or consular agent of the applicant Government, which Government shall also bear the cost of his embarkation.

Article 14

In criminal proceedings of a non-political character, when one of the Governments considers it necessary that persons in the other country should be heard or that any other act relating to the examination of the case, with the exception of domiciliary searches, should be performed, letters of request shall be despatched for the purpose through diplomatic or consular channels and, unless the Government applied to declares that they cannot be executed, effect shall be given to them in accordance with the laws of the country in which the hearing or act relating to the examination is to take place.

The letters of request shall be accompanied by a translation into French.

Article 15

In any non-political criminal case, if the appearance of a witness in person in the other country is necessary or desired, the Government of the country in which the witness resides shall invite him to comply with the request made to him; if he consent, he shall receive travelling and subsistence expenses in accordance with the rates and regulations in force in the country where he is to be heard, unless the applicant Government think fit to grant the witness a higher rate.

No witness of whatever nationality subpoenaed in one of the two countries who voluntarily appears before the judges of the other country may be prosecuted or kept in custody in respect of a prior criminal act or sentence, or on grounds of complicity in the acts forming the subject of the proceedings in which he is appearing as witness.

Article 16

In any non-political criminal case which is being examined in one of the two countries, when the communication of real evidence or of documents in the hands of the authorities of the other country is deemed necessary or useful, application shall be made through the diplomatic channel and shall be complied with, failing special reasons to the contrary, on the understanding that the documents shall be returned as soon as possible.

Article 17

The transit across the territory of one of the Contracting States of a person handed over by a third Power to the other Party and not belonging to the country of transit shall be authorised simply on production of the original or a certified true copy of one of the documents of procedure mentioned in Article 9, provided that the act constituting the grounds for extradition is covered by the present Convention and does not fall within the scope of Articles 4 and 8, and that the transport shall, as regards escort, be carried out with the assistance of officials of the country which has authorised transit across its territory.

Article 18

The Netherlands Government undertakes to inform the Finnish Government of sentences which have acquired the force of *res judicata* passed by its Courts on Finnish nationals for offences of all kinds, with the exception of non-indictable offences (*contraventions*).

The Finnish Government for its part undertakes to inform the Netherlands Government of sentences having acquired the force of *res judicata* passed on Netherlands nationals and appearing in the Finnish criminal records.

This information will be sent through the diplomatic channel to the Government of the country to which the convicted person belongs, in the form of a true copy or an extract from the final decision or criminal records, together with a translation into French.

Article 19

The costs occasioned by the execution of the measures provided for in the present Convention will be borne by the State on whose territory such measures are taken, with the exception of the costs of transit provided for in Article 17 and the embarkation costs provided for in Article 13.

Article 20

The present Convention shall apply also to the Netherlands Indies, Surinam and Curaçao, subject to provisions, arising out of the requirements of the laws in force in those oversea territories, that may be agreed upon later in an exchange of notes between the two States.

The form of the applications provided for in the present Treaty to be made by the authorities of the said territories or addressed to them will also be determined in these notes. By derogation from Articles 12 and 13, the time-limit for setting at liberty shall be three months.

Article 21

The present Treaty shall be ratified and ratifications shall be exchanged as soon as possible. It shall come into force one month after the date of the exchange of ratifications, but shall not apply in the extra-European territories of the Kingdom of the Netherlands referred to in Article 20 until a date which shall be fixed in the notes to be exchanged in pursuance of that Article.

Each of the High Contracting Parties may at any time denounce the present Treaty by giving the other Party six months' notice of its intention.

In faith whereof the respective Plenipotentiaries have signed the present Treaty.

Done in duplicate at Stockholm, February 21, 1933.

SWEERTS DE LANDAS

RAFAEL WALDEMAR ERICH

APPENDIX VI

SELECTED EXTRADITION STATUTES

1. Argentina

EXTRADITION LAW NO. 1612¹

(August 25, 1885)

Whereas; the Senate and Chamber of Deputies of the Argentine nation, in Congress assembled, sanction with the force of law:

CHAPTER I

CONCERNING EXTRADITION CASES

ARTICLE I. The Government of the Argentine Republic may surrender to foreign Governments, on condition of reciprocity, any person who may be pursued or accused, or who may have been convicted by the courts of the demanding power, provided that the crime or offense concerned is one of those enumerated in the present law, and in conformity with the rules thereby established.

ART. II. Extradition shall be granted when the crime committed is one of ordinary character, which according to the laws of the Republic, would render the perpetrator liable to not less than one year's imprisonment.

ART. III. Extradition shall not be granted:

(1) When the person for whose surrender application is made shall have been a native or naturalized Argentine citizen before the commission of the act on which the application for extradition is based.

(2) When the offenses committed shall be of a political character, or connected with political offenses.

(3) When the offenses shall have been committed in the territory of the Republic.

(4) When, although the offenses have been committed outside of the Republic, the perpetrator thereof shall have been prosecuted and tried definitively therein.

(5) When, according to the laws of the demanding power, the penalty or the right to prosecute for the offense on which the demand for extradition is based has become void through the statute of limitation.

ART. IV. When the person for whose extradition application is made shall be a slave who is charged with or has been convicted of an ordinary offense, extradition shall be granted provided that the nation making such application pledge itself to try him as a free man and to consider him always as such.

ART. V. In cases in which, according to the provisions of this law, the Government of the Republic is not to surrender the delinquents whose extradition is asked for, such delinquents shall be tried by the courts of the country, and shall be subject to the penalties established by

¹ *Papers Relating to the Foreign Relations of the United States* (1886), pp. 4-7.

law for crimes or offenses committed in the territory of the Republic. The final sentence or decision shall be communicated to the demanding Government.

ART. VI. Extradition shall always be granted with the proviso that the person surrendered shall not be prosecuted or punished for an offense distinct from that on which the demand for his extradition shall have been based, unless the offense concerned shall be another rendering him liable to extradition, and unless the Argentine Government shall duly consent thereto after the requirements of Articles 12 and 24 have been complied with. These restrictions shall not be enforced when the accused shall not have returned to the Republic within three months subsequent to his release, whether he shall have remained in the country that demanded his extradition or in another.

ART. VII. When application shall be made for the extradition of a foreigner who is pursued or accused, or who has been convicted in the courts of the Republic of a crime distinct from that on which the demand for his extradition is based, he shall not be surrendered until his trial is over and he has served out his punishment. Nevertheless, the extradition of a foreigner may be temporarily granted for the sole purpose of allowing him to appear before the courts of the demanding country on condition that he shall be returned when the trial is ended.

ART. VIII. If, after the extradition of a foreigner shall have been obtained by the Argentine Government, such foreigner shall be claimed by another state, on account of another offense, extradition shall not be granted if there is ground therefor, except by consent of the country that shall have surrendered him.

ART. IX. If the extradition of a foreigner shall be asked for on account of offenses committed in a territory not belonging to the demanding power, it shall not be granted, except in those cases in which prosecution for offenses committed outside of the territory is permitted by the Argentine laws.

ART. X. When two or more nations apply for the extradition of the same person, on account of different offenses, the extradition shall be granted to that nation in whose territory the most serious offense shall have been committed; and if the offenses shall be of equal magnitude, it shall be granted to the nation which shall have first made application.

ART. XI. If the person claimed shall not be a citizen of the demanding country, and shall likewise be claimed by the Government of his nation on account of the same offense, it shall be optional with the Argentine Government to surrender him to whichever Government it may think proper, according to the antecedents of the case.

CHAPTER II

PROCEDURE

ART. XII. Every demand for extradition shall be made diplomatically, and shall be accompanied by the following documents:

(1) The sentence of condemnation, notified in the form prescribed by the laws of the demanding country, if the person claimed shall already have been convicted, or the warrant of arrest issued by the competent courts, with the exact designation and the date of the commission of the offense in question, if the person is merely charged with committing the same. The originals of these documents or an authentic copy thereof shall be presented.

(2) All data and antecedents necessary to prove the identity of the person whose extradition is demanded.

(3) A copy of the legal provisions applicable, according to the laws of the demanding country, to the offense with which the person is charged.

ART. XIII. When the demand for extradition is received, the minister of foreign relations shall examine whether it is accompanied by the necessary documents, whether the offense for which it is made is included among the cases specified in this law, and whether any of the circumstances enumerated in Article III exist.

ART. XIV. If the result of such examination shall be unfavorable to the granting of the

extradition, he shall submit his opinion to the President of the Republic for the consideration of the cabinet, and if his said opinion shall be approved, he shall transmit it officially to the respective diplomatic minister, with the grounds on which it is based.

ART. XV. If, on the other hand, the minister of foreign relations shall consider that the requirements of Article XII are satisfied, and that the case comes within the provisions of this law, and not within the exceptions provided for in Article III, he shall immediately give notice to the minister of the interior, to the end that suitable measures may be adopted for the arrest of the person whose extradition is demanded, provided that he shall not already have been arrested, according to the provisions of Articles XXV and XXVII.

ART. XVI. The person arrested shall be placed at the disposal of the judge of the district in which his arrest shall have taken place, together with the accompanying antecedents, within the space of thirty days; at the expiration of which, without this having been done, the person arrested shall be released by the aforesaid judge.

ART. XVII. Within twenty-four hours from the receipt of the said documents the judge shall receive the statement of the presumptive criminal, with a view to obtaining proof of the identity of the person, who may be permitted to employ counsel.

ART. XVIII. It shall not be permissible to call into question the intrinsic validity of the documents produced by the demanding Government, but the investigation shall be confined to the following points:

- (1) Identity of the person.
- (2) Examination of the extrinsic forms of the documents presented.
- (3) Whether the crime is included among the cases enumerated in this law.
- (4) Whether the penalty enforced belongs to the category of those penalties which are properly applicable to the crime or offense in question, according to the laws of the demanding country.
- (5) Whether the case is included within the provisions of Article III.
- (6) Whether the sentence or the warrant of arrest emanates from the competent courts of the demanding country.

ART. XIX. The person whose surrender is demanded, or his counsel, shall have six days to present his defense, which the district attorney shall be allowed to hold for six days for examination.

ART. XX. If there shall be any necessity to prove any facts; the case shall be received for evidence, and with regard to this, and to its terms, the provisions of national procedure shall be observed.

ART. XXI. When the evidence has been laid before him, the judge shall decide within ten days, and declare whether there is or is not ground for granting the extradition.

ART. XXII. If the decision of the court shall be unfavorable to the granting of the extradition, owing to any defect in the documents which must accompany the demand, such decision shall be communicated by the minister of foreign relations to the representative of the demanding country, to the end that the defect in question may be remedied.

The person arrested shall be released if these documents shall not arrive within one month, reckoning from the time of the communication of the diplomatic notice, if the country concerned be one bordering on the Republic, and within three months in the case of all other countries.

ART. XXIII. If the decision of the court shall authorize or refuse extradition for any of the causes specified in paragraphs 3, 4, 5, and 6 of Article XVIII, an appeal to the supreme court may be taken; which court shall finally decide the case, it having previously been submitted to the attorney-general of the nation.

The original process shall be transmitted to the ministry of foreign relations through the ministry of justice, and an authenticated copy of the decision shall be transmitted to the demanding minister, together with the decree authorizing the extradition, if it is granted.

ART. XXIV. If, on account of a crime or offense committed previously to the act of the extradition, but discovered subsequently thereto, authorization shall be asked to prosecute

the person already surrendered, the demand, which shall be accompanied by the papers relative to the process, in which shall be contained the observations of the person accused, or a declaration signed by him that he has no observations to make, shall be submitted to the district judge before whom the demand for his extradition shall have come, and from his decision there shall be no appeal.

CHAPTER III

VARIOUS PROVISIONS

ART. XXV. In case of urgency, the courts of the Republic may order the preliminary arrest of a foreigner in compliance with the direct request of the judicial authorities of a country having an extradition treaty with the Republic, provided that the existence of a sentence or of a warrant of arrest be invoked, and provided that the nature of the crime for which the person in question has been sentenced or is pursued be clearly determined.

The demand may be made by mail or telegraph, and, at the same time, notice shall be given, diplomatically, to the minister of foreign relations. The courts that have caused the arrest to be made shall immediately give notice thereof to the minister of foreign relations, through the minister of justice.

ART. XXVI. A foreigner arrested in virtue of the provisions of the foregoing article shall be immediately released if it shall be so ordered by the Executive; or if, within the space of one month, when the country concerned is one bordering on the Republic, and of two months in the case of all other countries, the Argentine Government shall not receive, in due form, the diplomatic demand for extradition.

ART. XXVII. The preliminary arrest of a foreigner may likewise be ordered by the Executive, at the request of a diplomatic minister, pending the arrival of the documents necessary to be presented with the demand for extradition, and the provisions of the two foregoing articles shall be applicable to these cases.

ART. XXVIII. The Argentine Government may authorize the transit through the territory of the Republic of a surrendered person who is not an Argentine citizen, without any requirement save the diplomatic presentation of the sentence whereby he has been condemned or of the warrant issued for his arrest, provided that the person in question be not accused of political offenses or offenses therewith connected, and that it be for an offense rendering him liable to extradition according to this law.

ART. XXIX. All papers and other articles that may have been taken from the presumptive criminal, and that may serve to throw light upon the offense with which he is charged, shall be turned over to the Government applying for his extradition, if it shall so request, on condition that that Government shall return the same when the case shall be concluded, if there shall be third parties claiming them.

ART. XXX. Letters rogatory, issued by a competent foreign magistrate in a criminal, not a political, case, shall be presented diplomatically, and shall be transmitted to the competent judicial authorities.

ART. XXXI. Citations in a criminal, not a political, case, of witnesses domiciled or residing in the Republic, shall not be received, and notice thereof shall not be given, save on condition that such witnesses shall not be prosecuted or arrested on account of previous acts or convictions, or as accomplices in the offense then brought to trial, it being understood that the appearance of the witnesses is purely voluntary on their part, and that the expenses thereof shall be defrayed by the demanding Government.

ART. XXXII. The procedure established by the present law shall be applicable also to cases governed by extradition treaties in all points not at variance with their stipulations.

ART. XXXIII. The Executive shall give notice, at their expiration, of the desire of the Government of the Republic for the cessation of the effects of all extradition treaties that do not conform to the provisions of this law.

ART. XXXIV. Let it be communicated to the Executive. Done in the hall of sessions of

the Argentine Congress, at Buenos Ayres, on the twentieth day of August, one thousand eight hundred and eighty-five.

FRANCISCO B. MADERO

ADOLFO J. LABOUGLE,
Secretary of the Senate.

RAFAEL RUIZ DE LOS LLANOS

JUAN OVANDO,
Secretary ad interim of the Chamber of Deputies.

Therefore: Let it be obeyed, communicated, published, and inserted in the R. N. ROCA.
FRANCISCO J. ORTIZ

CODE OF CRIMINAL PROCEDURE ¹

ART. 646. The extradition of criminals, whether asked for by the Republic or granted at the request of another nation, is allowed only—

(1) In cases determined by existing treaties.

(2) In the absence of treaties, in those cases in which extradition may be allowed according to the principle of reciprocity or the uniform practice of nations.

ART. 647. The judge having jurisdiction in the cause against a criminal absent in a foreign country shall alone be competent to take cognizance of the matter of his extradition.

In case it is asked for by a foreign government, the judge presiding in the district where the person required lives shall have jurisdiction.

ART. 648. Provided there is a treaty, extradition will be asked for or conceded, according to the manner and conditions therein prescribed.

If there is no treaty, extradition shall be asked for or conceded through the diplomatic channel, according to the procedure and conditions established in this Code.

ART. 649. The judge who may have jurisdiction in the cause will *ex officio*, or at the instance of the party concerned, by decision based on legal principles, grant and demand the extradition from the moment in which, on account of the state of the process and its result, the extradition should be allowed.

ART. 650. Appeal may be taken from the decision by which the extradition is either granted or refused, should such decree be made by a judge of an inferior court.

ART. 651. The letter or communication asking for extradition, whether by authorities of this country or by those of another, must be accompanied by an authenticated transcript of the decision requiring such proceeding, and also by the following documents:

(1) The sentence of conviction according to the form prescribed by law, if the person claimed shall already have been convicted, or the warrant of arrest issued by the competent courts, with the exact designation and the date of the commission of the crime or offence, if the person has been indicted or is resting under suspicion. Said papers will be forwarded in original or in authenticated copies.

(2) All data and antecedents necessary to prove the identity of the person whose extradition is demanded.

(3) An authenticated copy of the legal provisions applicable to the offence with which the person is charged, according to the law of the respective country.

ART. 652. When the demand of extradition is not authorized by treaty, the national executive power, after taking the opinion of the Attorney-General, will determine what is proper to be done. Should the decision be adverse to the extradition, the requisition will be returned to the government or to the judge by whom it was issued, accompanied by a copy of the Attorney-General's opinion and of the decision made.

In case the application is favorably received, the government will forthwith communicate with the judge of the district wherein the refugee is, accompanied by all the antecedents, and notice shall be given to the foreign government interested. When extradition is asked for

¹ Moore, *A Treatise on Extradition and Interstate Rendition* (1891), Vol. 1, pp. 697-701.

by judges of the Republic, the national executive power will direct a corresponding letter to the government of the nation where the refugee is, and will so advise the judge asking for the extradition.

ART. 653. The request for extradition having been passed to that judge of the Republic who is to take cognizance of the case, he will order the detention of the refugee and give him a hearing within forty-eight hours, for the purpose of proving his identity, placing him at liberty immediately, if it is found that proceedings were taken against him erroneously.

ART. 654. If the identity of the person is established by proof, *prima facie* at least, he must be notified to name qualified counsel for his defence in the period of three days, it being the duty of the judge to do this, if the accused refuses to do so in the time specified.

ART. 655. In the argument concerning the application for extradition, it will not be permitted to traverse the intrinsic validity of the documents produced by the demanding government, the determination being limited to the following points:

- (1) Identity of the person.
- (2) Examination of the extrinsic forms of the documents produced.
- (3) Whether the crime or offence is embraced in either of the cases mentioned in Article 646.
- (4) Whether the penalty adduced belongs to the category of penalties which, by the laws of the demanding country, correspond to the crime or offence in question.
- (5) Whether the penal action or corresponding penalty is prescribed according to the laws of the demanding country.
- (6) Whether the decision or warrant of arrest, as the case may be, emanates from the competent courts of the demanding country.

ART. 656. The counsel of the person claimed shall have six days to present his defence, which the district attorney, who will necessarily be a party in every case relating to extradition, shall be allowed to hold six days for examination.

ART. 657. If there be necessity to prove any facts, the case shall be received for evidence, and with regard to this, and to the procedure, the provisions of this Code will determine.

ART. 658. At the end of the time allowed for proof, the judge, with the pleadings before him, shall decide within ten days, and will declare whether there is or is not ground for granting the extradition.

ART. 659. An appeal from the decision of the judge of the section may be made to the Supreme Court, which will briefly and definitely determine the matter, after taking the opinion of the Attorney-General. The original papers will be passed to the minister for foreign affairs, retaining a sufficient record thereof, and said determination will be forwarded to the demanding government.

ART. 660. No criminal extradited shall be tried for an offence prior to that for which his extradition was asked.

If on account of an offence committed previously to the order of extradition, but discovered subsequently thereto, authorization should be asked to prosecute the person already surrendered, the demand, which shall be accompanied by the papers relating to the process, in which shall be contained the statement of the person accused or a declaration signed by him that he has no statement to make, shall be submitted to the judge of the section before whom the demand for his extradition shall have come, and from his decision there shall be no appeal.

ART. 661. The Argentine government may authorize the transit, through the territory of the Republic, of a person surrendered who is not an Argentine citizen, without any further requirement than the presentation, through the diplomatic channel, of the sentence whereby he has been condemned or the warrant issued for his arrest.

ART. 662. The courts empowered to determine extradition cases will also have authority to determine whether papers and other things found on the person of the presumed offender shall be given up to the demanding government either wholly or in part.

ART. 663. Letters rogatory, issued by a competent foreign magistrate in a criminal mat-

ter not of a political character, shall be presented through the diplomatic channel, and shall be transmitted to the competent judicial authorities.

ART. 664. In urgent cases they can be transmitted directly to the Argentine authorities, who must act without delay, provided they are not in conflict with the laws of the Republic.

ART. 665. Citations in a criminal matter not of a political character, of witnesses domiciled or residing in the Republic, shall not be admitted and notice thereof shall not be given them, save on condition that such witnesses shall not be prosecuted nor imprisoned on account of previous acts or convictions, or as accomplices in the offence then brought to trial.

ART. 666. If the person asked for is on trial, or is convicted of a crime or offence committed in the Republic, extradition shall be deferred until the trial is finished or the penalty satisfied.

ART. 667. When, for the offence which prompts the demand for extradition there is a lighter penalty in the Republic, the accused person shall not be extradited, save on condition that the courts of the country which claims him shall impose on him the lighter penalty.

ART. 668. If the offender is demanded by more than one state at the same time, preference shall be given to that state in which the greatest offence was committed, and, in case of equal offence, to that state which first asked for him.

ART. 669. If the criminal is an Argentine citizen, and elects to be judged by the Argentine courts, the government of the demanding nation may furnish to said courts all the antecedents and proofs of the offence, in order that he may be tried according to the laws of the Republic.

ART. 670. The delivery of all the effects which the accused may have stolen in a foreign country, and which were found in his possession at the time of his arrest, and the things which may serve as proof of the offence of which he is charged, shall of course be included in the writ of extradition.

ART. 671. In case of urgency, the courts of the Republic may order the preliminary arrest of a foreigner in compliance with the direct request of the judicial authorities of a country having an extradition treaty with the Republic, provided that the existence of a sentence or of a warrant of arrest be established, and provided the nature of the crime for which the person in question has been sentenced or is pursued be clearly determined.

The demand may be made by mail or telegraph, and at the same time notice shall be given through the diplomatic channel to the minister for foreign affairs.

The courts that have caused the arrest to be made shall immediately give notice thereof to the minister for foreign affairs, through the minister of justice.

ART. 672. A foreigner arrested by virtue of the provisions of the foregoing article shall be immediately released, if within the period of fifteen days, when the country concerned is one bordering on the Republic, and of one month and a half in the case of all other countries, the Argentine government shall not receive in due form the demand, through the diplomatic channel, for extradition.

ART. 673. The preliminary arrest of a foreigner may likewise be ordered at the request of a diplomatic officer, pending the arrival of the papers necessary to be presented with the demand for extradition, and the provisions of the two foregoing articles shall be applicable to these cases.

ART. 674. Every foreigner arrested by virtue of a demand for extradition may ask for his provisional liberty, under bail, upon the same conditions as if the offence charged had been committed in the Republic. (See *Código de Procedimientos en lo Criminal*, pp. 216–225, inclusive.)

2. Belgium

LAW CONCERNING EXTRADITION¹

October 1, 1833

Article 6. It shall be expressly stipulated in these agreements that no foreigner may be prosecuted or punished for any political crime antecedent to the extradition, or for any act

¹ *Official Bulletin* No. 77. Unofficial translation.

connected with such a crime, or for any crime or misdemeanor not provided for by the present law; otherwise all extraditions and all temporary arrests are prohibited.

LAW CONTAINING AN ADDITIONAL PROVISION TO ARTICLE 6 OF THE LAW OF OCTOBER 1, 1833
CONCERNING EXTRADITION ¹

March 22, 1856

LEOPOLD, etc.

The Houses of Parliament have voted and We ratify the following:

One and Only Article

The following paragraph is added to Article 6 of the law of October 1, 1833:

"There shall not be considered as a political crime or as an act connected with such a crime an attack upon the person of the head of a foreign government or of the members of his family, when this attack takes the form of either murder, assassination or poisoning."

We declare the above to be a law, etc. (Countersigned by the Minister of Justice, M. ALPH. NOTHOMB).

LAW CONCERNING EXTRADITION ²

March 15, 1874

LEOPOLD II, etc.

The Houses of Parliament have voted and We ratify the following:

Article I. The Government may give over to the governments of foreign countries, upon condition of reciprocity, any foreigner who has been prosecuted, committed for trial, arraigned or sentenced by the courts of the said countries, either as perpetrator or as accomplice in any of the acts enumerated below, which may have been committed on their territory:

- 1) Assassination, poisoning, parricide, infanticide, murder, rape;
 - 2) Arson;
 - 3) Counterfeiting or falsifying public bills or bank notes, securities issued by governments or by private enterprises, the issuance or the putting into circulation of such counterfeited or falsified public bills or bank notes or securities, falsification in writing or in telegraphic despatches and in the use of such despatches, bills, notes or securities which have been counterfeited, forged or falsified;
 - 4) Counterfeiting coinage, including the counterfeiting and alteration of coins, the issuance and the putting into circulation of counterfeit or altered coins, as well as fraud in the selection of samples for the verification of the fineness and of the weight of the coins;
 - 5) False testimony and false statements by experts or interpreters;
 - 6) Theft, swindling, embezzlement or misappropriation of funds, committed by public officials;
 - 7) Fraudulent bankruptcy and fraud committed in bankruptcy;
 - 8) Association with malefactors;
 - 9) Threats of attack upon persons or property, which are punishable by the death penalty, penal servitude or imprisonment with hard labor and loss of civil rights;
- (Offers or proposals to commit a crime or to take part in it, or accepting such offers or proposals); ³
- 10) Abortion;
 - 11) Bigamy;
 - 12) Attacks upon personal liberty and inviolability of domicile, committed by individuals;
 - 13) Kidnapping, receiving, concealing, substituting or palming off a child;

¹ *Moniteur*, March 27, 1856. Unofficial translation.

² *Moniteur*, March 17, 1874. Modified and completed by the laws of July 7, 1875 (*Moniteur*, July 9, 1875), March 22, 1886 (*Moniteur*, March 26, 1886), June 22, 1889 (*Moniteur*, July 4, 1889), and July 3, 1893 (*Moniteur*, July 8, 1893). Unofficial translation.

³ The clause in parentheses was added by Art. 2 of the Law of July 7, 1875. See *cit. supra*.

- 14) Abandoning or deserting a child;
- 15) Kidnapping minors;
- 16) A criminal attack committed with violence;
- 17) A criminal attack committed without violence on the person of or with the aid of the person of a child of either sex aged less than 14 years;
- 18) An offense against public morals by habitually instigating, facilitating or furthering, in order to satisfy the desires of others, the debauchery or the depravity of minors of either sex;
- 19) Blows or wounds inflicted voluntarily, with premeditation or resulting in an apparently incurable illness, permanent incapacity for work, loss of the full use of an organ, serious mutilation or death, even when caused unintentionally;
- 20) Abuse of confidence, and deception;
- 21) Bribery of witnesses, experts or interpreters;
- 22) False oath;
- 23) Counterfeiting or falsifying seals, stamps, dies and trademarks; the use of seals, stamps, dies and trademarks which have been counterfeited or falsified; and the detrimental use of genuine seals, stamps, dies and trademarks (as well as the misdemeanor provided for in Article 25 of the law concerning the rights of authors);¹
- 24) Bribery of public officials;
- 25) Destruction of buildings, steam engines or telegraphic apparatus, destruction or defacement of tombs, monuments, art objects, documents or other papers, destruction of or injury to commodities, merchandise or other personal property, and opposition to the construction of public works;
- 26) Destroying and injuring crops, plants, trees or slips for grafting;
- 27) Destruction of agricultural implements, destruction or poisoning of cattle or other animals;
- 28) Desertion by the captain, except in the cases provided for in the law, of a vessel, a merchant ship or a fishing boat;
- 29) Stranding, loss or destruction by the captain or the officers and crew; changing of the course by the captain, of a vessel, a merchant ship or a fishing boat; throwing overboard or destroying unnecessarily all or part of the cargo, the provisions or the goods on board; altering the ship's course; borrowing unnecessarily, using as security the ship itself, its provisions or equipment, or offering as security or offering for sale of the cargo or provisions; or insertion in the accounts of imaginary losses or expenditures; the sale of the vessel without express authorization, except in the case of unseaworthiness; unloading of cargo without the necessary preliminary report, except in the case of immediate danger; theft committed on board; adulteration of provisions or of goods, perpetrated on board by the addition of injurious substances; attack or resistance by means of violence or blows to the captain by more than a third of the crew; refusal to obey the orders of the captain or officer in charge, for the safety of the vessel or the cargo, accompanied by blows and injuries; conspiracy against the safety, the liberty or the authority of the captain; capture of the vessel by the sailors or passengers by means of deception or violence to the captain;
- 30) Receiving objects obtained by means of one of the crimes or misdemeanors provided for in the present law;
- 31) Trading in slaves (Articles 1, 2, 3 and 5 of the law concerning the penalties for crimes and misdemeanors of slavery);
- 32) Resistance on the part of captains and crews of vessels to the orders of officers, acting by virtue of Article 42 and following, of the General Act of the Brussels Conference of July 2, 1890;
- 33) Infraction of the prohibitions concerning firearms and munitions, provided for by Articles 8 and 9 of the General Act of the Brussels Conference of July 2, 1890;²

¹ The clause in parentheses was added by Art. 8 of the Law of March 22, 1886 on copy-right. See *cit. supra*.

² Sections 31, 32 and 33 were added by Art. 11 of the Law of July, 1893. See *cit. supra*.

There is included in the preceding categories the attempt to perform any of these acts, when such an attempt is punishable by virtue of the penal laws.

Article II. Nevertheless, when the crime or the misdemeanor giving rise to the request for extradition shall have been committed outside the territory of the party making the request, the Government may deliver over, on condition of reciprocity, the prosecuted or condemned foreigner, in cases in which Belgian law authorizes prosecution for the same infractions of laws when committed outside the Kingdom.

Article III. Extradition shall be granted upon presentation of a statement of either the court decision or the sentence, or of the order of the advisory council of judges, or of the decision of the commission of arraignment, or of the statement of criminal proceedings, made out by a competent judge, formally decreeing or effecting with full authority the return of the accused or of the prisoner to the jurisdiction of the penal tribunals, when these statements have been delivered in their original form or have been despatched in the proper manner.

Extradition shall likewise be granted upon presentation of a warrant for arrest or of any other document having the same validity, when issued by the competent foreign authority, provided that such documents contain an exact statement of the act by reason of which they are made out, and provided that they be rendered valid by the decision of a lower court in whose jurisdiction is the domicile of the foreigner in Belgium or in whose jurisdiction he may be found.

As soon as the foreigner shall have been imprisoned, as a result of one of the acts mentioned above, of which he shall be duly notified, the Government shall ask for the opinion of the prosecuting attorneys of the Court of Appeal in the district in which the foreigner shall have been arrested.

The hearing shall be public unless the foreigner requests a private hearing.

The magistrate and the foreigner shall be heard. The latter may be assisted by counsel.

Within two weeks, counting from the receipt of the documents, these shall be returned, together with the resulting decision, to the Minister of Justice.

Article IV. Extradition in the form of a mere crossing of Belgian territory may nevertheless be granted without having the decision of the prosecuting attorneys, and with only the presentation of the original or of an authenticated copy of one of the documents mentioned in the preceding article when it shall have been requested for the use of a foreign State allied with Belgium by an agreement, including the infraction of the law which gives rise to the request for extradition, and when this request is not prohibited by Article 6 of the law of October 1, 1833, and by Article VII of the present law.

Article V. In urgent cases the foreigner may be arrested temporarily in Belgium for one of the acts mentioned in Article I upon presentation of a warrant for arrest issued by the examining magistrate of the district in which he resides or the district in which he may be found, and which is based upon an official statement given to the Belgian authorities by the authorities of the country in which the foreigner shall have been sentenced or prosecuted.

(However, in such a case, he shall be set at liberty if, within a period of three weeks dating from the time of his arrest, he is not served with any warrant for arrest issued by the competent foreign authority.)¹

This period may be extended to three months if the country which requests the extradition is outside Europe.

After the order for arrest, the examining magistrate is authorized to proceed in accordance with the regulations prescribed by Articles 87 to 90 of the Code for inquiry in criminal cases.

The foreigner may request temporary freedom in the cases in which a Belgian enjoys the same privilege and under the same conditions. The request shall be submitted to the advisory council of judges.

¹ The clause in parentheses is a provision of Art. I of the Law of June 28, 1889. It replaces the second clause of Art. 5 of the Law of March 15, 1874, which fixed the period of 15 days when the arrest was requested by a bordering State and three weeks otherwise. See *cit. supra*.

The advisory council of judges shall decide likewise, after having heard the foreigner, whether or not there is reason to forward all or part of the papers and other objects of which the court has taken possession, to the foreign government which asks the extradition. The advisory council shall order the restoration of any papers and other objects which are not directly connected with the act with which the accused is charged, and shall decide, in that case, upon the requests of third parties or others properly concerned in the matter.

Article Va. When the foreigner whose extradition is requested, is on a Belgian vessel which has left Belgian territorial waters, the examining magistrate of the district in which is included the port of departure, may issue a warrant for temporary arrest, provided for in the first paragraph of the preceding article, and, with the authorization of the Minister of Justice, may take the necessary steps in order that the captain may be informed of the existence of this warrant, either directly or by the intermediary of a consul.

Upon receipt of such notice, the person whose extradition is requested shall remain in custody on board until the vessel returns or until it meets another Belgian vessel which shall take him on board under the same conditions, without prejudice to the right set forth in Article 47 of the law of June 21, 1847.

Mention shall be made of all the facts of the case in the ship's log.

The period of time prescribed by Paragraph 2 of Article V above-mentioned, shall begin, in such a case, on the date when the foreigner shall have entered one of the prisons of the Kingdom.¹

Article VI. The agreements concluded by virtue of the present law shall be inserted in the *Moniteur*; they may not be enforced sooner than ten days after the date of their publication in this paper.

Article VII. Extradition may not take place if, since the date of the act attributed to the foreigner, or since the prosecution or the sentence, the prescription (*) of the act or of the sentence has occurred, in accordance with Belgian law.

Article VIII. Articles 2 and 3 of the law of December 30, 1836, concerning the penalties for crimes and misdemeanors committed by Belgians in foreign countries, are applicable to infractions of the law provided for by Article I of the present law.²

Article IX. These Articles 2 and 3 of the law of December 30, 1836, are likewise applicable to infractions of forestry, rural and fishing laws.³

Article X. Any foreigner who, after having committed outside the territory of the Kingdom any of the infractions mentioned in Art. I of the law of December 30, 1836,⁴ and Articles I and IX of the present law, acquires or regains Belgian nationality, may, if he is in Belgium, be prosecuted, sentenced and punished in conformity with the laws of the Kingdom, within the limits set by the above-mentioned law of December 30, 1836.⁵

Article XI. Writs of inquiry, proceeding from the competent foreign authorities, with the purpose of effecting either a search of the residence or the seizure of the main proof or of circumstantial evidence, may be executed in Belgium only in connection with one of the acts enumerated in Article I of the present law.

Except in the case provided for by Article V, such writs of inquiry shall previously be rendered valid by the advisory council of judges of the lower court of the district in which the searches and the seizures are to take place.

The advisory council of judges shall likewise decide whether or not there is reason to for-

¹ Art. 5a was added by Art. 2 of the Law of June 28, 1889. See *cit. supra*.

(* If no action has been taken or no sentence passed against the foreigner within ten years from the date of the alleged crime, the prescribed time limit has expired and no prosecution will be allowed in the future.)

² See Arts. 8, 12 and 13 of the Law of Apr. 17, 1878, replacing Arts. 2 and 3 of the Law of Dec. 30, 1836, which are abrogated (*cit. supra*).

³ See Art. 9 of the Law of Apr. 17, 1878 (*cit. supra*).

⁴ See Arts. 7, 12 and 13 of the Law of Apr. 17, 1878, replacing Art. 1 of the Law of Dec. 30, 1836 (*cit. supra*).

⁵ See the Law of Apr. 17, 1878.

ward all or part of the papers and other seized articles to the government requesting them.

The advisory council of judges shall order the restoration of any papers or other articles which are not directly connected with the act attributed to the accused person, and shall decide, in such a case, upon the claims of third parties or other persons properly concerned.

Article XII. The law of April 5, 1868, and the law of June 1, 1870, as well as the provisions of the law of October 1, 1833, with the exception of Article 6, are repealed.¹

The words: "in conformity with the laws of April 5, 1868, and of June 1, 1870," shall be stricken from Article I of the law of July 17, 1871, concerning foreigners.²

We promulgate, etc. . . .

(Countersigned by the Minister of Justice, M. T. DeLANTSHEERE.)

3. Brazil

LAW NO. 2416³

REGULATING THE EXTRADITION OF NATIONALS AND FOREIGNERS AND THE TRIAL AND JUDGMENT OF THE SAME WHEN, OUTSIDE THEIR OWN COUNTRY, THEY COMMIT ANY OF THE CRIMES MENTIONED IN THIS LAW

June 28, 1911

I, the President of the Republic of the United States of Brazil, hereby declare that the National Congress has decreed and that I sanction the following law:

Article 1. The extradition of nationals and foreigners is permitted:

§1. The extradition of nationals will be allowed when, by law or treaty, the country demanding the extradition assures Brazil of reciprocity of treatment.

§2. The absence of reciprocity will not prevent extradition in the case of naturalization subsequent to the crime which determines the request for extradition on the part of the country in which the crime was committed.

Article 2. Extradition can not be granted in the following cases:

I. When for the offense there had not been imposed, by Brazilian law, a prison penalty for one year or more, including attempted crime, co-authorship and complicity.

II. When the accused is actually under prosecution for, or has already been convicted or absolved by the Brazilian judiciary (*Poder Judiciario*) of the same crime which determines the request for extradition.

III. When the crime or punishment shall be barred by limitation in conformity with the law of the demanding country.

IV. When the accused shall have to appear, in the demanding country, before a summary tribunal or court.

V. When the infraction is:

- a) purely military;
- b) against religion;
- c) publishing;
- d) political.

The allegation of a political end or motive will not prevent extradition when the offense constitutes principally a common infraction of the penal law.

The Federal Supreme Court (*Supremo Tribunal Federal*), upon taking cognizance of the request for extradition, will estimate in kind the nature of the crime.

Extradition having been granted, surrender will be dependent on a pledge, on the part of the demanding country, that the political end or motive will not contribute to increase the penalty.

¹ See the Law of March 22, 1856, containing an additional provision to Art. 6 of the Law of Oct. 1, 1833.

² The Law of July 17, 1871, is abrogated. It is actually the Law of Feb. 12, 1897, which regulates the policy towards aliens.

³ *Extradicao de Nacionais e estrangeiros. Commentarias e informacoes Sobre a Lei n. 2.416, de 28 de junho de 1911 por Arthur Briggs, Rio de Janeiro, 1919, pp. 1-8.*

Article 3. When the accused, for whom the request for extradition is made, shall be actually under prosecution or subject to the completion of a prison sentence or of a penalty which is here determined by a different offense, but committed in Brazil, extradition will be decided according to the form of this law, but surrender will become effective after the trial is over or the penalty is fulfilled.

Article 4. If the penalty to which the accused is liable, according to the laws of the demanding State, is death or corporal punishment, extradition will only be permitted on condition that the punishment be commuted to a prison sentence.

Article 5. Extradition having been obtained, the demanding State will pledge itself not to hold the accused responsible for other offenses committed prior to the extradition, but only for the crime or crimes determining his surrender, unless the accused, voluntarily and expressly, consents to be tried for these other crimes or if, having been set at liberty, he remains in the territory of the demanding State for a period exceeding one month.

Article 6. The demanding State can not, without the consent of the surrendering State, deliver the accused to a third State which claims him, except according to the last exception indicated in the preceding article.

Article 7. In the case of a demand for extradition from several States, of the same person, if it is a question of the same crime, preference will be given to the request from the country in whose territory the crime was committed; if it is a question of various crimes, preference will be given to the request based on the most serious crime; in the case of crimes of equal seriousness, preference will be given to the State which first makes a request for surrender. In the last two hypotheses there can be stipulated extradition for subsequent surrender to the other demanding States.

Article 8. Requests for extradition shall be made through the diplomatic channels, the request to be accompanied by a copy, or authentic reproduction of the sentence of conviction or of the sentence or proceedings of the criminal action, emanating from the presiding judge. These documents shall contain the precise indication of the incriminating offense, the place where and the date on which it was committed and be accompanied by copies of the texts of the law applicable to the case.

Article 9. The Secretary of the Exterior shall remit the request to the Secretary of the Interior who will order the imprisonment of the accused and his appearance before the Federal Supreme Court.

Paragraph I. In urgent cases imprisonment may be effected preventively and maintained for 60 days, within which time the demanding State will present to the surrendering State the formal request duly drawn up.

Article 10. No demand for extradition will receive consideration without first a pronouncement by the Federal Supreme Court on the legality and procedure of the same.

The accused, who will be presented before the Tribunal, may be accompanied by a lawyer, his defense consisting of his not being the person demanded, of defects in the form of the documents presented and in the legality of the extradition.

Article 11. Extradition having been granted, if within 20 days from the date of the communication stating that the accused is at the disposition of the demanding State, the proper diplomatic agent of the demanding country shall not have taken charge of him, he shall be set at liberty and shall not again be seized for the same reasons as those for which his extradition was asked.

Article 12. When this law shall have been published, its text shall be sent to all the nations with which Brazil maintains relations and all extradition treaties then in force shall be annulled.

Article 13. Legal action may be taken against, and sentence imposed upon, Brazilians, even when absent from the Republic, who may have perpetrated any of the following crimes:

a) against the independence, integrity and dignity of the Fatherland (Penal Code, Articles 87, 92, 94, 98, 101, 102 and 104);

b) against the Constitution of the Republic and its form of government (Penal Code, Articles 107 and 108);

c) for counterfeiting (Penal Code, Articles 239 and 243);

d) for falsification of titles and letters of credit of the Federal Government, States and Banks (Penal Code, Articles 245 to 250.)

Sec. 1. The sentencing of such criminals, however, shall only become effective when they shall have returned to their country, either of their own free will or by extradition.

Sec. 2. The trial and sentencing of foreigners who shall commit any of the crimes here enumerated will take place when the criminals, voluntarily or by force, return to their country.

Article 14. There may be tried and sentence imposed upon the national or foreigner who in a foreign territory commits a crime against a Brazilian and for which the Brazilian law imposes a prison penalty of a minimum of two years.

Sec. 1. Legal procedure against national or foreigner will only be begun through the medium of a request from the Secretary of the Interior or a complaint on the part of the wronged party when, in cases in which extradition is permitted, it has not been asked for by the State in whose territory the crime was committed.

Sec. 2. Trial and sentencing for crimes indicated in Article 14 will not take place if the accused shall, in a foreign land, have already been absolved, punished or pardoned for such crimes, or if the crime or penalty shall have already been barred by limitation, according to the more favorable law.

Trial and sentencing in the case of crimes mentioned in Article 13 shall not be prevented by the imposing of a sentence or by any act of foreign authority.

However, there will be subtracted from the term of penalty the length of the prison term which shall have been served for such crimes in a foreign land.

Sec. 3. Federal judges alone are qualified to take cognizance of crimes committed in foreign lands.

Article 15. Regulations to the contrary are hereby annulled.

Rio de Janeiro, June 28, 1911, the 90th year of Independence and the 23d of the Republic.

HERMES R. DA FONSECA

RIVADAVIA DA CUNHA CORRÊA

4. Canada

AN ACT RESPECTING THE EXTRADITION OF FUGITIVE CRIMINALS¹

SHORT TITLE

1. This Act may be cited as the Extradition Act. R. S., c. 155, s. 1.

INTERPRETATION

2. In this Act, unless the context otherwise requires,

(a) "conviction" or "convicted" does not include the case of a condemnation under foreign law by reason of contumacy; but "accused person" includes a person so condemned;

(b) "extradition arrangement," or "arrangement," means a treaty, convention or arrangement made by His Majesty with a foreign state for the surrender of fugitive criminals and which extends to Canada;

(c) "extradition crime" may mean any crime which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the first schedule to this Act; and, in the application of this Act to the case of any extradition arrangement, the said expression means any crime described in such arrangement, whether comprised in the said schedule or not;

(d) "foreign state" includes every colony, dependency and constituent part of the foreign

¹ *Revised Statutes, 1927, Secs. 1083 to 1095.*

state; and every vessel of any such state shall be deemed to be within the jurisdiction of and to be part of the state;

(e) "fugitive" or "fugitive criminal" means a person being or suspected of being in Canada, who is accused or convicted of an extradition crime committed within the jurisdiction of any foreign state;

(f) "judge" includes any person authorized to act judicially in extradition matters;

(g) "warrant" in the case of a foreign state, includes any judicial document authorizing the arrest of a person accused or convicted of crime. R. S., c. 155, s. 2.

PART I

EXTRADITION UNDER TREATY

APPLICATION OF PART

3. In the case of any foreign state with which there is an extradition arrangement, this Part shall apply during the continuance of such arrangement; but no provision of this Part, which is inconsistent with any of the terms of the arrangement, shall have effect to contravene the arrangement; and this Part shall be so read and construed as to provide for the execution of the arrangement. R. S., c. 155, s. 3.

4. In the case of any foreign state with respect to which the application to the United Kingdom of the Act of the Parliament of the United Kingdom, passed in the year one thousand eight hundred and seventy, and intituled *An Act for amending the Law relating to the Extradition of Criminals*, and any Act or Acts amending the same, is made subject to any limitation, condition, qualification or exception, the Governor in Council shall make the application of this Part, subject to such limitation, condition, qualification or exception. R. S., c. 155, s. 4.

5. The Governor in Council may, at any time, revoke or alter, subject to the restrictions of this Part, any order made by him in council under this Part, and all the provisions of this Part with respect to the original order shall, so far as applicable, apply *mutatis mutandis* to the new order. R. S., c. 155, s. 5.

6. This Part, so far as its application in the case of any foreign state, depends on or is affected by any order in council, made under this Part or referred to therein, shall apply, or its application shall be affected from and after the time specified in the order, or, if no time is specified, after the date of the publication of the order in the *Canada Gazette*. R. S., c. 155, s. 6.

7. Any order of His Majesty in Council, referred to in this Part, and any order of the Governor in Council made under this Part, and any extradition arrangement shall be, as soon as possible, published in the *Canada Gazette* and laid before both Houses of Parliament. R. S., c. 155, s. 7.

8. The publication in the *Canada Gazette* of an extradition arrangement, or an order in council, shall be evidence of such arrangement or order, and of the terms thereof, and of the application of this Part, pursuant and subject thereto; and the court or judge shall take judicial notice, without proof, of such arrangement or order, and the validity of the order and the application of this Part, pursuant and subject thereto, shall not be questioned. R. S., c. 155, s. 8.

JUDGES AND COMMISSIONERS

9. All judges of the superior courts and of the county courts of any province, and all commissioners who are, from time to time, appointed for the purpose, in any province by the Governor in Council, under the Great Seal of Canada, by virtue of this Part, are authorized to act judicially in extradition matters under this Part, within the province; and every such person shall, for the purposes of this Part, have all the powers and jurisdiction of any judge or magistrate of the province.

2. Nothing in this section shall be construed to confer on any judge any jurisdiction in *habeas corpus* matters. R. S., c. 155, s. 9.

EXTRADITION FROM CANADA

10. Whenever this Part applies, a judge may issue his warrant for the apprehension of a fugitive on a foreign warrant of arrest, or an information or complaint laid before him, and on such evidence or after such proceedings as in his opinion would, subject to the provisions of this Part, justify the issue of his warrant if the crime of which the fugitive is accused, or of which he is alleged to have been convicted, had been committed in Canada.

2. The judge shall forthwith send a report of the fact of the issue of the warrant, together with certified copies of the evidence and foreign warrant, information or complaint, to the Minister of Justice. R. S., c. 155, s. 10.

11. A warrant issued under this Part may be executed in any part of Canada, in the same manner as if it had been originally issued, or subsequently endorsed, by a justice of the peace having jurisdiction in the place where it is executed. R. S., c. 155, s. 11.

12. Every fugitive criminal of a foreign state, to which this Part applies, shall be liable to be apprehended, committed and surrendered in the manner provided in this Part, whether the crime or conviction, in respect of which the surrender is sought, was committed or took place before or after the date of the arrangement, or before or after the time when this Part is made to apply to such state, and whether there is or is not any criminal jurisdiction in any court of His Majesty's dominions over the fugitive in respect of the crime. R. S., c. 155, s. 12.

13. The fugitive shall be brought before a judge, who shall, subject to the provisions of this Part, hear the case, in the same manner, as nearly as may be, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada. R. S., c. 155, s. 13.

14. The judge shall receive upon oath, or affirmation, if affirmation is allowed by law, the evidence of any witness tendered to show the truth of the charge or the fact of the conviction. R. S., c. 155, s. 14.

15. The judge shall receive, in like manner, any evidence tendered to show that the crime of which the fugitive is accused or alleged to have been convicted is an offence of a political character, or is, for any other reason, not an extradition crime; or that the proceedings are being taken with a view to prosecute or punish him for an offence of a political character. R. S., c. 155, s. 15.

16. Depositions or statements taken in a foreign state on oath, or on affirmation, where affirmation is allowed by the law of the state, and copies of such depositions or statements and foreign certificates of, or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Part. R. S., c. 155, s. 16.

17. Such papers shall be deemed duly authenticated if authenticated in manner provided, for the time being, by law, or if

(a) the warrant purports to be signed by, or the certificate purports to be certified by, or the depositions or statements, or the copies thereof, purport to be certified to be the originals or true copies, by a judge, magistrate or officer of the foreign state; and

(b) if the papers are authenticated by the oath or affirmation of some witness, or by being sealed with the official seal of the Minister of Justice, or some other minister of the foreign state, or of a colony, dependency or constituent part of the foreign state; of which seal the judge shall take judicial notice without proof. R. S., c. 155, s. 17.

18. (a) In the case of a fugitive alleged to have been convicted of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to the provisions of this Part, prove that he was so convicted; and

(b) in the case of a fugitive accused of an extradition crime, if such evidence is produced as would, according to the law of Canada, subject to the provisions of this Part, justify his committal for trial, if the crime had been committed in Canada; the judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign state, or discharged according to law.

2. If such evidence is not produced, the judge shall order him to be discharged. R. S., c. 155, s. 18.

19. If the judge commits a fugitive to prison, he shall, on such committal,

(a) inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*; and

(b) transmit to the Minister of Justice a certificate of the committal, with a copy of all the evidence taken before him not already so transmitted, and such report upon the case as he thinks fit. R. S., c. 155, s. 19.

20. A requisition for the surrender of a fugitive criminal of a foreign state who is, or is suspected to be in Canada, may be made to the Minister of Justice

(a) by any person recognized by him as a consular officer of that state resident at Ottawa; or

(b) by any minister of that state communicating with the Minister of Justice through the diplomatic representative of His Majesty in that state.

2. If neither of these modes is convenient, then the requisition shall be made in such other mode as is settled by arrangement. R. S., c. 155, s. 20.

21. No fugitive shall be liable to surrender under this Part if it appears

(a) that the offence in respect of which proceedings are taken under this Act is one of a political character; or

(b) that such proceedings are being taken with a view to prosecute or punish him for an offence of a political character. R. S., c. 155, s. 21.

22. If the Minister of Justice at any time determines

(a) that the offence in respect of which proceedings are being taken under this Part is one of a political character;

(b) that the proceedings are, in fact, being taken with a view to try or punish the fugitive for an offence of a political character; or

(c) that the foreign state does not intend to make a requisition for surrender; he may refuse to make an order for surrender, and may, by order under his hand and seal, cancel any order made by him, or any warrant issued by a judge under this Part, and order the fugitive to be discharged out of custody on any committal made under this Part; and the fugitive shall be discharged accordingly. R. S., c. 155, s. 22.

23. A fugitive shall not be surrendered until after the expiration of fifteen days from the date of his committal for surrender; or, if a writ of *habeas corpus* is issued, until after the decision of the court remanding him. R. S., c. 155, s. 23.

24. A fugitive who has been accused of an offence within Canadian jurisdiction, not being the offence for which his surrender is asked, or who is undergoing sentence under a conviction in Canada, shall not be surrendered until after he has been discharged, whether by acquittal or by expiration of his sentence, or otherwise. R. S., c. 155, s. 24.

25. Subject to the provisions of this Part, the Minister of Justice, upon the requisition of the foreign state, may, under his hand and seal, order a fugitive who has been committed for surrender to be surrendered to the person or persons who are, in his opinion, duly authorized to receive him in the name and on behalf of the foreign state, and he shall be so surrendered accordingly. R. S., c. 155, s. 25.

26. Any person to whom such order of the Minister of Justice is directed may deliver, and the person thereto authorized by such order may receive, hold in custody, and convey the fugitive within the jurisdiction of the foreign state; and if he escapes out of any custody to which he is delivered, on or in pursuance of such order, he may be retaken in the same manner as any person accused or convicted of any crime against the laws of Canada may be retaken on an escape. R. S., c. 155, s. 26.

27. Everything found in the possession of the fugitive at the time of his arrest, which may be material as evidence in making proof of the crime, may be delivered up with the fugitive on his surrender, subject to all rights of third persons with regard thereto. R. S., c. 155, s. 27.

28. If a fugitive is not surrendered and conveyed out of Canada within two months after his committal for surrender, or, if a writ of *habeas corpus* is issued, within two months after the decision of the court on such writ, over and above, in either case, the time required to convey him from the prison to which he has been committed, by the readiest way out of Canada, any one or more of the judges of the superior courts of the province in which such person is confined, having power to grant a writ of *habeas corpus*, may, upon application made to him or them by or on behalf of the fugitive, and on proof that reasonable notice of the intention to make such application has been given to the Minister of Justice, order the fugitive to be discharged out of custody, unless sufficient cause is shown against such discharge. R. S., c. 155, s. 28.

29. The forms set forth in the second schedule to this Act, or forms as near thereto as circumstance admit of, may be used in the matters to which such forms refer, and, when used, shall be deemed valid. R. S., c. 155, s. 29.

EXTRADITION FROM A FOREIGN STATE

30. A requisition for the surrender of a fugitive criminal from Canada, who is or is suspected to be in any foreign state with which there is an extradition arrangement, may be made by the Minister of Justice

(a) to a consular officer of that state resident at Ottawa; or

(b) to the Minister of Justice or any other minister of that state, through the diplomatic representative of His Majesty in that state.

2. If neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement. R. S., c. 155, s. 30.

31. Whenever, for the purposes of this Act, it becomes necessary or expedient to secure evidence by depositions taken in Canada to be used in a foreign state, any justice of the peace, or any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial, may take depositions in the absence of a person accused of any extradition crime in like manner as he might take the said depositions if such accused person was present and charged before him with such extradition crime.

2. Such justice of the peace or person having authority as aforesaid may, by subpoena or order, command the attendance at the time and place therein mentioned, of any person or witness for the purpose of being examined as to any extradition crime charged under this Act, and may require the production of any writings or other documents relating to such charge which are in the possession or power of such person or witness.

3. Upon the service upon such person or witness of such subpoena or order, and upon payment or tender of the like conduct money as is properly payable upon attendance at the trial of an indictable offence in a superior court, such subpoena or order may be enforced in like manner as a subpoena or order issued by such superior court. 1909, c. 14, s. 1.

32. Any person accused or convicted of an extradition crime, who is surrendered by a foreign state, may, under the warrant for his surrender issued in such foreign state, be brought into Canada and delivered to the proper authorities, to be dealt with according to law. R. S., c. 155, s. 31.

33. Whenever any person accused or convicted of an extradition crime is surrendered by a foreign state, in pursuance of any extradition arrangement, such person shall not, until after he has been restored or has had an opportunity of returning to the foreign state within the meaning of the arrangement, be subject, in contravention of any of the terms of the arrangement, to any prosecution or punishment in Canada for any other offence committed prior to his surrender, for which he should not, under the arrangement, be prosecuted. R. S., c. 155, s. 32.

LIST OF CRIMES

34. The list of crimes in the first schedule to this Act shall be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute

made before or after the passing of this Act, and as including only such crimes, of the descriptions comprised in the list, as are, under that law, indictable offences. R. S., c. 155, s. 33.

PART II

EXTRADITION IRRESPECTIVE OF TREATY

35. The provisions of this Part shall not come into force, with respect to fugitive offenders from any foreign state, until this Part shall have been declared by proclamation of the Governor General to be in force and effect as regards such foreign state, from and after a day to be named in such proclamation.

2. If by proclamation the Governor General declares this Part to be no longer in operation as regards any foreign state, the provisions thereof shall cease to have any force or effect with respect to fugitive offenders from such state from and after a day to be named in such proclamation. R. S., c. 155, s. 34.

36. The provisions of this Part shall apply to any crime mentioned in the third schedule to this Act committed after the coming into force of this Part, as regards any foreign state to which this Part has been by proclamation declared to apply. R. S., c. 155, s. 35.

37. In case no extradition arrangement exists between His Majesty and a foreign state, or in case such an extradition arrangement, extending to Canada, exists between His Majesty and a foreign state, but does not include the crimes mentioned in the third schedule to this Act, it shall, nevertheless, be lawful for the Minister of Justice to issue his warrant for the surrender to such foreign state of any fugitive offender from such foreign state charged with or convicted of any of the crimes mentioned in the said schedule.

2. The arrest, committal, detention, surrender and conveyance out of Canada of such fugitive offender shall be governed by the provisions of Part I of this Act, and all the provisions of the said Part shall apply to all steps and proceedings in relation to such arrest, committal, detention, surrender and conveyance out of Canada in the same manner and to the same extent as they would apply if the said crimes were included and specified in an extradition arrangement between His Majesty and the foreign state, extending to Canada. R. S., c. 155, s. 36.

38. All expenses connected with the arrest, committal, detention, surrender and conveyance out of Canada of any fugitive offender under this Part shall be borne by the foreign state applying for the surrender of such fugitive offender. R. S., c. 155, s. 37.

39. The list of crimes in the third schedule to this Act shall be construed according to the law existing in Canada at the date of the commission of the alleged crime, whether by common law or by statute, and as including only such crimes, of the description comprised in the list, as are, under that law, indictable offences. R. S., c. 155, s. 38.

40. No warrant shall issue under this Part for the extradition of any person to any state or country in which by the law in force in such state or country such person may be tried after such extradition for any other offence than that for which he has been extradited, unless an assurance shall first have been given by the executive authority of such state or country that the person whose extradition has been claimed will not be tried for any other offence than that on account of which such extradition has been claimed. R. S., c. 155, s. 39.

FIRST SCHEDULE

LIST OF CRIMES

1. Murder, or attempt or conspiracy to murder;
2. Manslaughter;
3. Counterfeiting or altering money, and uttering counterfeit or altered money;
4. Forgery, counterfeiting or altering, or uttering what is forged, counterfeited or altered;
5. Larceny or theft;

6. Embezzlement;
7. Obtaining money or goods, or valuable securities, by false pretenses;
8. Crimes against bankruptcy or insolvency law;
9. Fraud by a bailee, banker, agent, factor, trustee, or by a director or member or officer of any company, which fraud is made criminal by any Act for the time being in force;
10. Rape;
11. Abduction;
12. Child stealing;
13. Kidnapping;
14. False imprisonment;
15. Burglary, house-breaking or shop-breaking;
16. Arson;
17. Robbery;
18. Threats, by letter or otherwise, with intent to extort;
19. Perjury or subornation of perjury;
20. Piracy by municipal law or law of nations, committed on board of or against a vessel of a foreign state;
21. Criminal scuttling or destroying such a vessel at sea, whether on the high seas or on the great lakes of North America, or attempting or conspiring to do so;
22. Assault on board such vessel at sea, whether on the high seas or on the great lakes of North America, with intent to destroy life or to do grievous bodily harm;
23. Revolt, or conspiracy to revolt, by two or more persons on board such a vessel at sea, whether on the high seas or on the great lakes of North America, against the authority of the master;
24. Any offence under
 - (a) Part VI of the Criminal Code, except sections 308 to 312 inclusive, and sections 317 to 334 inclusive;
 - (b) Part VII of the Criminal Code, except sections 408 and 409, 416 to 418 inclusive, 429 to 444 inclusive, 486 to 503 inclusive, and section 505;
 - (c) Part VIII of the Criminal Code, except sections 516, 519, 524, 527, 529, and 538, and sections 542 to 545 inclusive; and,
 - (d) Part IX of the Criminal Code;
 and which are not included in any foregoing portion of this schedule.
25. Any offence which is, in the case of the principal offender, included in any foregoing portion of this schedule, and for which the fugitive criminal, though not the principal, is liable to be tried or punished as if he were the principal. R. S., c. 155, Sch. 1.

SECOND SCHEDULE

FORM ONE

Form of Warrant of Apprehension

_____;
To wit:—

To all and each of the constables of

Whereas it has been shown to the undersigned, a judge under the Extradition Act, that
late of _____ is accused (*or convicted*) of the
crime of _____ within the jurisdiction of _____

This is therefore to command you, in His Majesty's name, forthwith to apprehend the said
and to bring him before me, or some other judge under the said
Act, to be further dealt with according to law; for which this shall be your warrant.

Given under my hand and seal at _____ this _____ day of
A.D. _____

FORM TWO

Form of Warrant of Committal

_____;

To wit: —

To _____ one of the constables of _____ and to the
keeper of the _____ at _____

Be it remembered that on this _____ day of _____ in the year
_____ at _____ is brought before me _____ a
judge under the Extradition Act, _____ who has been apprehended
under the said Act, to be dealt with according to law; and forasmuch as I have determined
that he should be surrendered in pursuance of the said Act, on the ground of his being accused
(or convicted) of the crime of _____ within the jurisdiction of _____

This is therefore to command you the said constable, in His Majesty's name, forthwith to
convey and deliver the said _____ into the custody of the keeper of the
_____ at _____ and you, the said keeper to receive the said
_____ into your custody, and him there safely to keep until he is thence
delivered pursuant to the provisions of the said Act, for which this shall be your warrant.

Given under my hand and seal at _____ this _____ day of _____

A.D.

FORM THREE

Form of Order of Minister of Justice for Surrender

To the keeper of the _____ at _____ and to _____

Whereas _____ late of _____ accused (or convicted)
of the crime of _____ within the jurisdiction of _____ was
delivered into the custody of you, the keeper of the _____ at _____
by warrant dated _____ pursuant to the Extradition Act.

Now I do hereby, in pursuance of the said Act, order you, the said keeper, to deliver the
said _____ into the custody of the said _____; and

I command you, the said _____ to receive the said
_____ into your custody, and to convey him within the jurisdiction of the said
_____ and there place him in the custody of any person or persons (or of
_____) appointed by the said _____ to receive
him; for which this shall be your warrant.

Given under the hand and seal of the undersigned Minister of Justice of Canada, this
day of _____ A.D.

R. S., c. 155, Sch. 2.

THIRD SCHEDULE

- (1) Murder, or attempt or conspiracy to murder;
- (2) Manslaughter;
- (3) Counterfeiting or altering money and uttering counterfeit or altered money;
- (4) Forgery, counterfeiting or altering, or uttering what is forged, counterfeited or altered;
- (5) Larceny or theft;
- (6) Embezzlement;
- (7) Obtaining money or goods or valuable securities by false pretenses;
- (8) Rape;
- (9) Abduction; indecent assault;
- (10) Child stealing;
- (11) Kidnapping;
- (12) Burglary, house breaking or shop breaking;
- (13) Arson;

- (14) Robbery;
- (15) Fraud committed by a bailee, banker, agent, factor, trustee or member or public officer of any company or municipal corporation, made criminal by any law for the time being in force;
- (16) Any malicious act done with intent to endanger persons in a railway train;
- (17) Piracy by municipal law or law of nations, committed on board of or against a vessel of a foreign state;
- (18) Criminal scuttling or destroying such a vessel at sea, whether on the high seas or on the great lakes of North America, or attempting or conspiring to do so;
- (19) Assault on board such a vessel at sea, whether on the high seas or on the great lakes of North America, with intent to destroy life or to do grievous bodily harm;
- (20) Revolt, or conspiracy to revolt, by two or more persons, on board such a vessel at sea, whether on the high seas or on the great lakes of North America, against the authority of the master;
- (21) Administering drugs or using instruments with intent to procure the miscarriage of a woman;
- (22) Any offence which is, in the case of the principal offender, included in any foregoing portion of this schedule, and for which the fugitive criminal, though not the principal, is liable to be tried or punished as if he were the principal. R. S., c. 155, Sch. 3.

5. Chile

CODE OF PENAL PROCEDURE, BOOK III, TITLE 6, REGARDING EXTRADITION¹

I. REGARDING ACTIVE EXTRADITION (EXTRADITION REQUESTED BY CHILE)

Article 683. When in the course of court proceedings, a Chilean citizen resident in a foreign country is found to be involved as defendant (*reo*) in a criminal case in which corporal punishment is applied, the judge in the case will submit the antecedents to the Supreme Court of Justice to the end that that court may declare whether the extradition of the defendant must be asked of the Government of the country in which the said defendant is actually found.

The same procedure will be employed with respect to the defendants of other nationality or to those responsible for a crime (*simple delito*), in the cases enumerated in Article 2 of this Code and in those specified in treaties concluded with other nations.

Article 684. In order that the judge of a Court of First Instance may submit the proceedings to the Supreme Court, it will be necessary that a definitive order of imprisonment or a definitive sentence against the defendant whose extradition is sought may have been issued previously.

There must also be recorded in the proceedings the country and place in which the defendant may actually be found.

Article 685. When the Supreme Court receives the proceedings, it will forward them for review to the *Fiscal* of the court who will express an opinion as to whether or not extradition can be petitioned in conformity with the treaties concluded with the nation in which the defendant has sought refuge or, in the absence of a treaty, in accordance with the principles of international law.

Article 686. After the *Ministerio Público* has expressed its opinion, the court will hear the case without other formality than placing it on the docket, and it will resolve in a substantiated sentence whether or not to proceed with the request for extradition.

Article 687. In an affirmative case, the Supreme Court will address the Ministry of Foreign Relations, transmitting a copy of the sentence to which the previous article refers and asking that there be carried out the diplomatic proceedings which may be necessary in order to obtain the extradition.

¹ Unofficial translation.

It will also transmit a legalized copy of the evidence which was the basis for issuing the order of imprisonment of the defendant, or of the definitive sentence which may have been pronounced in the case if it refers to a convicted criminal (*reo rematado*).

Article 688. The Ministry of Foreign Relations, after legalizing the accompanying documents, will carry out the proceedings necessary to comply with the resolution of the Supreme Court; and if it should obtain the extradition of the defendant it will have him brought from the country where he may be and placed at the disposition of that court.

Article 689. In the case to which the preceding article refers, the Supreme Court will order that the defendant be placed at the disposition of the judge of the case to whom the respective proceedings will be returned to the end that the trial may continue; or that the criminal serve his sentence if a definitive sentence has already been pronounced.

Article 690. If the Supreme Court should declare the non-existence of grounds for extradition, or if it should not be granted by the authorities of the nation in which the defendant has taken refuge, the proceedings will be returned to the judge of the case so that he may proceed in the manner prescribed by the law with respect to those who are absent.

Article 691. If the proceedings should involve a defendant who may be abroad and other defendants within the country, the preceding provisions will be observed with respect to the former, and without prejudice to the fulfillment thereof, the trial of the defendants within the country will continue without interruption. In such case a copy of the proceedings will be submitted to the Supreme Court.

If the defendant should be surrendered the provisions in Article 647 will be observed in so far as may be applicable.

II. REGARDING PASSIVE EXTRADITION (EXTRADITION REQUESTED OF CHILE)

Article 692. When the Government of a foreign country requests the Government of Chile for the extradition of individuals who may be found here and who may be proceeded against or convicted there, the Ministry of Foreign Relations will transmit the petition and the antecedents to the Supreme Court so that it may pronounce thereon.

If the Ministry, by virtue of treaties with the requisitioning nation, may have had the defendant arrested, it will order him placed at the disposition of the said court.

Article 693. When the antecedents have been received, the Supreme Court will order that they be delivered to the judge upon whom it may devolve to examine, in first instance, the petition for extradition.

Article 694. If the antecedents give grounds the judge will declare the arrest of the defendant. In other cases he will receive the information which may be furnished by the one charged with requesting the extradition.

In order to decree the arrest the judge will proceed in conformity with the provisions of Paragraph II of Title IV, First Part, of Book II.

Article 695. The investigation shall cover especially the following points:

1st. To establish the identity of the defendant;

2nd. To establish whether the crime imputed to him is of those which authorize extradition in accordance with existing treaties or, in the absence of such treaties, in conformity with the principles of international law;

3rd. To establish whether the one accused of a crime has or has not committed the offense attributed to him.

Article 696. Without the necessity of previous information regarding points 2 and 3, specified in the preceding article, the arrest of the accused will be decreed as soon as his identity is established, provided that there is presented the sentence which may have condemned him or the decree of imprisonment issued against him by the court hearing the case, and provided that the crime imputed is of those which authorize extradition and that the order of imprisonment is founded on reasons which make presumptive the culpability of the defendant.

Article 697. When the defendant has been apprehended, a declaration will be taken from

him concerning his identity and his participation in the offense imputed to him. If in verifying his assertions there should be required the testimony of persons who may be found in Chile, the judge hearing the case will issue the summonses which he may consider conducive, and he may commission the respective judge to take declarations from witnesses who may reside outside of the Department of Santiago.

Article 698. During the hearing temporary liberty will not be granted.

Article 699. When the investigation has been concluded, the antecedents will be communicated to the *Ministerio Público* who, in view thereof and in accordance with the treaties or principles of international law, will ask that the requested extradition be granted or refused.

Article 700. The opinion of the *Fiscal* will be communicated to the defendant for answer within a reasonable time which can be extended but which in no case may exceed twenty days; and with his answer, or in default thereof, he will be cited to hear sentence.

If the requisitioning Government may have delegated some person to conduct the formalities of extradition, this person will be heard in the first place, followed by the defendant and lastly by the *Ministerio Público*.

Article 701. The judge will pronounce sentence within five days, which will be submitted to the court for confirmation (*en consulta*), if it should not be appealed.

Article 702. In second instance, there will be ordered brought before the court the documents relating to the summoning of the defendant, of the *Fiscal* and of the one delegated by the requisitioning Government, if there should be one; and the case will be tried in regular session (*forma ordinaria*), hearing the oral pleas which any of the said persons may care to make. This procedure will be observed whether the review (*revision*) is made in the form of an appeal or in the form of confirmation (*en consulta*).

Article 703. When the sentence of the Supreme Court approves the extradition, it will be ordered by the judge *a quo* that the defendant be placed at the disposition of the Ministry of Foreign Relations to the end that he may be surrendered to the diplomatic agent who may have requested the extradition.

But if the sentence denies the extradition, the same judge will proceed to place the defendant at liberty, and the court will communicate to the Ministry of Foreign Relations the result of the proceedings, including a legalized copy of the sentence which has been pronounced.

Article 704. A definitive stay of proceedings will be ordered at any point during the trial when it may be communicated to the court that the requisitioning Government desists in its reclamation.

Note: The *Fiscal de la Corte Suprema* is an officer of the *Oficina del Ministerio Público*, the duties and organization of which are described fully in Title XIII of the *Ley de Organización y Atribuciones de los Tribunales*. This law is contained in the *Códigos de Chile*, edited by E. Rojas Mery, a copy of which is in the Library of the Department of State. There does not seem to be an equivalent term for *Fiscal* under American jurisprudence, but it would appear that his duties, in many respects, are similar to those of an officer of the Attorney-General's office. Specifically he is charged by the court with preparing a legal opinion as to the applicability of the pertinent laws in the case being heard. However, he renders only advisory opinions, and the court can either accept or reject the same as it sees fit. The Spanish title *Fiscal* in this case should not be confused with the English word "fiscal" relating to financial matters.

The term *reo* used in the Spanish text is a most comprehensive word and has no equivalent translation. It includes the English terms "accused," "defendant" up to "convicted criminal." Under Chilean jurisprudence a person is declared a *reo* by the judge only after diligent examination of the evidence and testimony and the conclusion is reached that there are grounds for conviction. It is roughly equivalent to a person in the United States who has been indicted for a crime, but the designation continues right through to conviction.

6. France

LAW OF MARCH 10, 1927¹

TITLE I

CONDITIONS OF EXTRADITION

Article 1. In the absence of a treaty, the conditions, the procedure and the effects of extradition are determined by the provisions of the present law.

The present law applies as well to matters which are not regulated by treaties.

Art. 2. No surrender may be made of persons of a Foreign government who have not been the object of prosecution or conviction for an offense envisaged by the present law.

Art. 3. The French Government may deliver to foreign Governments, at their request, every person not French or french *ressortissant*, who, being the object of prosecution initiated in the name of the requesting State or convicted by its tribunals, is found in the territory of the Republic or of its colonial possessions.

Nevertheless, extradition is granted only if the offense which is the basis of the request has been committed:

Either within the territory of the requesting State by a subject of that State or an alien;
Or outside of its territory by a subject of that State;

Or outside of its territory by a person, an alien to that State, when the offense is one of the number of those of which the French law authorizes prosecution in France, even though they have been committed by an alien abroad.

Art. 4. The acts which may give rise to extradition, whether it is a question of requesting it or granting it, are the following:

1. All acts punished by a criminal penalty under the law of the requesting State;

2. Acts punished by a correctional penalty (*peines correctionnelles*) under the law of the requesting State, when the maximum penalty incurred is, by the terms of that law, two years or more, or, in the case of a convicted person, when the penalty pronounced under the law of the requesting State is equal to or greater than two months of imprisonment.

In no case is extradition granted by the French Government if the act is not punished under the French law by a criminal or correctional penalty.

Acts constituting an attempt or complicity are subject to the preceding rules on the condition that they are punishable under the law of the requesting State and under that of the requested State.

If the request is based upon several offenses committed by the person claimed and which have not yet been the subject of judicial determination, extradition is granted only if the maximum penalty incurred under the law of the requested State for these offenses taken together is equal to or greater than two years of imprisonment.

If the person claimed has been previously the object in any country of a final sentence of two months or more of imprisonment for a common offense (*un délit de droit commun*), extradition is granted following the preceding rules, that is to say, only for crimes or offenses without regard to the extent of the penalty incurred by or pronounced for the last infraction.

The preceding provisions apply to offenses committed by soldiers, sailors or the like, when they are punished under the French law as common offenses.

No change is hereby made as to the procedure relative to the surrender of deserting sailors.

Art. 5. Extradition is not granted:

1. When the person, the object of the request, is a French citizen or a person under French protection, the status of citizen or of protected person being determined as of the time of the offense for which the extradition is requested.

2. When the crime or offense has a political character or when it is clear (*resulte*) from the circumstances that the extradition is requested for a political end.

¹ Unofficial translation.

As to acts committed in the course of an insurrection or a civil war by one or the other of the parties engaged in the conflict and in the furtherance (*dans l'intérêt*) of its purpose, they may not be grounds for extradition unless they constitute acts of odious barbarism and vandalism prohibited by the laws of war, and only when the civil war has ended.

3. When the crimes or offenses have been committed in France or in French colonial possessions.

4. When the crimes or offenses, though committed outside of France or the French colonial possessions, have been there prosecuted to final judgment.

5. When, according to the law of the requesting State or according to that of the requested State, prescription of the action has taken effect previous to the request for extradition, or prescription of the punishment has taken effect previous to the arrest of the person claimed and, in general, whenever action on behalf of the requesting State would be extinguished.

Art. 6. If for a *single* offense extradition is requested concurrently by several States, it is granted in preference to the State against whose interests the offense was directed or to the one within whose territory it was committed.

If the concurrent requests have for their bases different offenses, all the circumstantial facts have to be taken into account in order to decide as to priority, especially:

The relative gravity and the place of the offenses, the respective dates of the requests, the obligation which would be undertaken by one of the requesting States of subsequent re-extradition.

Art. 7. Subject to limitation by the exceptions provided for hereafter, extradition is only granted on the condition that the extradited person shall be neither prosecuted nor punished for an offense other than that which motivated the extradition.

Art. 8. In the case where an alien is being prosecuted or has been convicted in France and where his extradition is requested of the French Government because of a different offense, the surrender can be affected only after the prosecution has been terminated and, in the case of conviction, after the penalty has been executed.

However, this provision does not create an obstacle to an alien being sent temporarily in order to appear before the tribunals of the requesting State on the express condition that he shall be sent back as soon as the judicial procedure abroad has been terminated.

The provisions of this article govern the case where an alien is subjected to a writ of arrest for debt (*soumis à la contrainte par corps*), by the application of the laws of July 22, 1867, and December 19, 1871.

TITLE II

EXTRADITION PROCEDURE

Art. 9. Every request for extradition shall be presented to the French Government through the diplomatic channels and shall be accompanied either by a judgment or a decree of conviction, even by default or *par contumace*, or a document of criminal procedure which formally decrees or legally effects the subjection of the person charged or accused to *criminal jurisdiction* (*opérant de plein droit le renvoi de l'inculpé ou de l'accusé devant la juridiction répressive*), or by a warrant of arrest, or by any other document having the same force and issued by the judicial authorities, in so far as the latter contain the precise indication of the act on account of which they are delivered and the date of that act.

The papers mentioned above must be produced in original or in authentic copy.

The requesting Government must furnish at the same time a copy of the texts of the law applicable to the act charged. It may add a statement of the facts of the case.

Art. 10. The request for extradition is, after verification of the papers, transmitted together with the papers (*dossier*) by the Minister for Foreign Affairs to the Minister of Justice who assures himself of the regularity of the request and proceeds with it according to law.

Art. 11. Within twenty-four hours of the arrest, the Procurator of the Republic or a member of his staff (*parquet*), shall proceed to the interrogation as to identity, of which there shall be kept a *procès-verbal*.

Art. 12. The alien shall be transferred as soon as possible to and registered in the place of detention in the headquarters (*chef-lieu*) of the Court of Appeals in whose district he was arrested.

Art. 13. The papers furnished in support of the request for extradition shall be transmitted at the same time by the Procurator of the Republic to the Procurator-General. Within twenty-four hours of their receipt the grounds on which the arrest has taken place shall be made known to the alien.

The Procurator-General, or a member of his staff, within the same period shall proceed to the interrogation, of which there shall be kept a *procès-verbal*.

Art. 14. The *Chambre des mises en accusation* has laid before it without delay the mentioned *procès-verbaux* and all other documents. The alien shall appear before it not later than eight days from the receipt of the documents. At the request of the representative of the State or of the person appearing, an additional period of eight days may be granted before the hearing. The court shall then proceed to an interrogation, of which shall be kept a *procès-verbal*. The hearing is public, unless it has been decided otherwise upon the request of the representative of the State or of the person appearing.

The representative of the State and the person interested shall be heard. The latter may be assisted by a licensed lawyer (*avocat inscrit*) and an interpreter. He may be provisionally set at liberty any time during the procedure in accordance with the rules which govern the matter.

Art. 15. If, upon his appearance, the person interested declares his renunciation of the benefit of the present law and consents formally to be delivered to the authorities of the requesting State, he is given by the court a certificate of this declaration.

A copy of this decision shall be transmitted without delay, at the initiative of the Procurator-General, to the Minister of Justice for all practical purposes.

Art. 16. In the contrary case, the *Chambre des mises en accusation* gives its reasoned decision, not subject to an appeal, as to the request for extradition.

This decision is unfavorable if the court finds that the legal conditions are not met or there is an evident error.

The *dossier* must be sent to the Minister of Justice within a period of eight days from the day of the expiration of the period provided for by Article 14.

Art. 17. If the reasoned decision of the *Chambre des mises en accusation* denies the request for extradition, this decision is final and the extradition may not be granted.

Art. 18. In the contrary case, the Minister of Justice, if there is ground for it, submits for the signature of the President of the Republic a decree authorizing the extradition. If within the period of one month from the communication of this document, the extradited person has not been taken by the agents of the requesting power, he is set free, and may not be claimed for the same act (*cause*).

Art. 19. In an urgent case and upon the direct request of the judicial authorities of the requesting country, the procurators of the Republic may order a provisional arrest of the alien upon a simple notice of the existence of one of the documents indicated by Article 9, communicated either by mail, or by any more rapid means of communication leaving a written record (*une trace écrite*).

A regular notice of the request shall be at the same time communicated through the diplomatic channels by mail, telegraph or any means of communication leaving a written record, to the Minister for Foreign Affairs.

The procurators of the Republic must give notice of this arrest to the Minister of Justice and to the Procurator-General.

Art. 20. The person arrested provisionally, under the conditions provided for by Article 12, may, if there is no ground for applying to him Articles 7, 8 and 9 of the law of December 3, 1849, be set at liberty, if the French Government does not receive, within a period of twenty days from the date of his arrest, one of the documents mentioned in Article 9, and if his arrest was effected upon the request of the Government of a bordering country.

The aforesaid period of twenty days may be extended to one month, if the territory of the requesting State is not bordering, and to three months if the territory is outside of Europe.

The liberation shall be pronounced upon a request addressed to the *Chambre des mises en accusation*, not subject to an appeal, within eight days. If eventually the afore-mentioned documents reach the French Government, the procedure is reopened in accordance with Article 10 and those following.

TITLE III

EFFECTS OF EXTRADITION

Art. 21. The person extradited may not be prosecuted or punished for an offense previous to the surrender, other than that which motivates the extradition.

It is otherwise, in the case of a special consent given on the following conditions by the requested State.

This consent may be given by the French Government, even in the case where the act which causes the request is not one of the offenses set forth by Article 4 of the present law.

Art. 22. In the case where the requesting Government seeks authorization for prosecution of the person already surrendered for an offense previous to the extradition, the decision of the *Chambre des mises en accusation* before which the person accused had appeared may be formulated upon mere presentation of the documents communicated in support of the new request.

There shall be communicated as well by the foreign Government and submitted to the *Chambre des mises en accusation* the documents containing the observations of the person surrendered or the declaration of his intent not to present any. These explanations may be completed by a lawyer chosen by him or who is assigned or acts by virtue of his office (*désigné ou commi d'office*).

Art. 23. Extradition obtained by the French Government is null if it has been procured (*intervenue*) in the cases not provided for by the present law.

The nullity is declared by action of the examining authority on its own initiative (*même d'office, par la juridiction d'instruction*), or by a judgment on the motion of the extradited person after his surrender.

If the extradition has been granted by virtue of a judicial decree (*d'un arrêt*) or a final judgment, the nullity is declared by the *Chambre des mises en accusation* in whose district the surrender took place.

The request for nullification formulated by the extradited person is only admissible if it is presented within a period of three days from the communication of the notice sent to him by the procurator of the Republic immediately after he has been taken into custody. The extradited person is informed, at the same time, as to the law which applies to him at his election, or as to having counsel assigned.

Art. 24. The same authorities judge as to the qualification given the acts which have motivated the request for extradition.

Art. 25. In the case where the extradition has been annulled, the extradited person, if he has not been claimed by the requested Government, is set at liberty, and cannot be detained again either for the acts which motivated the extradition or for acts previous to these, except when he is arrested in French territory after thirty days from his liberation.

Art. 26. The surrendered person is considered to be subjected without reservation to the application of the law of the requesting State in respect to any act previous to the extradition and different from the offense which motivated that measure, if he has had the possibility of leaving the territory of that State for thirty days from his final liberation.

Art. 27. In the case when the extradition of an alien has been obtained by the French Government and the Government of a third State solicits in its turn the extradition of the same person from the French Government, by reason of an act previous to the extradition and other than that judicially passed upon in France and not connected with that act, the

Government yields to that request, if there is a ground for it, only after being assured of the consent of the State by which the extradition was granted.

However, this reservation is not applicable when the extradited person has had the possibility of leaving French territory for the period of time fixed in the preceding article.

TITLE IV

CERTAIN ACCESSORY PROCEDURE

Art. 28. Extradition in transit through French territory or by transportation on a vessel of the French maritime services of a person of any nationality surrendered by another Government is authorized upon the mere request presented through diplomatic channels (and) supported by documents sufficient to establish that it does not concern a political or purely military offense.

This authorization may be given only to the Powers which accord within their territory the same privilege to the French Government.

The passage is effected under the direction of French agents and at the expense of the requesting Government.

Art. 29. The *Chambre des mises en accusation* decides whether or not there is ground for delivery to the requesting Government, in all or in part, of papers (*titres*), valuables, money or other seized articles.

Such delivery may take place even if the extradition cannot be effected as a result of the escape or the death of the person claimed.

The *Chambre des mises en accusation* orders the restitution of the papers and other articles enumerated above which do not refer to the act charged to the alien. It decides, if the case calls for it, upon the claim of third persons interested and others having rights.

The decisions provided for by the present article are not subject to any review.

Art. 30. In the case of non-political criminal prosecutions in a foreign State, *commissions rogatoires* by the foreign authorities are received through diplomatic channels and forwarded to the Ministry of Justice in the forms envisaged by Article 10. The *commissions rogatoires* are executed, if there is ground for it and in accordance with the French law.

In a case of urgency, they may be the object of direct communication between the judicial authorities of the two States in the forms envisaged by Article 19. In such a case, the direct communication between the judicial authorities of the two States shall not be acted upon in the absence of a notice given by the interested foreign Government through diplomatic channels to the French Ministry for Foreign Affairs.

Art. 31. When, in connection with a criminal prosecution being conducted abroad, a foreign Government finds it necessary to notify a person residing within French territory of an act of procedure or of a judgment, the document is sent following the forms envisaged by Articles 9 and 10, accompanied, if necessary, by a French translation. The notification is made personally at the request of the public prosecutor by a competent officer. The original with the record of notification is sent back through the same channel to the requesting Government.

Art. 32. When, in a criminal action being brought abroad, the foreign Government finds necessary the communication of records of sentence or documents which are in the hands of the French authorities, the request is made through diplomatic channels. It is acted upon, unless there are particular circumstances opposing it, and under the obligation of sending back the papers and documents as soon as possible.

Art. 33. If in a criminal action the personal appearance of a witness residing in France is judged necessary by a foreign Government, the French Government, having received the summons through diplomatic channels, undertakes to grant the request addressed to it.

However, the summons is received and given effect only on the condition that the witness will not be prosecuted or detained for acts or on account of convictions previous to his appearance.

Art. 34. The sending of detained persons for the purpose of confrontation is to be requested through diplomatic channels. The request is acted upon, unless there are particular circumstances opposing it, and on the condition that the aforementioned detained persons will be sent back as soon as possible.

Art. 35. The governors of French colonies may on their own responsibility, and under the duty of giving account without delay to the Minister of Colonies, decide upon requests for extradition which are presented to them either by foreign Governments or by the governors of foreign colonies.

The request is formulated either by the principal consular agent of the requesting State, or by the governor of the colony.

The request is entertained only on the conditions envisaged by Articles 3, 4 and 5 of the present law. Reciprocity may be demanded.

Moreover, the governors may exercise the rights conferred by Articles 28, 29, 30, 31, 32, 33 and 34.

The present law, debated and adopted by the Senate and the Chamber of Deputies, is to be executed as the law of the State.

Done at Paris, March 10, 1927.

7. Germany

EXTRADITION LAW OF DECEMBER 23, 1929¹

The *Reichstag* has voted the following law which with the consent of the *Reichsrat* is hereby promulgated:

FIRST SECTION

EXTRADITION AND EXTRADITION IN TRANSIT

Article 1. An alien who is sought by the authorities of a foreign State for, or has been convicted of, a punishable act, may be extradited, at the request of a competent authority, to the government of that State for prosecution or punishment.

Art. 2. (1) The extradition is permissible only for an act which under German law is either a crime (*Verbrechen*) or an offense (*Vergehen*).

(2) The extradition is not permissible if the act under German law is punishable only under the Military Penal Law (*Militärstrafgesetzen*), or is punishable only by a fine which may not be converted into a penalty of imprisonment.

Art. 3. (1) The extradition is not permissible if the act which would be the basis of the extradition is political, or if it is connected with a political act in such a manner that it was meant thereby to prepare for, secure, conceal or prevent the latter.

(2) Political acts are those punishable offenses (*Angriffe*) which are directed immediately against the existence of the security of the State, against the head or a member of the government of the State, as such, against a body provided for by the constitution, against the rights of citizens in electing or voting, or against the good relations with foreign States.

(3) The extradition is permissible if the act constitutes a deliberate offense (*Verbrechen*) against life, unless committed in open combat.

Art. 4. The extradition is not permissible:

1. If reciprocity is not guaranteed;
2. If the prosecution or punishment for the act would not be permissible under German law, because of prescription (*Verjährung*), amnesty or other reasons.

3. If the act is within German jurisdiction (*Gerichtsbarkheit*) and a judgment has been rendered by German authorities against the person sought (*Verfolgten*) or if the prosecution has been discontinued before trial.

Art. 5. The extradition is permissible only if there is submitted a warrant of arrest

¹ Reichsgesetzblatt 1, Teil 1, 1929, S. 239. Unofficial translation.

(*Haftbefehl*), or the decision of a competent authority of the foreign State for criminal prosecution (*vollstreckbare Straferkenntnis*) relative to the act.

Art. 6. The extradition is permissible only if there is a guarantee that, without the consent of Germany, the person extradited shall not be subjected, in the State to which he has been extradited, to investigation or punished or extradited to a third State for an act committed before the extradition, for which the extradition is not granted, or be restrained in his personal liberty for any other judicial reason which arose before the extradition, unless he does not leave the territory of the foreign Government within one month following the day of his liberation, or returns thereto after he has left it, or is re-extradited by a third Government.

Art. 7. The extradition may be granted only if the court declares it permissible, or if the person sought declares his consent to by a *procès-verbal* (*zu Protokoll*) before a judge.

Art. 8. (1) The state's attorney (*Staatsanwalt*) of the Superior Provincial Court (*Oberlandesgericht*) prepares the decision as to the extradition and executes the extradition granted.

(2) The Superior Provincial Court is competent to render the judicial decision as to the permissibility of the extradition.

Art. 9. (1) Territorial competency vests in the state's attorney and in the Superior Provincial Court in whose district the person sought is arrested, or, if an arrest did not take place, in whose district he was found.

(2) If several persons, who are to be extradited for authorship, participation, assistance or concealment (*Hehler.i*) in regard to the same act, are arrested or found in the districts of various Superior Provincial Courts, the state's attorney and the Superior Provincial Court who first took jurisdiction of the case shall proceed with it.

(3) If the whereabouts of the person sought is unknown, the supreme court of Reich (*Reichsgericht*) shall determine the state's attorney and the Superior Provincial Court which will deal with the case at the outset. If the person sought is arrested or found, the territorial competency as to further proceedings is determined in conformity with Par. 1.

Art. 10. (1) An alien may be arrested for the purpose of extradition to a foreign Government after the receipt of the requisition for extradition, if there is the danger that he will evade the proceedings for extradition, or the execution of it, or if there are circumstances which lead to the conclusion that he would render difficult the means of establishing the truth in the criminal proceedings pending against him; the circumstances must be set forth in the documents. (Arrest for extradition—*Auslieferungshaft*.) This does not apply if the extradition appears at the outset to be not permissible.

(2) The arrest for extradition may be ordered under the conditions set forth in Par. 1, even before the receipt of the requisition for extradition, if a competent authority of a foreign State so requests, or if an alien appears under strong suspicion of having committed an act for which extradition is permissible. (Provisional arrest for extradition—*vorläufige Auslieferungshaft*.)

Art. 11. The Superior Provincial Court determines as to the order (*Anordnung*), maintenance (*Aufrechterhaltung*), execution (*Vollstreckung*) or cancellation (*Aufhebung*) of the arrest for extradition and of the provisional arrest for extradition.

Art. 12. (1) The arrest for extradition and the provisional arrest for extradition shall be ordered by a written warrant of arrest (*Haftbefehl*).

(2) In the warrant of arrest the person sought and the reason for his arrest shall be indicated. It shall be also set forth to what State and for what act the person sought is to be extradited.

Art. 13. (1) The warrant of arrest shall be communicated, if possible, to the person sought at the time of the arrest. If such communication is oral, the person sought is to be told that at his request, a written copy of it will be given to him. If such communication does not take place at the time of the arrest, the reason for the arrest shall be provisionally made known to the person sought. The communication of the warrant of arrest shall take place in this case without delay.

(2) The person sought shall be given an opportunity to notify his relatives of his arrest or,

in so far as he finds it of essential importance, other persons, provided that this does not impair the purpose of the arrest.

Art. 14. The person sought shall be brought without delay, and not later than the day following his arrest, before the nearest local judge (*Amtsrichter*). The judge shall question him without delay and not later than the following day.

Art. 15. (1) At the questioning (*Vernehmung*), the personal situation of the person sought, particularly his nationality, is to be established; he is to be given an opportunity to express himself as to the charge brought against him.

(2) At the questioning the person sought is to be asked further whether he raises any objections to the warrant of arrest and, likewise, he is to be invited to assert the facts which speak against the warrant of arrest, or its execution.

(3) If it appears at the questioning that the warrant of arrest has been withdrawn, or the person arrested is not the person sought in the warrant of arrest, the person arrested shall be set free without delay.

Art. 16. (1) The Superior Provincial Court decides as to the objections of the person sought to the warrant of arrest.

(2) The Superior Provincial Court may order that the execution of the warrant of arrest be discontinued, if the person sought has furnished security that he will not evade the extradition proceedings, nor the execution of the extradition.

(3) Articles 118 to 121 and Art. 122, Par. 1, Par. 2, Sent. 1, and Par. 3 of the Code of Criminal Procedure (*Strafprozessordnung*) apply correspondingly.

(4) The decisions are to be communicated to the person sought.

Art. 17. (1) The warrant of arrest is to be cancelled if the reason given for the arrest has disappeared, or if the extradition has been pronounced not permissible.

(2) The warrant of arrest is also to be cancelled if the state's attorney so requests. At the same time that he presents the request the state's attorney may order the discharge of the person sought.

Art. 18. (1) If the person sought finds himself under a provisional arrest for extradition, the Superior Provincial Court shall without delay, upon the receipt of the requisition for extradition, make a decision as to the continuation of the arrest for extradition.

(2) The state's attorney requests the cancellation (*Aufhebung*) of the warrant of arrest if the person sought has been under provisional arrest for extradition for one month since the day of his arrest without the Superior Provincial Court having reached a decision as to the continuance of the arrest.

(3) The Superior Provincial Court may at the request of the state's attorney prolong the duration of the provisional arrest for extradition for one month, if the detention has been requested by a State situated outside of Europe.

(4) The decisions are to be communicated to the person sought.

Art. 19. If the provisional arrest for extradition has been terminated in consequence of the lapse of time (*Fristablauf*) as provided by Art. 18, Pars. 2 and 3, the same may not be ordered again.

Art. 20. If the person sought is under arrest for extradition, the Superior Provincial Court in virtue of its authority shall determine before the end of each period of two months from the day of the arrest, or from the day of the last decision ordering the continuation of the arrest for extradition, whether the arrest for extradition shall be maintained.

Art. 21. (1) If the conditions for a provisional arrest for extradition or for an arrest for extradition are present, the state's attorney and any officer of the police and public safety service (*Sicherheitsdienst*) may arrest or have arrested an alien; under the provisions of Art. 127, Par. 1, of the Code of Criminal Procedure anyone has the right to arrest.

(2) Articles 14 and 15, Pars. 1 and 2, apply correspondingly. If at the questioning it is discovered that the order of arrest (*Festnahmeersuchen*) has been withdrawn, or that the person arrested is not the person indicated in the order (*Ersuchen*), he shall be discharged without delay.

(3) The Superior Provincial Court makes the decision as to the order for the provisional arrest for extradition, or for the arrest for extradition.

Art. 22. (1) To the provisional arrest for extradition and the arrest for extradition, as well as to the arrest as provided for by Art. 21, the provisions of the Code of Criminal Procedure regulating the execution of the arrest for examination (*Untersuchungshaft*) apply correspondingly.

(2) The state's attorney for the Superior Provincial Court determines the institution (*Anstalt*) in which the person sought is to be kept.

(3) The necessary judicial decisions (*erforderlichen richterlichen Verfügungen*) are made by the presiding judge of the court.

Art. 23. (1) If the provisional arrest for extradition or the arrest for extradition is ordered, but the whereabouts of the person sought is unknown, the state's attorney for the Superior Provincial Court may issue a writ of arrest (*Steckbrief*).

(2) The writ of arrest shall contain, as far as possible, a description of the person sought and set forth the grounds for the arrest.

(3) If the person sought is arrested under the writ of arrest, the subsequent procedure shall conform to Arts. 13 to 15.

Art. 24. After the receipt of the requisition for extradition, the state's attorney requests the local judge, competent under Art. 162 of the Code of Criminal Procedure, to question the person sought. At the questioning the person sought is to be given opportunity to express himself as to the requisition. He has to be questioned, also, whether he consents to the extradition.

Art. 25. (1) If the person sought has not declared his consent to the extradition in *procès-verbal* before a judge, the state's attorney requests the decision of the Superior Provincial Court as to whether or not the extradition is permissible.

(2) The state's attorney may also request the decision of the Superior Provincial Court even if the person sought has declared his consent to the extradition.

Art. 26. (1) The Superior Provincial Court may, before the decision, question the person sought and take evidence as to the permissibility of the extradition; it may authorize an appointed (*beauftragten*) judge, or one called in (*ersuchten*), to conduct the questioning and take the evidence. It may also order a hearing (*mündliche Verhandlung*).

(2) The state's attorney, the person sought and his counsel are to be notified as to the place and time of the taking of evidence or of the hearing. If the person sought is not at liberty, he is to be brought to the taking of evidence or to the hearing, unless he has renounced his right of presence, or a great distance, or sickness of the person sought, or other irremovable obstacles stand in the way of his being present.

(3) At the hearing the state's attorney must be present. If the person sought has not been brought to the hearing, a counsel must represent his rights. At the hearing the parties are to be given opportunity to express their views of the matter. Art. 245, Par. 1, of the Code of Criminal Procedure applies correspondingly; as for the rest, the court determines the nature and extent of the evidence to be taken, without being bound by any demands (*Anträge*), renunciations (*Verzichte*), or previous decisions (*Beschlüsse*). A record (*Protokoll*) is to be made of the hearing.

Art. 27. (1) If the Superior Provincial Court finds that a decision of the Supreme Court (*Reichsgericht*) is desirable in order to clarify a question of law of fundamental importance, or if it desires to deviate from a decision of the Supreme Court on a question of law in matters of extradition, made after this law came into force, it states its opinion and obtains the decision of the Supreme Court on the question of law.

(2) The decision of the Supreme Court is also obtained, if the Attorney General (*Oberreichsanwalt*) or the state's attorney requests it for the clarification of a question of law.

(3) The decision of the Supreme Court on the matter is binding on the Superior Provincial Court. It is adopted without a hearing (*mündliche Verhandlung*).

Art. 28. The reasons are to be set forth for the decision as to the permissibility of the

extradition. It is final. It is to be communicated to the state's attorney and the person sought.

Art. 29. (1) If, after the court has declared the extradition permissible, circumstances arise which permit the appearance of doubt as to the continued existence of the grounds for permissibility, the court, at the request of the state's attorney or the person sought, has to render a new decision as to the permissibility of the extradition.

(2) The court can order a postponement of the execution of the extradition.

(3) For the procedure Arts. 26 to 28 apply.

Art. 30. If the person sought is at liberty, the state's attorney may, for the purpose of executing the extradition, issue a summons (*Vorführungsbefehl*) or a warrant of arrest (*Hafibefehl*). If the person sought evades the execution of the extradition, the state's attorney may issue a writ of arrest (*Steckbrief*).

Art. 31. (1) If the extradition has been executed, and if the foreign Government requests the consent to a criminal prosecution, punishment, or further extradition for an act for which the extradition has not been granted, consent can be given only if the extradition of the person sought for the act would be permissible and the person extradited has declared his consent in a *procès-verbal* before a judge of the foreign State to the measures intended, or the court has decided that the extradition would be permissible.

(2) The proposal for judicial decision is made by the state's attorney who dealt with the extradition. The judicial decision may be rendered also, if the consent of the person sought to the measures intended has been given.

(3) To the procedure Arts. 26 to 29 apply correspondingly, with the modification that the questioning or the appearance of the extradited person may only be ordered with the consent of the state's attorney.

Art. 32. (1) The person sought may at any stage of the proceedings avail himself of the assistance of a lawyer or a professor of law in a German university. The appointment must be communicated to the state's attorney for the Superior Provincial Court.

(2) Should the Superior Provincial Court, in accordance with Art. 26, Par. 1, have ordered a hearing, the presiding judge of the court (*Vorsitzende des Gerichts*) at the same time shall assign for the person sought, who has not chosen counsel, a lawyer to act as counsel at the hearing.

(3) The counsel has access to the documents submitted to the court concerning the extradition. He is permitted to have oral and written communication with the person sought under arrest. The presiding judge of the court may, before the order for a hearing, forbid written communications, if he is not assured of having knowledge of them. He may, before the order for a hearing, order that conversations with the counsel take place in his presence or in that of an appointed judge or one called in.

(4) The assigned lawyer has the duty of accepting this assistance (*Beistandsleistung*).

Art. 33. (1) An alien, who is sought by the authorities of a foreign State for, or has been convicted of, a punishable act, may, upon request of a competent authority of that State, be extradited in transit through the territory of Germany, if the extradition of the person sought would be permissible under Arts. 1 to 6.

(2) To the procedure Arts. 8, 32, Pars. 1 and 3, apply correspondingly with the following modifications:

1. A judicial decision as to the permissibility of the extradition is not required. The Superior Provincial Court, upon request of the state's attorney, determines as to the permissibility of the extradition. Arts. 26 to 31 apply correspondingly; the questioning or appearance of the person sought may only be ordered with the consent of the state's attorney.

2. The Reich's Government Upper House (*Reichsregierung*), with the approval of the *Reichsrat*, determines the territorial jurisdiction of the state's attorney and of the Superior Provincial Court.

3. The extradition in transit may not be granted if the court declares that the extradition would not be permissible.

SECOND SECTION

DELIVERY OF PROPERTY

Art. 34. (1) Upon request of a competent authority of a foreign State, there may be delivered to the government of that State:

1. Articles which may be of importance as evidence in a criminal prosecution in a foreign State;

2. Articles which have been subjected to confiscation (*Einziehung*) or forfeiture (*Verfallerklärung*) in a criminal prosecution in a foreign State;

3. Articles in possession of the person sought which he or an accomplice in a foreign State has acquired by means of the punishable act for which he is sought, or which he has obtained in exchange for such articles;

4. Articles which have been taken over together with the person sought in an extradition in transit.

(2) The delivery is only permissible if reciprocity is guaranteed and if an extradition in the criminal prosecution, for which the delivery is to take place, would be permissible in accordance with Arts. 2, 3 and 4, Pars. 2 and 3.

Art. 35. (1) The delivery is permissible only if the foreign Government is obligated to observe the rights of third persons and, in the case of a reservation made at the delivery, to return upon request without delay the articles delivered.

(2) If the delivery is to take place irrespective of the extradition or extradition in transit of a person sought, it is permissible only if decision for confiscation (*Beschlagnahmebeschluss*) is submitted, which has been issued by a competent authority of the foreign State.

Art. 36. A party interested in the delivery is one who establishes a right in the article.

Art. 37. (1) The state's attorney for the Superior Provincial Court prepares the decision on the delivery and effects the delivery when it is granted.

(2) The Superior Provincial Court decides on the permissibility of the delivery if the state's attorney or an interested party so requests.

(3) If the court declares the delivery permissible, it may charge the interested party, who requested the judicial decision, with the costs resulting to the state [treasury].

Art. 38. (1) If the delivery is to take place together with the extradition, or the extradition in transit of a person sought, territorial competency vests in the state's attorney and the Superior Provincial Court, who are competent as to the proceedings for the extradition or the extradition in transit. If the delivery is to take place irrespective of an extradition or an extradition in transit, the state's attorney and the court are territorially competent in whose district the articles requested are found. If the delivery of several articles which are found in different districts is requested, the state's attorney and the court who first took jurisdiction of the matter shall carry it through.

(2) Articles 26 to 29 and 32, Pars. 1 and 3, Sent. 1, apply correspondingly; the parties interested take the place of the person sought.

Art. 39. (1) Articles whose delivery to a foreign State is permissible, may, after the receipt of the request for the delivery, be taken in custody (*sichergestellt*) or attached (*beschlagnahmt*).

(2) The decisions in accordance with Art. 150 of the Law of Judicial Organization (*Gerichtsverfassungsgesetz*) are rendered upon proposal of the state's attorney for the Superior Provincial Court.

Art. 40. The delivery shall not be granted if the court has declared it not permissible.

THIRD SECTION

OTHER INSTANCES OF JUDICIAL ASSISTANCE IN CRIMINAL MATTERS

Art. 41. (1) Judicial assistance in criminal matters is permissible in other forms than extradition, extradition in transit, or delivery of property, if a competent authority of a foreign State so requests and reciprocity is guaranteed.

(2) Upon the proposal of the state's attorney, the Superior Provincial Court decides whether these conditions are met. The provisions of Art. 25, Par. 1, Sent. 1, Arts. 27 to 29, apply correspondingly. Judicial assistance may not be rendered if the court has declared it not permissible.

(3) Judicial assistance may be especially rendered as follows:

1. Official information, namely information from the criminal record (*Strafregister*), will be communicated;

2. Documents relating to the criminal prosecution will be presented and summonses (*Ladungen*) produced;

3. Acts of investigation will be undertaken, namely, the questioning of persons accused, witnesses and experts, attachment (*Besehlagnahme*), search (*Durehsuchung*), and judicial inspection (*Einnahme des richterlichen Augenseheins*);

4. Arrested persons will be brought to foreign authorities for questioning as witnesses or for confronting other persons.

Art. 42. The authorities requested to render judicial assistance shall fulfill the request, if the conditions are met under which German authorities could request judicial assistance from them. The decisions in accordance with Art. 159 of the Law of Judicial Organization are rendered upon the proposal of the state's attorney for the Superior Provincial Court.

Art. 43. (1) The summoning (*Ladung*) of witnesses or experts to appear before foreign authorities is permissible only if they are obligated not to prosecute or punish the summoned persons, regardless of their nationality, either for authorship, participation, assistance or concealment in connection with the prosecution conducted, or any other criminal act, which was initiated before they had left the territory of Germany, or restrict their personal liberty for any other previously existing judicial reason, unless they do not leave the territory of the foreign Government within one week from the day on which they are released and the departure is possible.

(2) An arrested person may be produced only under corresponding conditions.

FOURTH SECTION

FINAL PROVISIONS

Art. 44. (1) The Reich's Government is competent to decide upon the requests of the foreign Governments.

(2) The Reich's Government may delegate the exercise of its powers to the provincial governments. These have the right of further delegation (*Übertragung*).

Art. 45. The expenses of judicial assistance in criminal matters, incurred by German authorities, may be undertaken by Germany if reciprocity is guaranteed.

Art. 46. (1) Conventions with foreign States on judicial assistance in criminal matters do not need ratification of the *Reichstag*, if they conform to the provisions of this law.

(2) The conventions are to be published in the *Reichsgesetzblatt* and brought to the knowledge of the *Reichstag* in its next session.

Art. 47. To the procedure under this law apply, in so far as it does not stipulate otherwise, the provisions of the Law of Judicial Organization and the Code of Criminal Procedure.

Art. 48. The matters which by this law are assigned to the Supreme Court or to the Superior Provincial Court are decided upon by the criminal division (*Strafsenat*), and those which are assigned to the presiding judge of the court, by the presiding judge of the criminal division.

Art. 49. By the legislation of a state (*Land*) in which there are several Superior Provincial Courts, the functions assigned by this law to the Superior Provincial Courts and their respective state's attorneys (*Staatsanwaltschaften*) may be transferred to one of the Superior Provincial Courts and its respective state's attorney exclusively, or instead of that, to the highest state court (*Obersten Landesgericht*) and its respective state's attorneys.

Art. 50. The Code of Criminal Procedure, in its form of March 22, 1924 (*Reichsgesetzbl.* 1, Pg. 322) is modified as follows:

1. After Art. 154, the following Art. 154a is inserted:

Art. 154a. The initiation of the public prosecution may be abandoned, if the prosecuted person is extradited for the act to a foreign government.

The same takes place if he has been extradited to a foreign Government for other acts and the penalty to which the domestic prosecution may lead is of no importance compared to that which has been rightfully imposed upon him in the foreign State, or which he may expect in the foreign State.

If, in the cases provided for by Pars. 1 and 2, the public prosecution has been already initiated, the court upon the proposal of the state's attorney shall provisionally suspend the proceedings.

Art. 154, Pars. 3 to 5, applies with the modification that the period set in Par. 3 amounts to one year.

2. After Art. 456, the following Art. 456a is inserted:

Art. 456a. The execution of the penalty restricting liberty may be abandoned if the convicted person has been extradited to a foreign Government for another act.

Art. 51. The ordinance setting the fees for attorneys as it appears in the publication of May 20, 1898 (*Reichsgesetzbl.*, Pg. 369, 692) is modified as follows:

After Art. 75, the following Section 4a is inserted:

SECTION 4A

Fees for Services in the Course of International Judicial Assistance

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Art. 75a. The lawyer receives 40 marks for the services provided for by Arts 32, 33 or 38, Par. 2, of the German Extradition Law.

For representation at a hearing, he receives 80 marks. If the hearing is extended for several days, the fee is increased for each subsequent day by five-tenths.

Art. 75b. The fees set forth in Art. 75a include the drawing up of the proposals (*Anträge*), requests (*Gesuche*), and declarations (*Erklärungen*) to all interested authorities.

Art. 75c. If a lawyer is the common counsel for several persons sought, the fees are increased by five-tenths.

Art. 52. The provisions of the law concerning temporary measures for administration of justice in respect to the Saar Region of March 10, 1922 (*Reichsgesetzbl.* 1, Pg. 241) remain unchanged.

Art. 53. The Minister of Justice (*Reichsminister der Justiz*) may order that the permissibility of judicial assistance in respect to certain foreign Governments is subject to further conditions. He may also determine as to fees for the services of the judicial authorities.

Art. 54. If a foreign Government in granting judicial assistance in criminal matters sets a condition to which the rendering of the judicial assistance is subject, this condition is to be observed in the domestic procedure.

Art. 55. This law comes into force April 1, 1930.

BERLIN, December 23, 1929.

Der Reichspräsident VONHINDENBURG

Der Reichsminister der Justiz V. GUÉRARD

8. Great Britain

EXTRADITION ACT, 1870¹

Whereas it is expedient to amend the law relating to the surrender to foreign states of persons accused or convicted of the commission of certain crimes within the jurisdiction of such states, and to the trial of criminals surrendered by foreign states to this country:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

¹ 33 & 34 Vict. c. 52.

PRELIMINARY

1. This Act may be cited as "The Extradition Act, 1870".

2. Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign state.

Her Majesty may, by the same or any subsequent order, limit the operation of the order, and restrict the same to fugitive criminals who are in or suspected of being in the part of Her Majesty's dominions specified in the order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

Every such order shall recite or embody the terms of the arrangement and shall not remain in force for any longer period than the arrangement.

Every such order shall be laid before both Houses of Parliament within six weeks after it is made, or, if Parliament be not then sitting, within six weeks after the then next meeting of Parliament, and shall also be published in the *London Gazette*.

3. The following restrictions shall be observed with respect to the surrender of fugitive criminals:

(1) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character:

(2) A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded:

(3) A fugitive criminal who has been accused of some offence within English jurisdiction not being the offence for which his surrender is asked, or is undergoing sentence under any conviction in the United Kingdom, shall not be surrendered until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise:

(4) A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender.

4. An Order in Council for applying this Act in the case of any foreign state shall not be made unless the arrangement—

(1) provides for the determination of it by either party to it after the expiration of a notice not exceeding one year;

and,

(2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act.

5. When an order applying this Act in the case of any foreign state has been published in the *London Gazette*, this Act (after the date specified in the order, or, if no date is specified, after the date of the publication,) shall, so long as the order remains in force, but subject to the limitations, restrictions, conditions, exceptions and qualifications, if any, contained in the order, apply in the case of such foreign state. An Order in Council shall be conclusive evidence that the arrangement therein referred to complies with the requisitions of this Act, and that this Act applies in the case of the foreign state mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatever.

6. Where this Act applies in the case of any foreign state, every fugitive criminal of that state who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and

whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime.

7. A requisition for the surrender of a fugitive criminal of any foreign state, who is in or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal.

If the Secretary of State is of opinion that the offence is one of a political character, he may, if he think fit, refuse to send any such order, and may also at any time order a fugitive criminal accused or convicted of such offence to be discharged from custody.

8. A warrant for the apprehension of a fugitive criminal, whether accused or convicted of crime, who is in or suspected of being in the United Kingdom, may be issued—

(1) by a police magistrate on the receipt of the said order of the Secretary of State, and on such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England; and

(2) by a police magistrate or any justice of the peace in any part of the United Kingdom, on such information or complaint and such evidence or after such proceedings as would in the opinion of the person issuing the warrant justify the issue of a warrant if the crime had been committed or the criminal convicted in that part of the United Kingdom in which he exercised jurisdiction.

Any person issuing a warrant under this section without an order from a Secretary of State shall forthwith send a report of the fact of such issue, together with the evidence and information or complaint, or certified copies thereof, to a Secretary of State, who may if he think fit order the warrant to be cancelled, and the person who has been apprehended on the warrant to be discharged.

A fugitive criminal, when apprehended on a warrant issued without the order of a Secretary of State, shall be brought before some person having power to issue a warrant under this section, who shall by warrant order him to be brought and the prisoner shall accordingly be brought before a police magistrate.

A fugitive criminal apprehended on a warrant issued without the order of a Secretary of State shall be discharged by the police magistrate, unless the police magistrate, within such reasonable time as, with reference to the circumstances of the case, he may fix, receives from a Secretary of State an order signifying that a requisition has been made for the surrender of such criminal.

9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, prove that the prisoner was convicted of such crime, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

If he commits such criminal to prison, he shall commit him to the Middlesex House of

Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State, a certificate of the committal, and such report upon the case as he may think fit.

11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of Habeas corpus.

Upon the expiration of the said fifteen days, or, if a writ of Habeas corpus is issued, after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign state from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

It shall be lawful for any person to whom such warrant is directed and for the person so authorised as aforesaid to receive, hold in custody, and convey within the jurisdiction of such foreign state the criminal mentioned in the warrant; and if the criminal escapes out of any custody to which he may be delivered on or in pursuance of such warrant, it shall be lawful to retake him in the same manner as any person accused of any crime against the laws of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

12. If the fugitive criminal who has been committed to prison is not surrendered and conveyed out of the United Kingdom within two months after such committal, or, if a writ of Habeas corpus is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's Superior Courts at Westminster, upon application made to him by or on behalf of the criminal, and upon proof that reasonable notice of the intention to make such application has been given to a Secretary of State, to order the criminal to be discharged out of custody, unless sufficient cause is shown to the contrary.

13. The warrant of the police magistrate issued in pursuance of this Act may be executed in any part of the United Kingdom in the same manner as if the same had been originally issued or subsequently indorsed by a justice of the peace having jurisdiction in the place where the same is executed.

14. Depositions or statements on oath, taken in a foreign state, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act.

15. Foreign warrants and depositions or statements on oath, and copies thereof, and certificates of or judicial documents stating the fact of a conviction, shall be deemed duly authenticated for the purposes of this Act if authenticated in manner provided for the time being by law or authenticated as follows:

(1) If the warrant purports to be signed by a judge, magistrate, or officer of the foreign state where the same was issued;

(2) If the depositions or statements or the copies thereof purport to be certified under the hand of a judge, magistrate, or officer of the foreign state where the same were taken to be the original depositions or statements, or to be true copies thereof, as the case may require; and

(3) If the certificate of or judicial document stating the fact of conviction purports to be certified by a judge, magistrate, or officer of the foreign state where the conviction took place; and

if in every case the warrants, depositions, statements, copies, certificates, and judicial documents (as the case may be) are authenticated by the oath of some witness or by being sealed with the official seal of the minister of justice, or some other minister of state: And all courts of justice, justices, and magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

CRIMES COMMITTED AT SEA

16. Where the crime in respect of which the surrender of a fugitive criminal is sought was committed on board any vessel on the high seas which comes into any port of the United Kingdom, the following provisions shall have effect:

(1) This Act shall be construed as if any stipendiary magistrate in England or Ireland, and any sheriff or sheriff substitute in Scotland, were substituted for the police magistrate throughout this Act, except the part relating to the execution of the warrant of the police magistrate:

(2) The criminal may be committed to any prison to which the person committing him has power to commit persons accused of the like crime:

(3) If the fugitive criminal is apprehended on a warrant issued without the order of a Secretary of State, he shall be brought before the stipendiary magistrate, sheriff, or sheriff substitute who issued the warrant, or who has jurisdiction in the port where the vessel lies, or in the place nearest to that port.

FUGITIVE CRIMINALS IN BRITISH POSSESSIONS

17. This Act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession in the same manner as if throughout this Act the British possession were substituted for the United Kingdom or England, as the case may require, but with the following modifications; namely,

(1) The requisition for the surrender of a fugitive criminal who is in or suspected of being in a British possession may be made to the governor of that British possession by any person recognized by that governor as a consul general, consul, or vice-consul, or (if the fugitive criminal has escaped from a colony or dependency of the foreign state on behalf of which the requisition is made) as the governor of such colony or dependency:

(2) No warrant of a Secretary of State shall be required, and all powers vested in or acts authorised or required to be done under this Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone:

(3) Any prison in the British possession may be substituted for a prison in Middlesex:

(4) A judge of any court exercising in the British possession the like powers as the Court of Queen's Bench exercises in England may exercise the power of discharging a criminal when not conveyed within two months out of such British possession.

18. If by any law or ordinance, made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act in the case of any foreign state, or by any subsequent order, either

suspend the operation within any such British possession of this Act, or of any part thereof, so far as it relates to such foreign state, and so long as such law or ordinance continues in force there, and no longer;

or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act.

GENERAL PROVISIONS

19. Where, in pursuance of any arrangement with a foreign state, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act is surrendered by that foreign state, such person shall not, until he has been restored or had an opportunity of returning to such foreign state, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's

dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded.

20. The forms set forth in the second schedule to this Act, or forms as near thereto as circumstances admit, may be used in all matters to which such forms refer, and in the case of a British possession may be so used, *mutatis mutandis*, and when used shall be deemed to be valid and sufficient in law.

21. Her Majesty may, by Order in Council, revoke or alter, subject to the restrictions of this Act, any Order in Council made in pursuance of this Act, and all the provisions of this Act with respect to the original order shall (so far as applicable) apply, *mutatis mutandis*, to any such new order.

22. This Act (except so far as relates to the execution of Warrants in the Channel Islands) shall extend to the Channel Islands and Isle of Man in the same manner as if they were part of the United Kingdom; and the royal courts of the Channel Islands are hereby respectively authorised and required to register this Act.

23. Nothing in this Act shall affect the lawful powers of Her Majesty or of the Governor General of India in Council to make treaties for the extradition of criminals with Indian native states, or with other Asiatic states conterminous with British India, or to carry into execution the provisions of any such treaties made either before or after the passing of this Act.

24. The testimony of any witness may be obtained in relation to any criminal matter pending in any court or tribunal in a foreign state in like manner as it may be obtained in relation to any civil matter under the Act of the session of the nineteenth and twentieth years of the reign of Her present Majesty, chapter one hundred and thirteen, intituled "An Act to provide for taking evidence in Her Majesty's Dominions in relation to civil and commercial matters pending before foreign tribunals;" and all the provisions of that Act shall be construed as if the term civil matter included a criminal matter, and the term cause included a proceeding against a criminal: Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

25. For the purposes of this Act, every colony, dependency, and constituent part of a foreign state, and every vessel of that state, shall (except where expressly mentioned as distinct in this Act) be deemed to be within the jurisdiction of and to be part of such foreign state.

26. In this Act, unless the context otherwise requires,—

The term "British possession" means any colony, plantation, island, territory, or settlement within Her Majesty's dominions, and not within the United Kingdom, the Channel Islands, and Isle of Man; and all colonies, plantations, islands, territories, and settlements under one legislature, as hereinafter defined, are deemed to be one British possession:

The term "legislature" means any person or persons who can exercise legislative authority in a British possession, and, where there are local legislatures as well as a central legislature, means the central legislature only:

The term "governor" means any person or persons administering the government of a British possession, and includes the governor of any part of India:

The term "extradition crime" means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act:

The terms "conviction" and "convicted" do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term "accused person" includes a person so convicted for contumacy:

The term "fugitive criminal" means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign state who is in or is suspected of being in some part of Her Majesty's dominions; and the term "fugitive criminal of

a foreign state” means a fugitive criminal accused or convicted of an extradition crime committed within the jurisdiction of that state:

The term “Secretary of State” means one of Her Majesty’s Principal Secretaries of State:

The term “police magistrate” means a chief magistrate of the metropolitan police court, or one of the other magistrates of the metropolitan police court in Bow Street:

The term “justice of the peace” includes in Scotland any sheriff, sheriff’s substitute, or magistrate:

The term “warrant,” in the case of any foreign state, includes any judicial document authorising the arrest of a person accused or convicted of crime.

REPEAL OF ACTS

27. The Acts specified in the third schedule to this Act are hereby repealed as to the whole of Her Majesty’s dominions; and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign states with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act.

Provided that if any proceedings for or in relation to the surrender of a fugitive criminal have been commenced under the said Acts previously to the repeal thereof, such proceedings may be completed, and the fugitive surrendered, in the same manner as if this Act had not passed.

SCHEDULES

FIRST SCHEDULE

List of Crimes

The following list of crimes is to be construed according to the law existing in England, or in a British possession, (as the case may be,) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Murder, and attempt and conspiracy to murder.

Manslaughter.

Counterfeiting and altering money and uttering counterfeit or altered money.

Forgery, counterfeiting and altering, and uttering what is forged or counterfeited or altered.

Embezzlement and larceny.

Obtaining money or goods by false pretences.

Crimes by bankrupts against bankruptcy law.

Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company made criminal by any Act for the time being in force.

Rape.

Abduction.

Child stealing.

Burglary and housebreaking.

Arson.

Robbery with violence.

Threats by letter or otherwise with intent to extort.

Piracy by law of nations.

Sinking or destroying a vessel at sea, or attempting or conspiring to do so.

Assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

SECOND SCHEDULE

Form of Order of Secretary of State to the Police Magistrate

To the chief magistrate of the metropolitan police courts *or* other magistrate of the metropolitan police court in Bow Street (*or* the stipendiary magistrate at _____).

Whereas, in pursuance of an arrangement with _____, referred to in an Order of Her Majesty in Council dated the _____ day of _____, a requisition has been made to me, _____, one of Her Majesty's Principal Secretaries of State, by _____, the diplomatic representative of _____, for the surrender of _____ late of _____, accused (*or* convicted) of the commission of the crime of _____ within the jurisdiction of _____: Now I hereby, by this my order under my hand and seal, signify to you that such requisition has been made, and require you to issue your warrant for the apprehension of such fugitive, provided that the conditions of the Extradition Act, 1870, relating to the issue of such warrant, are in your judgment complied with.

Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, this _____ day of _____ 18 ____.

Form of Warrant of Apprehension by Order of Secretary of State

Metropolitan police district, (*or* county *or* borough of _____) to wit.

To all and each of the constables of the metropolitan police force (*or* of the county *or* borough of _____).

WHEREAS the Right Honourable _____ one of Her Majesty's Principal Secretaries of State, by order under his hand and seal, hath signified to me that requisition hath been duly made to him for the surrender of _____ late of _____ accused (*or* convicted) of the commission of the crime of _____ within the jurisdiction of _____: This is therefore to command you in Her Majesty's name forthwith to apprehend the said _____ pursuant to the Extradition Act, 1870, wherever he may be found in the United Kingdom or Isle of Man, and bring him before me or some other (*magistrate sitting in this court), to show cause why he should not be surrendered in pursuance of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal at (*Bow Street, one of the police courts of the metropolis) this _____ day of _____ 18 ____.

J. P.

Form of Warrant of Apprehension without Order of Secretary of State

Metropolitan police district, (*or* county *or* borough of _____) to wit.

To all and each of the constables of the metropolitan police force (*or* of the county *or* borough of _____).

WHEREAS it has been shown to the undersigned, one of Her Majesty's justices of the peace in and for the metropolitan police district (*or* the said county *or* borough of _____)

* *Note*.—Alter as required.

J. P.

J. P.

Be it remembered, that on this day of in the year
of our Lord late of is brought before me
 the chief magistrate of the metropolitan police courts (*or* one of
the police magistrates of the metropolis) sitting at the police court in Bow Street, within the
metropolitan police district, (*or* a stipendiary magistrate for ,) to
show cause why he should not be surrendered in pursuance of The Extradition Act, 1870, on
the ground of his being accused (*or* convicted) of the commission of the crime of
 within the jurisdiction of , and forasmuch as no sufficient
cause has been shown to me why he should not be surrendered in pursuance of the said Act.

This is therefore to command you the said constable in Her Majesty's name forthwith to convey and deliver the body of the said _____ into the custody of the said keeper of the _____ at _____, and you the said keeper to receive the said _____ into your custody, and him there safely to keep until he is thence delivered pursuant to the provisions of the said Extradition Act, for which this shall be your warrant.

Given under my hand and seal at Bow Street, one of the police courts of the metropolis, (or at the said _____) this day of _____ 18 .

J. P.

Form of Warrant of Secretary of State for Surrender of Fugitive

To the keeper of _____ and _____ to

WHEREAS, _____ late of _____ accused (or convicted) of the commission of the crime of _____ within the jurisdiction of _____, was delivered into the custody of you _____ the keeper of _____ by warrant dated _____ pursuant to The Extradition Act, 1870:

Now I do hereby, in pursuance of the said Act, order you the said keeper to deliver the body of the said _____ into the custody of the said _____, and I command you the said _____ to receive the said _____ into your custody, and to convey him within the jurisdiction of _____, and there place him in the custody of any person or persons appointed by the said _____ to receive him, for which this shall be your warrant.

Given under the hand and seal of the undersigned, one of Her Majesty's Principal Secretaries of State, this day of _____.

THIRD SCHEDULE

Year and Chapter	Title
6 & 7 Vict. c. 75	An Act for giving effect to a convention between Her Majesty and the King of the French for the apprehension of certain offenders.
6 & 7 Vict. c. 76	An act for giving effect to a treaty between Her Majesty and the United States of America for the apprehension of certain offenders.
8 & 9 Vict. c. 120	An Act for facilitating execution of the treaties with France and the United States of America for the apprehension of certain offenders.
25 & 26 Vict. c. 70	An Act for giving effect to a convention between Her Majesty and the King of Denmark for the mutual surrender of criminals.
29 & 30 Vict. c. 121	An Act for the amendment of the law relating to treaties of extradition.

AN ACT TO AMEND THE EXTRADITION ACT, 1870¹

(5th August 1873)

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent

¹ 36 & 37 Vict. c. 60.

of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Construction of Act and short title

(33 & 34 Vict. c. 52)

1. This Act shall be construed as one with The Extradition Act, 1870 (in this Act referred to as the principal Act), and the principal Act and this Act may be cited together as the Extradition Acts, 1870 and 1873, and this Act may be cited alone as the Extradition Act, 1873.

Explanation of sect. 6 of 33 & 34 Vict. c. 52

2. Whereas by section six of the principal Act it is enacted as follows:

“Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in or suspected of being in any part of Her Majesty’s dominions, or that part which is specified in the Order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the Order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty’s dominions over that crime.”

And whereas doubts have arisen as to the application of the said section to crimes committed before the passing of the principal Act, and it is expedient to remove such doubts, it is therefore hereby declared that—

A crime committed before the date of the Order includes in the said section a crime committed before the passing of the principal Act, and the principal Act and this Act shall be construed accordingly.

Liability of accessories to be surrendered

3. Whereas a person who is accessory before or after the fact, or counsels, procures, commands, aids, or abets the commission of any indictable offence, is by English law liable to be tried and punished as if he were the principal offender, but doubts have arisen whether such person as well as the principal offender can be surrendered under the principal Act, and it is expedient to remove such doubts; it is therefore hereby declared that—

Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any extradition crime, or of being accessory before or after the fact to any extradition crime, shall be deemed for the purposes of the principal Act and this Act to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly.

Explanation of sect. 14 of 33 & 34 Vict. c. 52 as to statements on oath, including affirmations

4. Be it declared, that the provisions of the principal Act relating to depositions and statements on oath taken in a foreign State, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign State, and copies of such affirmations.

Power of taking evidence in United Kingdom for foreign criminal matters

5. A Secretary of State may, by order under his hand and seal, require a police magistrate or a justice of the peace to take evidence for the purposes of any criminal matter pending in any court or tribunal in any foreign State; and the police magistrate or justice of the peace, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken that such evidence was taken before him, and shall transmit the same to the Secretary of State; such

evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition.

Any person may, after payment or tender to him of a reasonable sum for his costs and expenses in this behalf, be compelled, for the purposes of this section, to attend and give evidence and answer questions and produce documents, in like manner and subject to the like conditions as he may in the case of a charge preferred for an indictable offence.

Every person who wilfully gives false evidence before a police magistrate or justice of the peace under this section shall be guilty of perjury.

Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

Explanation of sect. 16 of 33 & 34 Vict. c. 52

6. The jurisdiction conferred by section sixteen of the principal Act on a stipendiary magistrate, and a sheriff or sheriff substitute, shall be deemed to be in addition to, and not in derogation or exclusion of, the jurisdiction of the police magistrate.

Explanation of diplomatic representative and consul

7. For the purposes of the principal Act and this Act a diplomatic representative of a foreign State shall be deemed to include any person recognised by the Secretary of State as a consul-general of that State, and a consul or vice-consul shall be deemed to include any person recognised by the Governor of a British Possession as a consular officer of a Foreign State.

Addition to list of crimes in schedule

8. The principal Act shall be construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to this Act.

SCHEDULE

List of Crimes

The following list of crimes is to be construed according to the law existing in England or in a British Possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Kidnapping and false imprisonment.

Perjury, and subornation of perjury, whether under common or statute law. (24 & 25 Vict. c. 96, &c.)

Any indictable offence under the Larceny Act, 1861, or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-seven, "To consolidate and amend the statute law of England and Ireland relating to malicious injuries to property," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-eight, "To consolidate and amend the statute law of England and Ireland relating to indictable offences by forgery," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-nine, "To consolidate and amend the statute law of the United Kingdom against offences relating to the coin," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth

years of the reign of Her present Majesty, chapter one hundred, "To consolidate and amend the statute law of England and Ireland relating to offences against the person," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act.

AN ACT FOR CONSOLIDATING WITH AMENDMENTS THE ACTS FOR CARRYING INTO EFFECT TREATIES FOR THE MORE EFFECTUAL SUPPRESSION OF THE SLAVE TRADE, AND FOR OTHER PURPOSES CONNECTED WITH THE SLAVE TRADE ²

(5th August 1873)

27. Offences committed against this Act or the enactments with which this Act is to be construed as one or otherwise in connexion with the slave trade, whether committed on the high seas or on land, or partly on the high seas or partly on land, shall be deemed to be inserted in the first schedule to the Extradition Act, 1870, and that Act, and any Act amending the same, shall be construed accordingly.

AN ACT TO AMEND THE EXTRADITION ACTS, 1870 AND 1873, SO FAR AS RESPECTS THE MAGISTRATE BY WHOM AND THE PLACE IN WHICH THE CASE MAY BE HEARD AND THE CRIMINAL HELD IN CUSTODY ¹

(6th July 1895)

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. (1) Where a fugitive criminal has been apprehended in pursuance of a warrant under section eight of the Extradition Act, 1870, and a Secretary of State on representation made by or on behalf of the criminal is of opinion that his removal for the purpose of his case being heard at Bow Street will be dangerous to his life or prejudicial to his health, the Secretary of State, if it appears to him consistent with the Order in Council under the Extradition Act, 1870, applicable to the case, may in his discretion by order, stating the reasons for such opinion, direct the case to be heard before such magistrate as is named in the order, and at the place in the United Kingdom at which the criminal was apprehended, or for the time being is.

(2) The magistrate may be, if the place is in England, a metropolitan police magistrate or a stipendiary magistrate, and if it is in Scotland, a sheriff or sheriff-substitute, and if it is in Ireland, any stipendiary magistrate, and the magistrate hearing the case in pursuance of the order shall for that purpose be deemed to be a police magistrate within the meaning of the Extradition Act, 1870, and also shall have the same jurisdiction, duties, and powers, as near as may be, and may commit to the same prison as if he were a magistrate for the county, borough, or place in which the hearing takes place.

(3) Provided that, when the fugitive criminal is committed to prison to await his surrender, the committing magistrate, if of opinion that it will be dangerous to the life or prejudicial to the health of the prisoner to remove him to prison, may order him to be held in custody at the place in which he for the time being is, or any other place named in the order to which the magistrate thinks he can be removed without danger to his life or prejudice to his health, and while so held he shall be deemed to be in legal custody, and the Extradition Acts, 1870 and 1873, shall apply to him as if he were in the prison to which he is committed, and the forms of warrant used under the said Acts may be varied accordingly.

2. This Act may be cited as the Extradition Act, 1895, and shall be construed together

¹ 36 & 37 Vict. c. 88.

² 58 & 59 Vict. c. 33.

with the Extradition Acts, 1870 and 1873; and those Acts and this Act may be cited collectively as the Extradition Acts, 1870 to 1895.

AN ACT TO INCLUDE BRIBERY AMONGST EXTRADITION CRIMES ¹

(4th August 1906)

Whereas a Convention has been concluded between His Majesty and the President of the United States for including in the list of crimes on account of which extradition may be granted certain offences, and amongst others bribery:

And whereas it is provided by the said Convention that it shall come into force within ten days after publication in conformity with the laws of the high contracting parties:

And whereas bribery is not at present included in the list of crimes in the First Schedule to the Extradition Act, 1870, and the said Convention cannot be published in conformity with the laws of the United Kingdom until bribery is so included:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The Extradition Act, 1870, shall be construed as if bribery were included in the list of crimes in the First Schedule to that Act.

2. This Act may be cited as the Extradition Act, 1906; and the Extradition Acts, 1870 to 1895, and this Act may be cited together as the Extradition Acts, 1870 to 1906.

AN ACT TO INCLUDE OFFENCES IN RELATION TO DANGEROUS DRUGS, AND ATTEMPTS TO COMMIT SUCH OFFENCES, AMONG EXTRADITION CRIMES ²

(12th July 1932)

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. The Extradition Act, 1870, shall be construed as if offences against any enactment for the time being in force relating to dangerous drugs, and attempts to commit such offences, were included in the list of crimes in the First Schedule to that Act.

2. This Act may be cited as the Extradition Act, 1932, and the Extradition Acts, 1870 to 1906, and this Act may be cited together as the Extradition Acts, 1870 to 1932.

MEMORANDUM OF HOME OFFICE, JULY, 1922

EXTRADITION

1. The surrender of an accused person can only be obtained ordinarily from a foreign country if there is an extradition treaty with that country which includes the offence charged. Inquiry can be made of the Home Office in any particular case whether extradition is possible. The Home Office will in no case take steps to obtain extradition unless it is furnished in the first instance with an indemnity in the form appended for any expenses that may be incurred. No steps can be taken in the ordinary course unless a warrant has actually been issued by a magistrate in this country for the arrest of the accused. Extradition can only be claimed in respect of the offence for which the warrant has been issued, and if it is granted, the accused on being surrendered to this country can only be tried on that charge. He cannot be tried upon any other charge unless he is first sent back, or is given an opportunity of returning to the country from which he has been extradited. In an urgent case, however, where there are a series of charges against the accused, it may be desirable to issue a warrant and secure the arrest of the accused on one of them in the first instance, with a view of adding further charges at a later stage of the proceedings before extradition is actually granted.

2. In every case it is necessary to examine the terms of the treaty under which extradition is to be claimed. In some countries the foreign Government bears all expenses incurred within its own territories; in others, they fall on the prosecutor. In many countries the

¹ 6 Edw. VII, c. 15.

² 22 & 23 Gez. 5, c. 39.

foreign Governments are precluded from extraditing their own subjects; in others, they have an option under the treaty but are under no obligation to do so. Again, though generally speaking a claim for extradition requires to be supported by such evidence as would be sufficient to justify a committal for trial in this country, reference should be made to the treaty as to this, and also as to the form in which the evidence should be presented to the foreign Government. If copies of warrants, informations or depositions are sent, they must be certified by a magistrate—if possible by the magistrate by whom they were issued or taken—and all evidence has to be authenticated at the Home Office.

3. The application for action to be taken for the extradition of a fugitive criminal must be addressed by the prosecutor or the Chief Officer of the police concerned in the case to the Secretary of State for the Home Department, who will communicate, through the proper diplomatic channels, with the authorities of the place where the accused is believed to be.

4. The police in this country may communicate direct with police of foreign countries for the purpose of giving or obtaining information, but under no circumstances should direct application be made by them for the *arrest* of a fugitive.

5. Where the apprehension of the accused is a matter of urgency His Majesty's representative in the country where he is may be instructed by the Secretary of State by telegram to apply for provisional arrest in anticipation of the claim for extradition. Where a treaty provides for the provisional arrest of a fugitive in a foreign country, it usually fixes a period (varying from 14 to 60 days) from the date of arrest within which the formal claim for extradition must be made.

6. An application to the Secretary of State must be accompanied by the warrant of arrest or a certified copy of it, an indemnity for expenses, a description of the accused sufficient for purposes of identification with if possible a photograph, and all available information with regard to his whereabouts. In a case of urgency the evidence to support the claim for extradition may be sent later.

7. Police officers may by arrangement in special cases be sent out to help the foreign police in tracing the accused or in supporting the claim for extradition after his arrest. Arrangements for bringing the prisoner back to this country must always be made through them, the prosecutor being liable to them for expenses so incurred.

9. Greece

THE LAW OF FEBRUARY 7, 1904¹

George the First, King of Greeks. Upon our concurrent resolution with the Chamber of Deputies we decree:

Article 1. The convention on extradition of criminals concluded between Greece and Belgium and signed in Athens on June 26–July 9, 1901, consisting of ten articles with two pertinent notes and three annexed protocols and whose text in translation follows, is given full force.

Art. 2. The request for extradition accompanied by the documents sufficiently justifying the purpose of it, with an authentic translation, shall be transmitted to the Minister for Foreign Affairs or to the Minister of Justice who, after having examined the legality of the request, shall forward it with the accompanying documents through the Procurator-General to the Presiding Judge of the Court of Appeal in the district where the person whose extradition is requested has his residence.

The Presiding Judge of the Court of Appeal upon receipt of the *dossier* shall issue without delay a warrant of arrest of the person claimed and order the seizure of all incriminating documents.

The Procurator-General shall have charge of the execution of the warrant of arrest and of the seizure of the documents.

¹ Published in the *Official Journal*, No. 28, 9/21. The law gives sanction to the extradition convention concluded between Greece and Belgium, June 26–July 9, 1901, and establishes the extradition procedure to be followed.

Art. 3. The arrested person, together with the written record of his arrest, seizure and identification, as well as other relative information, shall be, without being detained by the Procurator-General, brought to the Court of Appeal in the district where the arrest had taken place, and put in prison in the place assigned for the persons arrested before trial.

The Procurator-General shall send immediately the *dossier* to the Presiding Judge of the Court of Appeal, who in his turn summons within 24 hours the Chamber of Indictment of the Court of Appeal, as provided by Art. 262 of the Code of Criminal Procedure, before which the prisoner, if he consents to it, shall appear; otherwise he is given the privilege of being represented by counsel.

The prisoner is entitled to have knowledge of the *dossier*.

Art. 4. The hearing at the Chamber of Indictment of the Court of Appeal is public, unless the prisoner demands a closed hearing (*huis clos*) or does not appear at the Chamber at all.

The Chamber of Indictment, after questioning the prisoner and after having heard the Procurator-General as well as the person claimed, if he appears, and his counsel, passes its reasoned opinion on the request for extradition. The Chamber of Indictment determines:

- (1) The identity of the person claimed with the one arrested.
- (2) Existence of the documents required by the treaty to justify the requisition.
- (3) The question whether the arrested person is the one who may be extradited, and the infraction which is imputed to him is the one for which extradition may be granted.
- (4) The question whether criminal action or punishment are barred under the Greek Law.

However, the Chamber of Indictment is not competent to examine the sufficiency of the evidence as to the infraction for which the arrested person is being accused.

A copy of the decision in each case is transmitted without delay to the Minister of Justice through the legal channels and accompanied by all the documents relating to it.

Art. 5. The reasoned decision of the Chamber of Indictment declining the request for extradition is final and precludes the extradition.

Art. 6. If the decision of the Chamber of Indictment is favorable to granting the request, the extradition may be authorized by the royal decree issued upon the motion of the Minister of Justice.

Art. 7. Each time when provisional detention of an alien is permitted by the treaty for urgent cases, the provisions of Articles 8 and 4 of the present law apply in so far as his arrest and provisional detention are concerned.

Art. 8. Each time when the treaty permits the passage of an arrested alien through Greek territory or his transfer on board a vessel the authorization for this shall be given by the Minister of Justice.

Art. 9. Each time when in conformity with the treaty the seizure of the incriminating documents or other articles may take place, the seizure is operated in accordance with the provisions of the Code of Criminal Procedure.

The Chamber of Indictment of the Court of Appeal determines among the rest, as provided by Art. 4, which of the seized articles shall be delivered to the requesting state.

Art. 10. If the arrested person is not set at liberty within the period of time fixed by the treaty, the prolongation shall be ordered by the Presiding Judge of the Court of Appeal upon the request of the court.

Art. 11. The articles of the Law XYB, except the first, sanctioning the reciprocal convention on extradition of criminals, concluded between Greece and Italy, are abrogated and replaced by Articles 2-10 of the present law.

10. Italy

REGULATIONS OF THE PENAL CODE AND CODE ON CRIMINAL PROCEDURE GOVERNING EXTRADITION¹

PENAL CODE

Article 13. The subject of extradition is governed by Italian criminal law and by international treaties and usage.

¹ English translation furnished through the courtesy of the State Department. The Italian Ministry of Justice transmitted this translation with the Remarks which follow.

Extradition is not granted if the act giving rise to the request for extradition does not constitute a crime according to Italian law and the law of the foreign country.

Extradition may be granted or offered even for crimes not envisaged in international conventions provided the latter do not expressly preclude them.

Extradition of citizens is not granted unless specifically provided for in international conventions.

CRIMINAL PROCEDURE CODE

Article 661. The Minister of Justice is the officer competent to offer or grant the extradition of persons accused or sentenced abroad in the cases not precluded by Article 13 of the Penal Code and to make decision as to order of procedure in the case of more than one simultaneous request for extradition.

Offering and granting extradition are always subordinated to the condition that the person extradited is not to be tried for any previous different act or subjected to any punishment other than that provided in the sentence by virtue of which his extradition is offered or granted. The Minister may, moreover, subordinate the offer or grant of extradition to other conditions which he may deem advisable.

Article 662. The extradition of a person accused or sentenced abroad cannot be made without a favorable decision to that effect by the Section of Investigations of the Court of Appeals in whose district the accused or sentenced person is located.

The Section of Investigations is not, however, consulted when the extradition concerns one State only and when the sentenced or accused foreigner requests to be consigned to that State.

A favorable decision and a request by the interested party to be consigned to the State making request do not render extradition obligatory.

Article 663. The person whose extradition the Minister of Justice intends to offer or whose extradition is requested by a foreign State, is placed under arrest upon the request of the Minister of Justice by means of an arrest warrant issued by the King's Attorney of the place where the individual is located.

The public security authorities may place the individual under arrest even without the above-mentioned warrant provided it has notification of the existence of an arrest warrant or some other equivalent document issued by the legal authorities of the foreign country and that it fears that the individual may escape.

The Minister of Justice must in all cases give immediate notification that arrest has been made and may authorize the Attorney-General temporarily to release the person to be extradited under whatever guarantee he thinks fit to require.

The authorities making the arrest must sequester any objects which may constitute the *corpus delicti*.

Article 664. The arrested person is presented without delay to the King's Attorney or *Pretor* of the locality in which he was arrested.

The King's Attorney or *Pretor*, after ascertaining the individual's identity, makes provision for placing him at the disposition of the Attorney-General competent to solicit decision (*i.e.*, of the section of investigations).

Article 665. The person under arrest is released if, within sixty days from the time of arrest in the case that the requesting State is in Europe, or within ninety days if the requesting State is outside of Europe, the Minister of Justice has not received the documents upon which the request for extradition is founded. This time may be once extended upon the request of the foreign government for a further period of not more than one month.

Extension is provided for by the Minister of Justice.

The arrest is not subject to the foregoing limitations when the Minister of Justice intends to offer extradition.

Article 666. The Attorney-General of the Court of Appeals in whose district is located the accused or sentenced person solicits the decision of the Section of Investigations and appoints an attorney for the defense of the individual in case he has no attorney.

The President of the Section of Investigations delegates a counsellor to conduct the examination, the latter executing all necessary investigations and having the faculty of providing, even through the Ministry of Justice, for any research he may think advisable.

When investigations have been completed, the findings are communicated to the Attorney-General who presents his requisite documents to the Section of Investigations.

After these documents have been presented, the reports, documents and sequestered objects are filed in the registry office. The regulations of Article 372 are to be observed.

At the end of the period established by the aforementioned Article 372 or the extended period, the President of the Section of Investigations fixes the date for the hearing of the case through a decree which is communicated to the public ministry and of which notification is to be given to the attorney for the defense at least five days prior to the date fixed for the hearing, which, if this rule is not observed, becomes null and void.

Article 667. The Section of Investigations deliberates in the council chamber after hearing the opinion of the public ministry, the attorney for the defense if he presents himself, and the accused or sentenced person if he so requests.

The Section ascertains whether the conditions established in Article 13 of the Penal Code and in the international treaty concerned are present. Should there be no convention or should the convention not otherwise stipulate, it also ascertains whether the acts and documents submitted give sufficient evidence of guilt or whether the sentence already pronounced has been verified.

When decision is favorable to extradition, the Section decides whether total or partial consignment may be made to the foreign government of the documents and sequestered objects.

Decision is given in the form of a sentence, and the provisions of Article 151 are observed.

Article 668. The Attorney-General and the interested party may appeal against the decision of the Section of Investigations to the Court of Cassation even as regards merits.

The Court of Cassation after examining data and completing any investigations it considers necessary, deliberates the case in the council chamber and gives sentence.

Article 669. If the judge gives irrevocable decision that extradition will not be offered or granted, the Attorney-General orders the arrested person to be released and immediately notifies the Ministry of Justice thereof. Order for release is also given when in any case the Minister of Justice has decided not to proceed to extradition.

The sentence in which decision is made against offering or granting extradition does not preclude a subsequent offer or request based upon elements which were not taken into consideration by the judge.

Article 670. Extradition is suspended if the accused or sentenced person is to be tried within the territory of the State or is to undergo penalty for crimes committed before or after that connected with his extradition, unless the Minister of Justice decides to consign him temporarily to the requesting State or to come to an arrangement with the latter whereby the punishment to have been undergone within the territory of the State will be executed abroad.

In other cases extradition is effected when the person being extradited has been released under irrevocable sentence or has fulfilled the penalty within the territory of the State.

Measures of personal safety to which the released or sentenced person has been subjected within the territory of the State are applied whenever the individual returns thereto for any reason whatsoever.

However, if five years have elapsed since his consignment and the individual is not a habitual or professional criminal or lawbreaker or delinquent by nature, the application of measures of safety is conditional upon the reexamination of the circumstances of the person who has returned into the territory of the State in order to ascertain whether he is still a social menace.

Article 671. When it is necessary to request of a foreign State the extradition of an accused or sentenced person, the Attorney-General of the Court of Appeals in whose district

the case is being tried or sentence was pronounced makes request of the Minister of Justice, to whom it transmits the necessary acts and documents.

The Minister of Justice may request extradition upon his own initiative.

REMARKS UPON THE PROVISIONS OF THE PENAL AND CRIMINAL PROCEDURE CODES GOVERNING
THE INSTITUTION OF EXTRADITION

In the first place it should be pointed out that Article 13 of the Penal Code establishes the policy of domestic law with regard to extradition and that consequently its provisions also must be considered in the application of extradition treaties. The Penal Code, however, recognizes that in certain contingencies international treaties and usage take precedence over domestic law. Thus, for example, when Paragraph 2 prescribes that extradition may be offered or granted even for crimes not envisaged in treaties, provided the latter do not expressly preclude them, it is implicitly asserted that policy in this matter is to be guided first of all by international treaties and that the Government may exercise the faculty provided by the said paragraph only if such treaties do not include the *nomen juris* in question among the crimes for which extradition may be granted or must be considered excepted.

The same may be said for the extradition of citizens, which is permitted only if stipulated in a specific convention for this purpose.

It should next be noted that the above-cited article does not forbid extradition for political crimes as did Article 9 of the Penal Code of 1889, and that the provision made in the first paragraph, which states that "extradition is not applicable if the act for which extradition is requested is not envisaged as crime by the Italian law and by the law of the other country," embodies a universally recognized principle of law. Many extradition treaties explicitly contain such a provision, but even should a treaty *make no mention thereof*, extradition must be considered precluded when the act giving rise to the request does not constitute crime in Italy.

In this connection it is to be noted that the law of the State of whom request is made need not necessarily attribute to the act the *same legal qualification*, since extradition may be granted if the fact constitutes crime according to Italian law and if there is no express prohibition of extradition.

This rule does not, however, extend to cases in which according to Italian law the crime can no longer be prosecuted or the act (the crime) or sentence have expired, in accordance with Article 641 of the Code of Criminal Procedure of 1913, leaving the question of time limitations to be governed by treaties; and if a convention establishes specific rules in this connection, such rules are to be observed.

The rules on procedure established for the concession of extradition are, upon the basis of Article 656 of the Code of Criminal Procedure, to be applied only when the matter is not governed by international treaties and usage.

This article thus confirms the principle contained in Article 13 of the Penal Code as to the prevalence of international conventions and usage over Italian law in matters of extradition.

Particularly important, finally, is Article 670 of the Code of Criminal Procedure which makes provision for effecting extradition and envisages cases of the suspension of extradition, of temporary extradition, and of the possibility of executing abroad sentences handed down in Italy. These are rules which are supported by prevailing doctrine as to the most efficacious manner of obtaining greater international solidarity in the suppression of crime but which are not provided for in the majority of extradition treaties or accepted by all States and can, as far as Italy is concerned, be applied even when an extradition treaty makes no stipulations on the matter.

11. Japan

REGULATIONS GOVERNING EXTRADITION UNDER TREATY¹

Article 1. The words { “High Contracting Parties”
“Treaty Powers” } in the present Regulations signify

those foreign Powers which have already concluded extradition treaties with the Empire of Japan, or shall do so in the future.

The words “offenses liable to extradition” signify crimes or offenses mentioned in the extradition treaties concluded between Japan and Foreign Powers.

The words “fugitive criminals” signify those who are not Japanese subjects who have been accused or prosecuted, or given the verdict of guilty, on account of crimes or offenses liable to extradition committed within the jurisdiction of the High Contracting States (Treaty Powers), and who have taken refuge within the jurisdiction of the Empire of Japan or are suspected to have taken refuge therein or to be preparing to do so. However, in either of the following cases the Japanese subjects shall be involved:

(1) In case the extradition treaty concluded between the Empire of Japan and a High Contracting State (another Power), the latter of which requested the extradition of a criminal or criminals, contains a clause or clauses providing for the mutual surrender of the subjects of the respective countries (stipulating that the subjects of the two contracting parties may be extradited mutually).

(2) In case the extradition treaties contain clauses stipulating that the High Contracting Parties may, at mutual discretion, comply with a request for the extradition of their respective subjects, and in case a High Contracting State (foreign Powers) which requests the extradition of its subjects propose to surrender their own subjects when requested to do so.

Article 2. In case a High Contracting State requests the extradition of its fugitive criminals, the procedure for such extradition shall be taken in accordance with the provisions of the present Regulations.

Article 3. In either of the following cases, the extradition of fugitive criminals shall not take place:

(1) In case crimes or offenses committed by the person claimed are of a political nature.

(2) In case the person claimed has proved that the request for his extradition is practically based on an intention to examine or punish him on a charge of crime of a political nature.

Article 4. In case fugitive criminals have been accused or prosecuted, or are undergoing terms of punishment in districts within the jurisdiction of the Empire of Japan on account of offenses or crimes other than those for which they are claimed, the extradition shall not take place until after they are acquitted as not guilty, or released on the expiry of their term or for other reasons.

Article 5. In case an extradition treaty is concluded between the Empire of Japan and a foreign Power, the Empire of Japan may, in compliance with the request of that treaty Power, surrender fugitive criminals even though their crimes or offenses were committed before the conclusion of the said treaty.

Article 6. Though the Japanese law courts enjoy juridical rights similar to those of the law courts of the High Contracting States in dealing with offenses liable to extradition, yet fugitive criminals may be surrendered in case the Minister of Justice is of the opinion that it would be advisable to deliver them up in order to facilitate their trial.

Article 7. All warrants issued in accordance with the present Regulations shall be legally effective in any place within the limits of the Empire of Japan.

¹ Promulgated under Imperial Ordinance No. 42 on August 10, 1895. Unofficial translation.

Article 8. In case a request for the extradition of one fugitive criminal is made by more than two High Contracting States on account of offenses committed by that criminal in each of these Contracting States, he shall be surrendered to the Contracting Party which was the first to request his surrender. However, this clause does not apply to cases where there are special promises or agreements among those Contracting States.

Article 9. The Minister of Justice may, upon the request of the Minister of Foreign Affairs, give orders to one or more Public Procurators of senior rank for the issuance of provisional warrants of arrest to be rendered according to Form No. 1 as herewith attached, in order to arrest fugitive criminals provisionally.

The request of the Minister for Foreign Affairs referred to in the foregoing paragraph shall be made only when he receives information from a High Contracting State or States that the latter have, with proper procedure, already forwarded warrants of arrest in the form of either letters or telegrams for the arrest of fugitive criminals and only after he (Minister of Foreign Affairs) has been given a guarantee that a formal request for the extradition of those fugitive criminals will be made.

Article 10. In the event of a fugitive criminal being arrested under the provisional warrant of arrest, if no request for his extradition is forthcoming within a reasonable period not exceeding two months, he shall be released. The provision, however, does not prevent his being re-arrested and surrendered.

If there is a request for extradition of fugitive criminals who were arrested under provisional warrants of arrest, warrants of arrest rendered according to Form No. 2 as herewith attached shall be issued and exchanged for the provisional warrants of arrest.

Article 11. With the exception of the exceptional case as provided in Article 9, no fugitive criminals can be arrested with a view to surrendering them unless a High Contracting Party or Parties have, by following the proper procedure as stipulated in the extradition treaties, presented requests for their extradition accompanied by the following documents:

(1) In the case of those accused or prosecuted, an official copy or copies of a warrant or warrants of arrest which are recognizable as issued by the proper official or officials of the country or countries which have taken measures regarding offenses of the fugitive criminals, and an official copy or copies of either a written testimony or a written statement on the basis of which the warrants of arrest were issued.

(2) In the case of those sentenced as guilty a copy of the verdict bearing the seal of the law court which has pronounced the verdict.

Article 12. In case the Minister for Foreign Affairs receives a written request for extradition of a fugitive criminal or criminals and finds that request in accord with the provisions of the extradition treaty or treaties, he shall send to the Minister of Justice the written request together with documents relating thereto.

When the Minister of Justice receives the written request referred to and deems the request is proper and reasonable, he shall give orders to the Public Procurator or Procurators of senior rank on the district where the fugitive criminal or criminals are staying or are supposed to arrive, to issue warrants of arrest.

Article 13. Upon receipt of the orders from the Minister of Justice as mentioned in the preceding article, the Public Procurator or Procurators shall issue a warrant of arrest rendered in accordance with the Form No. 2 as herewith attached.

Article 14. When the claimed fugitive criminal or criminals are arrested, or provisionally arrested as requested, they shall be handed over to the Public Procurator or Procurators of senior rank who issued the said warrant of arrest, or to the Public Procurator or Procurators of the place where the criminal or criminals were arrested.

The Public Procurator or Procurators of senior rank shall at once report to the Minister of Justice particulars as to the arrest of the criminals.

The Minister of Justice, upon receipt of the particulars about the arrest of criminals from the Public Procurator or Procurators of senior rank, shall at once send to the Public Procurator a copy or copies of the written request for extradition, if any, and other documents relat-

ing thereto. However, this procedure is not required when orders are to be issued for the release of the accused.

Article 15. In the case of those accused or prosecuted, the Public Procurator of senior rank shall at once examine them, establish their identity, and ascertain whether the documents attached to the written request or requests for extradition are accurate and correct. However, if the Public Procurator finds that the documents alone are insufficient to establish evidence, he may obtain further evidences as to offenses committed by the accused.

In the case of those who have been sentenced, the Public Procurator of senior rank shall at once examine them, establish their identification, and verify that they were given the verdict at a proper court of the High Contracting State which claims their extradition.

Article 16. The Public Procurator of senior rank shall, upon the conclusion of the examination of the accused, submit to the Minister of Justice an interrogatory (the protocol of inquiry) together with his opinion as to how to deal with the accused (defendants). In so doing, the Public Procurator shall return to the Minister of Justice the copy or copies of written request for extradition and other documents relating thereto.

In case the Minister of Justice receives the interrogatory and other documents from the Public Procurator, he shall issue a letter or letters of extradition in accordance with Form No. 3 as herewith attached or release those who were arrested.

Article 17. Fugitive criminals shall not be detained for more than two months after they are arrested on warrants of arrest.

Article 18. The Minister of Justice may issue a letter or letters of extradition only in either of the following instances:

(1) In the case of those who were accused or prosecuted on account of offenses liable to extradition, if it is recognized that there are sufficient evidences of offenses to subject the accused to trial according to the laws of the Empire of Japan, presuming that the offenses, for which they are accused or prosecuted, were committed within the jurisdiction of the Empire of Japan.

(2) In the case of those who have been adjudged guilty, if it is recognized that they were given the verdict at a proper court of law.

Article 19. Those who were given the verdict of guilty by default shall, under the present Regulations, be regarded as having been accused or prosecuted, and not as one having been given the verdict of guilty, unless there exists a special agreement between the Empire of Japan and the High Contracting Party which requested their extradition.

Article 20. In case letters of extradition are issued for the release of those who are arrested, or for their extradition, the Minister of Justice shall return to the Minister for Foreign Affairs the written requests for extradition and other documents relating thereto, together with notes mentioning therein the procedure taken and the reasons therefor in an abridged form.

Article 21. After the issue of letters of extradition no one shall be detained for more than one month. However, if the accused are not taken delivery of within the prescribed period and taken outside the Empire of Japan, they shall be released unless proper officials of the High Contracting State which requested their extradition give suitable reasons for the delay in taking delivery of them.

Article 22. In case fugitive criminals are to be surrendered all articles belonging to them which were seized at the time of their arrest shall be handed over along with the criminals at the time of their delivery unless there are proper reasons for doing otherwise.

Article 23. The Minister of Justice may, in accordance with a request of the Minister for Foreign Affairs, permit those who are being extradited from one foreign country to another foreign country to pass through the lands and seas within the jurisdiction of the Empire of Japan.

The request mentioned in this article shall be made only when the Minister for Foreign Affairs receives from the Government of the country which claims for the extradition of the criminals, the letter of inquiry coming through proper procedure together with an official

copy of the letter of extradition. However, when there is no special agreement between the Empire of Japan and a treaty Power claiming extradition, the said request shall be made only in case that country gives in addition to the letter of inquiry, an assurance to allow fugitive criminals to pass through the lands and seas within the jurisdiction of that country when criminals are transferred from a third country to the Empire of Japan.

12. Sweden

LAW

REGARDING THE EXTRADITION OF CRIMINALS ¹

(Given at the Palace of Stockholm, June 4, 1913)

We, GUSTAF, by the grace of God King of Sweden, of the Goths and of the Wends, hereby make known that We, together with the *Riksdag*, have deemed fit graciously to decree as follows:

CHAPTER I

REGARDING THE CONDITIONS FOR EXTRADITION

Section 1

At the request of the government of a foreign State a person who resides in the Kingdom and who is suspected of, charged with, or sentenced for a crime, may be extradited to the foreign State as provided in this law.

Extradition may take place even though the requisition in the matter is not based upon an agreement with the foreign State, provided, however, that unless special circumstances occasion an exception, extradition in such cases may be granted only on the condition that the foreign State promise to grant a requisition made by Sweden in a similar case.

Section 2

A Swedish subject may not be extradited.

Section 3

Extradition may not take place for a crime which is committed within Sweden or on board a Swedish vessel outside the country. If the extradition of anyone is demanded for complicity in a crime which is committed abroad, extradition may, however, in special cases, notwithstanding the provisions of Chapter I, Section 2, of the Penal Law, be granted also in cases where the accessory acts in the crime are to be regarded as having been committed in Sweden or on a Swedish vessel outside the country.

Section 4

Extradition may not be effected unless the criminal act is, or, if it had been committed in Sweden under corresponding circumstances, would be regarded as a crime which under the Swedish Penal Code or the Swedish Maritime law may incur a more severe penalty than imprisonment. To the crimes which are mentioned above there shall also be added crimes which only in cases where they are accompanied by aggravating circumstances merit a severer penalty than imprisonment.

For an act such as referred to in Chapter 10 of the Penal Law, extradition may not be granted, unless the act, judged in accordance with the rest of the Penal Law, would be regarded as a crime for which extradition in accordance with the provisions of this section may be effected.

Section 5

If the act for which extradition is sought, is to be regarded under Swedish law as an infringement of the press laws, extradition may not be granted.

¹ Unofficial translation.

Section 6

When a requisition for extradition refers to an act which under Swedish law would be regarded as a crime against the military penal law, extradition may take place if the act is of such a nature that if it had been committed by anyone not subject to the same law, extradition because of it could have taken place in accordance with the provisions of Section 4.

Section 7

Extradition may not take place for a political crime. However, in a case where the act for which extradition is requested also includes a crime of a non-political nature, extradition may be granted provided the act in view of the circumstances in the special case is found to have chiefly the character of a non-political crime.

In no case shall murder, attempted murder or manslaughter of a foreign Chief of State or of a person belonging to the family of a foreign sovereign be regarded as a political crime.

Section 8

Extradition may not be granted unless a condemnatory sentence rendered by a court, or else a decision rendered by a court or some other competent authority implying a warrant of arrest, has been submitted in support of the request in the matter; in the document the nature of the crime and the time and place of commission shall be clearly stated.

If a requisition regarding extradition is based on anything else than a condemnatory sentence or a decision which has been preceded by an investigation before a court or an examining judge, and if the person whose extradition is requested denies that he is guilty of the alleged crime, extradition may not be granted, unless it is also proved that there are probable reasons to suspect that he is guilty thereof. Provided, however, that in accordance with an agreement with a foreign State, and subject to reciprocity, extradition to that State may take place also when such evidence as is mentioned above has not been produced.

Section 9

Extradition may not be granted:

1. If already before the requisition in the matter was made, a judgment had been rendered or prosecution had been conducted in the Kingdom relating to the crime for which extradition is demanded;
2. If under Swedish law the penalty for the crime should be regarded as having lapsed.

Section 10

If a person, whose extradition is requested, finally has been sentenced to punishment here in the Kingdom for a crime other than that which is referred to in the requisition respecting extradition, extradition may not be granted until he has undergone the complete punishment to which he has been sentenced; however, he may for the sake of being tried be extradited temporarily to the foreign State, if the latter engages to surrender him to Swedish authority immediately after he has been finally sentenced there.

If a person whose extradition is requested is being prosecuted here in the Kingdom for another crime, extradition may in no case take place before the trial has been finally concluded if he is kept in custody in connection with the trial.

Section 11

In granting extradition the following conditions, in so far as relevant, shall apply:

1. The person extradited may not be tried or punished in the State to which he has been surrendered for any punishable action committed prior to his extradition other than that which gave rise to the extradition, nor, irrespective of such cases as are referred to in Section 13, paragraph 2, be given up to a third State, unless special consent has been obtained in accordance with the provisions of Section 27, or unless the person extradited has freely and

publicly given his consent thereto before a court or otherwise, or, after having been pardoned or having fully served his sentence, has been discharged and, in spite of no obstacles having been placed in his way, has either failed to leave the country within the course of one month or has returned there after having left it.

2. During the period of one month, referred to above, unless the person extradited commits a new crime, no obstacle whatever shall be placed in the way of his leaving the country if he desires so to do.

3. The person extradited may not be prosecuted for the crime in question before a court which has been invested with authority to judge cases of such a nature only for the time being or for specific exceptional cases.

When extradition is granted in such cases as are referred to in Section 4, paragraph 2, or Section 6, it shall, moreover, be stipulated that the person extradited shall not be punished more severely for the act involved than if it were of a nature such as to give rise to extradition. If extradition is granted in accordance with the provisions of Section 7 for an act which is chiefly in the nature of a non-political crime, the condition shall be made that the person extradited may not be punished for the act as for a political crime.

Section 12

If a request respecting extradition of a person is made by several States and the requisitions refer to the same crime, the King shall determine to which State extradition shall take place; provided, however, that when special circumstances do not require that the extradition should take place to the State of which the person in question is a citizen, the extradition shall as a rule take place to the State in which the crime was committed, or, if the crime was committed within the jurisdiction of several States, to the one where the principal act was committed.

Section 13

If several States have requested the extradition of the same person for various crimes, preference shall be given to the State which first requested his extradition or his arrest, in the manner referred to in Section 24, when consideration of the position of the various States, or if some other special circumstance, is not found to occasion a deviation from this rule.

In such cases, as are referred to in this section, in connection with the granting of the extradition, it may be prescribed as a condition that the person whose extradition is involved shall, on the completion of his term of servitude in the one State, be given up to the other.

CHAPTER II

REGARDING THE MANNER OF PROCEDURE IN EXTRADITION MATTERS

Section 14

Requisitions respecting extradition shall be made through diplomatic channels.

The requisition shall contain information concerning the citizenship of the person referred to therein, and such a document as is mentioned in Section 8, paragraph 1, shall be attached to the request.

A personal description should, if possible, also be given.

If the documents received are not as complete as necessary, or if further information is necessary in some respect, the foreign State may be requested to furnish the missing information.

Section 15

If it appears from the documents received that the requisition is not of such a nature as can be legally complied with, or if the King otherwise finds that there is reason not to grant the extradition, it shall immediately be rejected.

Section 16

If no reasons for rejection, as prescribed in Section 15, are found to exist, the King may decree that the person whose extradition is requested shall be arrested, when this has not already been done in accordance with the provisions of Section 24 or 25, and shall be brought before the King's representative for a hearing.

Section 17

At the hearing before the King's representative, the person taken into custody may have the benefit of assistance if he requests it. If he states that he himself cannot obtain assistance, the King's representative shall designate a suitable person to assist him.

If the person arrested admits during the hearing that he is the person whose extradition has been requested, and if he declares that he has no exception to take to a consent to the requisition respecting his extradition, the record of what has thus taken place, as well as the other documents in the matter, shall be submitted to His Royal Majesty.

If the person arrested does not give such consent and make such a declaration, as referred to above, the matter shall be referred to a court; and thereupon the record of the hearing and the other documents in the matter shall be submitted to the magistrate's court in the city where the King's representative is stationed. A report on what has thus taken place during the hearing shall immediately be submitted to the Ministry for Foreign Affairs.

Section 18

In a case which, in accordance with Section 17, has been received by a magistrates' court, the magistrates' court shall examine whether conditions which, under Sections 2-9, constitute obstacles to extradition exist; and with regard to the treatment of such a case, unless otherwise provided below, that which is in force with regard to the trial of a person arrested applies.

In connection with the treatment of the case, a special prosecutor, who shall be appointed by the King's representative, shall be present in order to look after the interests of the foreign State in the case.

The person arrested shall have the benefit of assistance in pleading his cause. If he states that he himself cannot obtain assistance, the King's representative shall designate a suitable person to assist him.

Whenever, in a special case, consideration of the foreign State demands that the case be considered in *camra*, it is for the magistrates' court to issue the orders in the matter.

Section 19

It is for the Supreme Court to decide whether there are obstacles to the extradition such as are referred to in Sections 2-9.

It is incumbent on the magistrates' court when the treatment has been concluded there to send in speedily the record and other documents in the case to the Lower Board of Revision.

Section 20

Questions of compensation for a witness or another person who has been summoned to furnish information in the case, or to an interpreter, shall be decided by the Supreme Court in connection with the main case.

Section 21

The King shall prescribe how to determine the compensation for the prosecutor and assistants referred to in Sections 17 and 18.

Section 22

Whenever during the course of the extradition case it is found that the person arrested is not the person whose extradition has been requested, it shall rest with the authority before whom the case is pending to issue orders respecting his release.

In a case other than that now referred to, the person arrested shall remain in prison pending the decision of the Supreme Court.

Section 23

After the decision of the Supreme Court has been rendered, or when the case has not been pending there after the documents in the case have been received from the King's representative, the King in Council shall give his decision concerning the requisition made. It may not be granted if, through a decision of the Supreme Court, obstacles to the extradition have been declared to exist.

In a decision whereby extradition is decreed, in addition to the conditions with regard to extradition which, in accordance with Section II, shall apply, and the further conditions the King may deem necessary to set up, there shall also be fixed a certain period from the issuing of the decision within which period the person arrested shall be taken away by the foreign State, as well as that if this is not done he shall be set at large. When no special circumstances so require, such a period as referred to above may not be fixed at more than one month and may in no case exceed three months.

Section 24

At the request of the government of a foreign State, before a formal requisition regarding the extradition of a certain person has been made, he may, pending it, be arrested here in the Kingdom. Such a request shall be made through diplomatic channels and shall contain information concerning the crime with which the person is charged, the time and place of the same, and notification that a sentence or decision, such as mentioned in Section 8, exists. A personal description should, if possible, also be presented.

After an agreement with a foreign State, and subject to reciprocity, the King is empowered to prescribe that such a request which is made by an authority in the foreign State directly to a police authority here in the Kingdom may also be acted upon by it.

A request respecting an arrest shall be considered, when received through diplomatic channels, by the Minister for Foreign Affairs, and in other cases by the authority to which the request is addressed. If the request is as complete as necessary, and if there seem to be no obstacles to extradition, measures for carrying out the arrest shall be taken at once. When the arrest has been made, information in the matter shall immediately be sent in to the Ministry for Foreign Affairs.

A requisition for the extradition of the person arrested shall be made in the usual way within a certain period, which, when not mentioned in the treaty with the foreign State, shall be determined by the Minister for Foreign Affairs. If this is not done, the arrested person shall be set at liberty. Such a period, as referred to above, may not be fixed at more than six weeks, or in the case of extradition to a non-European State, or of otherwise undergoing trial or punishment at a place outside Europe, at more than three months from the date when the foreign State received information of the arrest.

Section 25

Anyone who, in a foreign State, is being sought for a crime which under this law may give rise to extradition, may be arrested here in the Kingdom without a special requisition in the matter being at hand. A report on the arrest shall immediately be submitted to the Ministry for Foreign Affairs.

If the Minister for Foreign Affairs finds that there are obstacles to the extradition of the person arrested, he shall issue an order concerning his release. If it is found that there are no obstacles, the foreign State shall be informed of the arrest, and in connection therewith a certain period shall be fixed in accordance with the provisions of Section 24 within which requisition for the extradition of the person arrested shall be made.

Section 26

When anyone, in accordance with the provisions of this law, is arrested, all the objects which he then has in his possession and which may be assumed to be of importance as evi-

dence of the crime with which he is charged, or the surrender of which the plaintiff may be assumed to demand, shall be confiscated, and, when extradition is granted, be delivered to the authorities in the foreign State. With regard to the objects referred to, the King shall, however, be empowered to make such reservations for the safeguarding of the rights of a third party which may be considered to be required.

CHAPTER III

CONCERNING CERTAIN REQUISITIONS BY FOREIGN STATES IN CONNECTION WITH THE SYSTEM OF EXTRADITION

Section 27

If a foreign State wishes to obtain permission to hold anyone who has been extradited to it, irrespective of the conditions mentioned in Section 11, sub-section 1, responsible for some crime committed before the extradition other than that for which the extradition took place, or be extradited to a third State, a requisition in the matter shall be made through diplomatic channels and the requisition shall contain or be accompanied by information concerning the nature of the crime and the time and place of the same.

Permission, as referred to above, may not be granted if under this law there would be obstacles to extradition for the alleged crime; provided, however, that the investigation thereof may on no condition include the question of the guilt of the person extradited.

When it is not obvious that legally there are obstacles to the granting of permission, the question shall be subjected to consideration by the Supreme Court.

When a decision has been given in such a question, the King in Council shall take the requisition under consideration for decision; however, it may in no case be granted when in a decision of the Supreme Court it has been declared that there are obstacles to the granting of permission.

Section 28

Permission to conduct through the Kingdom a person who is being extradited by one foreign State to another may be granted by the King on the condition that it is not a question of a Swedish subject. A requisition in the matter shall be made through diplomatic channels, and to it there shall be attached a document showing the contents of the decision concerning the extradition, or also such a document as is mentioned in Section 8, paragraph 1.

CHAPTER IV

OTHER PROVISIONS

Section 29

Irrespective of that which is prescribed above in this law, in so far as extradition to Denmark and Norway is concerned, on condition of reciprocity,—

1. Extradition may be granted also for a crime which, in accordance with Section 4, would not give rise to extradition unless the crime can be followed by imprisonment as provided therein;

2. In connection with a decision respecting extradition for a certain crime, or when extradition for a certain crime has already been granted in the manner prescribed in Section 27, consent may be granted to punishing the person extradited also for another crime of a nature such that extradition therefor could not have taken place in accordance with Section 4, if there would have been no obstacles to extradition for the crime on account of other provisions in the law.

Section 30

That which is prescribed in this law shall not be applied to requisitions regarding the returning of seamen who have deserted their service.

This law shall become effective on July 1, 1913. If, in accordance with a provision of a treaty which is then in force, the obligation of extradition is prescribed in cases when there are obstacles in accordance with this law, or if a provision in such a treaty is otherwise in opposition to that which is prescribed in this law, the provision shall be observed.

Let all concerned duly comply herewith. In faith whereof, We have signed this with Our own hand and have caused it to be confirmed by our Royal Seal. The Palace of Stockholm, June 4, 1913.

GUSTAF
(L.S.)

(Department of Justice.)

GUST. SANDSTRÖM

13. Switzerland

THE FEDERAL LAW ON EXTRADITION TO FOREIGN STATES¹

Jan. 22, 1892

The Federal Assembly of the Swiss Confederation, in view of Art. 102, paragraph (*chiffre*) 8 of the Federal Constitution; in view of the message of the Federal Council of June 9, 1890, decrees:

TITLE FIRST

CONDITIONS OF EXTRADITION

Article 1. The Federal Council may, on the condition of reciprocity, or, as an exception, even without that condition, deliver to foreign States at their request and under the conditions stipulated by the provisions of the present law, any alien who is sought, arrested, formally charged or convicted by the competent judicial authority of the requesting State and who is found within the territory of the Confederation.

The Federal Council may, when it requests from a foreign State the extradition of a person who is sought, arrested, formally charged or convicted by competent Swiss tribunals, promise reciprocity within the limits of the provisions of the present law.

Extradition treaties may be concluded with foreign States within the limits of the provisions of the present law.

When an extradition treaty exists between Switzerland and the requesting State, the Federal Council may, nevertheless, on the condition of reciprocity, or even without that condition, grant the extradition for an infraction not envisaged by the treaty, within the limits fixed by the present law; and if Switzerland is the requesting State, it may, within the same limits, promise reciprocity.

The Federal Council shall inform the Federal Assembly of the promises of reciprocity given or received.

Art. 2. No Swiss citizen may be delivered to a foreign State.

When a Swiss citizen is sought in Switzerland by a foreign State for an infraction envisaged by the treaty or by the promise of reciprocity, the Federal Council shall guarantee to the State which makes the request or to which it refuses the extradition, that the person sought will be tried and, if there is ground, punished in Switzerland in conformity with the law of the competent Swiss tribunal. The requesting State, on its part, shall give the assurance that the person will not be prosecuted within its territory for the second time for the same act, and that conviction which could be pronounced against him in the requesting State will not be executed, at least that he will not be subjected to the penalty to which he has been convicted in Switzerland.

If this assurance is given, the Canton of residence or, in default of such residence, the Canton of origin, is under the obligation to proceed against the person in question as if the infraction were committed within the territory of that Canton.

¹ Promulgated by the *Conseil des États*, Jan. 22, 1892; published in *Feuille fédérale*, Vol. 1, p. 444; ratified by the *Conseil fédéral*, May 19, 1892. Unofficial translation.

Art. 3. The following acts may be the basis for extradition, if they constitute a common offense and are punishable both under the law of the place of refuge and under that of the requesting State:

I. Offenses against the person

1. Assassination, murder, involuntary homicide;
2. Infanticide and abortion;
3. Exposing, abandonment of children or defenceless persons;
4. Wounds causing death or permanent disability or incapacity to work for more than 20 days; participation in an affray having such consequences;
5. Mistreatment of parents by their children; habitual mistreatment of children by parents or persons in whose care they are placed.

II. Offenses against personal liberty and family rights

6. Abduction of adults and children;
7. Constraint of persons;
8. Kidnapping of minors;
9. Invasion of domicile committed under aggravated circumstances;
10. Threats to commit a crime against person or property;
11. Alteration or suppression of civil status.

III. Offenses against morals

12. Rape, indecent assault committed with violence or against defenceless or mentally incompetent person;
13. Immoral acts committed against children or against any person by one to whom he is entrusted;
14. Corruption of minors by parent, teacher or any other person having charge of their supervision;
15. Procuring (*proxénétisme*);
16. Immoral acts causing public scandal;
17. Incest;
18. Bigamy.

IV. Offenses against property

19. Robbery (piracy), extortion, theft, receiving of stolen goods;
20. Embezzlement (fraudulent misappropriation) and breach of trust;
21. Damages voluntarily caused to property;
22. Cheating, fraudulent bankruptcy and fraud committed in connection with insolvency or seizure or legal process.

V. Offenses destructive of public confidence

23. Counterfeiting or falsification of coins or paper money or stamps representing a certain value (postage stamps, etc.), bank-notes, obligations, shares or other documents issued by the State, corporations, societies or individuals; introduction, issue, circulation of such counterfeit or falsified articles with fraudulent intention;
24. Counterfeiting or falsification of seals, coins, stamps or plates (*clichés*); fraudulent use or abuse of seals, stamps or plates, counterfeit or authentic;
25. Forgery (falsification or counterfeiting of documents); use of false papers (fraudulent use of counterfeit or falsified documents), abstraction of documents, abuse of blank signature.
26. Displacement of boundaries.

VI. Offenses constituting a public danger

- 27. Arson, misuse of explosives, intentional, negligent or imprudent flooding of property;
- 28. Destruction or injury, voluntary or by negligence or imprudence, of railroads, steamships, posts, electric apparatus and lines (telegraphs, telephones) and endangering their operation;
- 29. Voluntary acts or acts committed by negligence or imprudence tending to cause destruction, stranding or loss of a vessel;
- 30. Spreading, voluntary or by negligence or imprudence, of contagious diseases, epidemics or epizootics; contamination by injurious substances constituting a public danger of springs, fountains or other waters;
- 31. Imitation or intentional falsification of food-stuffs constituting danger to the health of people or animals; putting on sale or in circulation of such unwholesome or corrupted food with concealment of its injurious character.

VII. Offenses against the Administration of Justice

- 32. Slandorous accusation (*dénonciation calomnieuse*);
- 33. Perjury or false statement contained in an affirmation (*sous promesse solennelle*);
- 34. False testimony, false report of experts, false statement by an interpreter; subornation of witnesses, experts, interpreters.

VIII. Offenses relative to the exercise of public functions

- 35. Corruption of public officers, jurymen, arbitrators, and experts;
- 36. Embezzlement and extortion committed by public officers; abuse of authority as a consequence of corruption or with fraudulent intention.
- 37. Suppression of letters and of telegrams, violation of the secrecy of letters and telegrams by employees of postal and telegraphic service.

The provisions of the present article apply as well to attempt, participation (instigation and complicity), assistance rendered after the offense; provocation for offense and offer to commit or to participate in it.

It shall be lawful to refuse the extradition and to forego the presentation of a request for it for minor offenses, particularly when the penalty already imposed does not exceed three months of imprisonment.

Art. 4. Extradition may be granted for an infraction contained in Art. 3 and punishable under the law of the requesting State, even if it is not expressly envisaged by the law of the Canton of refuge, if that omission is only due to the external circumstances, such as difference in geographical situation of the two States.

Art. 5. If the penalty prescribed by the law of the requesting State for the infraction which motivates the request for extradition is a corporal punishment, the extradition shall be granted subject to the condition that that penalty in such a case will be changed to imprisonment or fine.

Art. 6. Extradition is refused when the criminal action or punishment is barred either under the law of the Canton of refuge or under that of the requesting State.

Art. 7. Extradition is always subject to the condition that the extradited person will neither be prosecuted nor punished for infractions which he may have committed previous to the request, other than that one which is the basis for extradition and infractions connected with it, except, however, when the extradited person or, if the circumstances require it, his defender or counsel, expressly consent to it, or when the first, having had for three months since his final liberation the possibility of leaving the territory of the requesting State, has not made use of this possibility.

The Federal Council may, upon a new request of the requesting State, permit that the extradited person be prosecuted or punished for an infraction committed previous to and not mentioned in the first request.

When, under similar circumstances, Switzerland is the requesting (State), the Federal Council may consent to the condition mentioned in the first paragraph of the present article.

Art. 8. The State to which the person has been delivered may not deliver him on its own accord to a third State, except in the cases envisaged in the first paragraph of the preceding article.

Art. 9. Extradition is only granted on the condition that the delivered person will not be tried before a special tribunal.

Art. 10. Extradition is not granted for political offenses. It is granted, however, even when the guilty person alleges a political motive or end, if the act for which it has been requested constitutes primarily a common offense. The Federal Tribunal decides liberally in each particular instance upon the character of the infraction according to the facts of the case.

When the extradition is granted, the Federal Council sets the condition that the person whose extradition is requested shall be neither prosecuted nor punished for a political crime, nor for his political motive or end.

Art. 11. Extradition is not granted for infraction of fiscal laws or for purely military offenses. When a person prosecuted for an infraction motivating the extradition has besides violated a fiscal or military law, extradition is granted only on the condition that such violation shall not result in conviction or constitute an aggravating circumstance.

Art. 12. Extradition is not granted when the infraction for which it has been requested was committed within the territory of the Confederation, nor when that infraction, though committed outside the territory, has nevertheless been prosecuted to final judgment in Switzerland or is there the object of criminal prosecution.

Art. 13. If the person claimed is being prosecuted or has been convicted in Switzerland because of an infraction other than the one which is the basis for the request for extradition, his surrender is effected only after the prosecution has been terminated and the penalty has been served.

However, the Federal Council may permit the temporary delivery of the person claimed in order to appear before the tribunals of the requesting State, on the condition that he shall be sent back to Switzerland as soon as the judicial procedure in the requesting State has been terminated.

Art. 14. When extradition is requested by several States for the same act, it is granted in preference to the State within whose territory that act was perpetrated; if it concerns an act committed in several countries, to the State within whose territory the principal act was perpetrated.

When extradition is requested by several States for different infractions, preference is given to the State whose request is motivated by the gravest infraction. When the gravity is equal, as well as in the case of doubts as to the relative gravity, the Federal Council considers the priority of the request; but the geographical situation of the requesting States, as well as the nationality of the person claimed, may be also taken into consideration. In granting the extradition, the Federal Council may make reservation as to re-extradition, after the judgment and punishment, to another or other requesting States.

This does not affect particular conventions.

SECOND TITLE

EXTRADITION PROCEDURE

Art. 15. Each request for extradition is, as a rule, addressed to the Federal Council through the diplomatic channels. When Switzerland is the requesting State, the Federal Council likewise addresses the foreign State through the diplomatic channels.

A request for extradition is accompanied by an original or by an authentic copy of a judgment or of a warrant of arrest issued by the competent authority and executed in the form prescribed by the law of the requesting State; or by all other documents customary in the requesting State having at least the same force as a warrant of arrest, containing a precise indication of the incriminating act, the place where it was committed and the date; it is

also accompanied by the reference to and, if it is needed, by the text of the law which is applicable to the incriminating act; as far as possible, the request is accompanied by the description of the person claimed, the personal information as detailed as possible, and information as to his nationality.

Art. 16. The Federal Council decides whether there is reason to act upon the matter concerning the request for extradition, and under what conditions. If it does not act upon the matter, it so informs the requesting State.

If it acts upon the matter, it takes the measures envisaged in Art. 18 for search and arrest of the person claimed.

If the request does not satisfy the requirements of Art. 15, the Federal Council may invite the requesting State to make it regular or complete, taking in the meantime measures envisaged in Art. 18, if it judges them proper.

Art. 17. The Federal Council takes the same measures as envisaged in Art. 18 upon a communication made through the diplomatic channels, with the request for a provisional arrest, advising of the existence of a writ of arrest or another equivalent document, and that extradition be requested, and containing also the necessary information mentioned in Art. 15.

In such cases, the arrested person, providing that there is no other reason for detaining him, is set at liberty, if the writ of arrest issued by a competent authority or an equivalent document or the request for extradition are not duly produced within the certain period of time, which is twenty days from the arrest when the requesting State is a bordering one, and thirty days when it is non-bordering a European State; it may be extended to three months when the requesting State is situated outside of Europe.

Art. 18. If the request or other information disclose in what Canton the person claimed is taking refuge, the Federal Council invites the government of that Canton to have the person claimed sought out and to have him arrested as promptly as possible.

The arrest is ordered and executed in conformity with the law of the Canton by a competent authority. All searches and seizures authorized or prescribed by the law of the Canton are effected according to the order of arrest.

If the Canton of refuge is unknown, the Federal Department of Justice and the police take proper measures to find the person claimed and, if needed, publish his description, inviting the Cantonal police to seek and arrest him.

If the search remains fruitless, the Federal Council advises of it the requesting State.

Art. 19. In case of urgency, the governments and the judicial authorities of Cantons may respond to a request for a provisional arrest which is directly addressed to them through telegraph or post by the competent foreign authorities. The governments and the judicial authorities which receive such a request notify the Federal Council of it without delay. They also inform it as to the motives of a delay in execution of the requested arrest, if such a delay takes place. A notice of the request shall be, however, presented promptly through the diplomatic channels to the Federal Council.

The arrested person is set at liberty in the cases envisaged in the second paragraph of Art. 17.

Art. 20. In serious cases and when there is a danger of loss of time, the police authorities of a Canton may, on their own accord, proceed to the arrest of a person, the description of whom has been published by the foreign police. They inform immediately the Federal Council.

The provisions of Art. 17, paragraph 2, apply by analogy.

Art. 21. Promptly after the arrest, the competent authority proceeds to the questioning of the arrested person.

After the examination of the question of nationality, the arrested person is informed as to the conditions of extradition; he may be given assistance of counsel. He is invited to declare whether he consents to be delivered without further delay, or whether, on the contrary, he opposes his extradition and on what basis (on what grounds). A verbal process of questioning is transmitted to the Federal Council with all documents and relative information.

Art. 22. If the arrested person declares his consent to be delivered without delay, and when no legal impediment bars his extradition, or if he raises no objections against it which are founded upon the present law, treaty or declaration of reciprocity, the Federal Council renders his extradition accordingly. It communicates on the matter to the requesting State and the Cantonal government, which take charge of proceeding with the arrested person, giving account of it to the Federal Council.

Art. 23. If, on the contrary, the arrested person raises objection founded upon the present law, treaty or declaration of reciprocity, the Federal Council transmits the *dossier* (case) to the Federal Tribunal, advising the government of the interested Canton.

The Federal Council may order the personal appearance of the arrested person. The hearing is public unless a closed hearing (*le huis clos*) is ordered by the Federal Tribunal for serious reasons which are to be mentioned in the *procès-verbal*.

The Procurator-General of the Confederation may take part in the inquiry and discussion.

The arrested person may be assisted, when it is required, by counsel appointed by the court.

Art. 24. The Federal Tribunal decides whether or not there are grounds for extradition.

Art. 25. Temporary liberation may be granted if that measure seems to be justified by the circumstance.

It is authorized by the Federal Tribunal if it comes up at the judicial procedure, if not, by the Federal Council.

Art. 26. If the extradition is granted, the procedure is determined by the provisions of Art. 22. If the extradition is refused, the Federal Council informs the requesting State. The arrested person is immediately set at liberty, unless he is to be detained for another reason.

Art. 27. The person who is to be extradited in virtue of Art. 22 or 26, is conducted to the frontiers and delivered by the competent police authorities to the authorities or agents of the requesting State, together with papers, valuables and other seized articles which are connected with the infraction for which the extradition is granted.

If the surrender of the person claimed cannot be effected, the papers and seized articles are nevertheless delivered to the requesting State.

The same applies to all articles of that kind found subsequently.

The rights to these articles which may have been acquired by third persons remain observed.

Art. 28. If within the period of twenty days from the communication of the decree granting the extradition, the requesting State does not provide for reception of the extradited person, he is set at liberty. A prolongation of the period may be granted by the Federal Council.

Art. 29. In the cases envisaged in Arts. 19 and 20, if the arrested person consents to his extradition, the Cantonal government may order and execute it in view of a writ of arrest and without other formalities.

It advises immediately the Federal Departments of Justice and Police, transmitting to them the writ of arrest with the extract of the *procès-verbal* containing (stating) the consent given by the extradited person, over his signature.

Art. 30. The Federal Council may, with the consent of all interested parties, grant authorization of the execution in a state prison of penalty of imprisonment pronounced abroad; in such a case it takes the necessary measures.

Art. 31. The Confederation bears the expenses in extradition to foreign States ordered by its authorities.

THIRD TITLE

TRANSIT

Art. 32. The Federal Council may authorize the transit through the territory of the Confederation of persons extradited by a foreign State to another foreign State upon the demand

addressed to the Federal Council through the diplomatic channels, and accompanied by one of the documents mentioned in Art. 15. However, the transit is refused in the case when extradition would be refused in virtue of Arts. 2, 3, 10 or 11 of the present law.

FOURTH TITLE

MISCELLANEOUS PROVISIONS

Art. 33. Art. 58 of the Federal Law of the Judicial Organization (*Rec. off., nouv. série, I. 117*), of June 27, 1874, is repealed.

The Federal Council, in conformity with the provisions of the federal law of June 17, 1874, concerning the public voting (?) upon federal laws and ordinances, has charge of publication of the present law and of fixing the time when it will come into force.

So decreed by the Federal Council,

BERNE, *January 21, 1892.*

President: ADR. LACHENAL

Secretary: RINGIER.

So decreed by the Council of States,

BERNE, *January 22, 1892.*

President: GOTTISHEIM

Secretary: SCHATZMANN

THE FEDERAL COUNCIL RESOLVES

The above federal law, published on January 27, 1892,¹ shall be included in the collection of the federal laws and come into force immediately.

BERNE, *May 19, 1892.*

In name of the Swiss Federal Council

Vice-President

SCHENK

Vice-Chancellor

SCHATZMANN

THE FEDERAL LAW MODIFYING

THE FEDERAL LAW OF JANUARY 22, 1892, ON EXTRADITION TO
FOREIGN STATES²

June 14, 1928

The General Assembly of the Swiss Confederation, in view of the message of the Federal Council of December 12, 1927, decides:

First Article

Art. 3 of the Federal Law of January 22, 1892, on Extradition to Foreign States is completed by the following addition to Group VI "Offenses constituting public danger":

"31^{bis}. Voluntary infractions of provisions concerning narcotics in so far as that infraction involves imprisonment."

Article 2

The Federal Council takes charge of execution of the present law.

The above federal law is published in virtue of Art. 89, paragraph 2 of the Federal Con-

¹ See the Federal File of 1892, Vol. 1, page 44.

² Promulgated by the *Conseil national*, Mar. 13, 1928; published: *F.F.* 1928, II, p. 203; ratified by the *Conseil des États*, June 14, 1928; ratified by the *Conseil fédéral*, Sept. 29, 1928.

stitution, and Art. 3 of the law of June 17, 1874, concerning the common violation of the federal laws and ordinances.

So resolved by the National Council.

BERNE, *March 13, 1928.*

President: R. MINGER

Secretary: F. V. ERNST

So resolved by the Council of States,

BERNE, *June 14, 1928.*

President: Dr. EMILE SAVOY

Secretary: LEIMGRUBER

THE FEDERAL COUNCIL RESOLVES

The above federal law, published on June 20, 1928,¹ shall be included in the selection of laws of the Confederation and come into force on October 1, 1928.

BERNE, *September 29, 1928.*

By order of the Swiss Federal Council:

Chancellor of the Confederation
KAESLIN

14. Turkey

THE TURKISH PENAL CODE ²

Article 9

The extradition of a Turk to foreign States for an offense can not be granted by the State.

The extradition of a foreigner to foreign States for a political offense or for one connected therewith can not be granted by the State.

In case a request for extradition is made by a foreign State, the Fundamental Court of the locality in which the demanded person is residing must pass a judgment relative to his citizenship and the nature of his offense.

The request for extradition is not granted in case it is established by court that the citizenship of the person demanded is Turkish, or that his offense is either political or military or related thereto.

The request for extradition may be granted by the government if it be decided that the person demanded is a foreigner and that his offense is a common offense (*i.e.*, related to common law).

An arrest warrant may be issued by the local examining magistrate against a person the extradition of whom has been requested and granted.

Note

The following note was transmitted from the Turkish Ministry of Foreign Affairs to the Department of State of the U. S. A. in connection with the text of Article 9 of the Turkish Penal Code:

A. One single legal text, Article 9 of the Penal Code, deals with extradition and may be summed up as follows:

Turkey does not surrender her nationals.

Surrender is furthermore refused in the case of political, military and other offenses of a similar nature.

On the request for extradition by a foreign Government, the tribunal to whose jurisdiction the individual in question belongs, has in the first place to determine the latter's nationality as well as the nature of his offense.

Should this tribunal establish that the individual in question is of Turkish nationality, or that the incriminated offense is of a political or military nature, extradition shall not be granted.

¹ Sec *F.F.* 1928, II, p. 203.

² Unofficial translation.

The request for extradition of an individual whose alien nationality has been established and whose crime is regarded as a common crime, may be complied with.

The local examining magistrate may issue a warrant of arrest against the individual whose extradition has been requested and granted.

The conditions of extradition and its procedure are governed chiefly by treaties and conventions which Turkey concludes with alien governments. In this connection Turkey has already concluded treaties with Italy, Bulgaria, Germany, Syria, Czechoslovakia and Iraq. Should the Embassy of the United States desire it the Ministry of Foreign Affairs will be glad to supply it with the text of each of these treaties.

Turkey sometimes consents to grant extradition of offenders, without a convention, on condition of reciprocity.

B. There is likewise no legislative text regarding extradition procedure. The rules provided for by treaties and the procedure *de facto* followed in extraditions not based on conventions may be summed up as regards Turkey as follows:

1. The request for extradition has to be transmitted through diplomatic channels.
 2. The proofs which should accompany such a request are:
 - a) Documents establishing the identity of the offender;
 - b) In case the individual in question has not been subject to proceedings, documents which set forth the nature of the offense, minutes of the investigation containing an enumeration of the proofs, evidence, etc., as well as the legal decisions;
 - c) In case the individual in question has already been sentenced following a hearing of both parties or uncontested proceedings, a copy of the sentence, the legalized texts of the Penal Code referring to the offense as well as their authenticated translations.
- A warrant of arrest or a *subpoena* is likewise required.

3. Should the Ministry of Foreign Affairs establish that the *dossier* is complete, he transmits it to the Ministry of Justice which in turn forwards it to the competent tribunal.

4. Should the tribunal decide, in accordance with the provisions of Article 9 of the Penal Code or in accordance with the treaty in application, that there is no obstacle to the surrender of the individual requested extradition is granted following the decision by the Council of Ministers.

Should Turkey be the claiming party, she will likewise transmit her request through diplomatic channels together with all the documents indicated in the above.

15. The United States of America

UNITED STATES CODE ANNOTATED

TITLE 18—CRIMINAL CODE AND CRIMINAL PROCEDURE¹

CHAPTER 20. EXTRADITION

Section 651. *Fugitives from foreign country.* Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, or commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to

¹ The present text is derived from a series of statutes as follows: (a) Act of 1848 (9 Statutes at Large, p. 302); (b) Act of 1860 (12 Stats., p. 84); (c) Act of 1876 (19 Stats., p. 59); (d) Statute of 1878 (R. S. 5270-5277); (e) Act of 1882 (22 Stats., p. 215); (f) Act of 1900 (31 Stats., p. 656).

sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. (R. S. §5270; June 6, 1900, c. 793, 31 Stat. 656.)

HISTORICAL NOTE

This section is identical with Rev. St. §5270 as enacted. Act of June 6, 1900, c. 793, cited above, amended Rev. St. §5270, by adding thereto the provisions comprising section 652 of this title, *post*.

Rev. St. §5270, had its source in Act of Aug. 12, 1848, c. 167, §1, 9 Stat. 302.

§652. *Fugitives from country under control of United States.* Whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employes, or depositaries; larceny or embezzlement of an amount not less than \$100 in value; robbery; burglary, defined to be the breaking and entering by night time into the house of another person with intent to commit a felony therein; and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering, or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, any Territory thereof or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections 653 to 655 and 658 to 661 of this title,¹ so far as applicable, shall govern proceedings authorized by this section. Such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged. No return or surrender shall be made of any person charged with the commission of any offense of a political nature. If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial. (R. S. §5270; June 6, 1900, c. 793, 31 Stat. 656.)

HISTORICAL NOTE

The words of this section reading "sections 653 to 655 and 658 to 661 of this title," are a translation of a reference in the provision as originally enacted to Rev. St. §5270—

¹ "sections 653 to 655 and 658 to 661 of this title" should read, "sections 651, 653 to 655, and 658 to 661 of this title."

5277. It should, therefore, apparently, include reference to section 651 of this title, *ante*.

See, as to derivation of this section, note to section 651 of this title, *ante*.

§653. *Surrender of fugitive.* It shall be lawful for the Secretary of State, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape. (R. S. §5270.)

HISTORICAL NOTE

Rev. St. §5272, cited above, had its source in Act of Aug. 12, 1848, c. 167, §3, 9 Stat. 302.

§654. *Time allowed for extradition.* Whenever any person who is committed under this chapter or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any State, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the Secretary of State, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered. (R. S. §5273.)

HISTORICAL NOTE

Rev. St. §5273, cited above, was derived from Act of Aug. 12, 1848, c. 167, §4, 9 Stat. 303.

§655. *Evidence on hearing.* In all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under this chapter, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required. (R. S. §5271; Aug. 3, 1882, c. 478, §5, 22 Stat. 216.)

HISTORICAL NOTE

This is section 5 of Act of Aug. 3, 1882, c. 378, cited to the text.

R. S. §5271, also cited to the text, was derived from Act of Aug. 12, 1848, c. 167, §2, 9 Stat. 302, as amended by Act of June 22, 1860, c. 184, 12 Stat. 84. It read as follows: "In every case of complaint, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any foreign country may have been granted, certified under the hand of the person issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended, if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section."

R. S. §5271, just quoted above, was amended by Act of June 19, 1876, c. 133, 19 Stat. 59, so as to read as follows: "In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section."

Said amendatory act, however, was repealed by section 6 of Act of Aug. 3, 1882, c. 378, which also repealed so much of R. S. §5271 as was inconsistent with that act.

The omission of R. S. §5271 from the Code was evidently on the theory that it was entirely inconsistent with this section.

§656. *Witnesses for indigent defendants.* On the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he can not safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States. (Aug. 3, 1882, c. 378, §3, 22 Stat. 215.)

§657. *Place and character of hearing.* All hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public. (Aug. 3, 1882, c. 378, §1, 22 Stat. 215.)

§658. *Continuance of provisions limited.* The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer. (R. S. §5274.)

HISTORICAL NOTE

R. S. §5274, cited above, was derived from section 5 of Act of Aug. 12, 1848, c. 167, 9 Stat. 303.

§659. *Protection of accused.* Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safekeeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused. (R. S. §5275.)

HISTORICAL NOTE

R. S. §5275, cited to the text, was derived from section 1 of Act of March 3, 1869, c. 141, 15 Stat. 337.

§660. *Agent receiving offenders; powers.* Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping. (R. S. §5276.)

HISTORICAL NOTE

R. S. §5276, cited to the text, was derived from Act of March 3, 1869, c. 141, §2, 15 Stat. 338.

§661. *Same; penalty for opposing.* Every person who knowingly and willfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not more than \$1,000, and by imprisonment for not more than one year. (R. S. §5277.)

HISTORICAL NOTE

R. S. §5277, cited to the text, had its source in Act of March 3, 1869, c. 141, §3, 15 Stat. 338.

§664. *Delivery of fugitives as between foreign country and Philippines.* The provisions of sections 651, 653 to 655, and 658 to 661 of this title, so far as applicable, shall apply to the Philippine Islands for the arrest and removal therefrom of any fugitives from justice charged with the commission within the jurisdiction of any foreign government of any of the crimes provided for by treaty between the United States and such foreign nation, and for the delivery by a foreign government of any person accused of crime committed within the jurisdiction of the Philippine Islands. Such fugitive from justice of a foreign country may, upon warrant duly issued by any judge or magistrate of the Philippine Islands, and agreeably to the usual mode of process against offenders therein, be arrested and brought before such judge or magistrate, who shall proceed in the matter in accordance with the provisions hereby made applicable to the Philippine Islands. For the purposes of this section the order or warrant for delivery of a person committed for extradition prescribed by section 653 of this title shall be issued by the Governor of the Philippine Islands under his hand and seal of office, and not by the Secretary of State. (Feb. 6, 1905, c. 454, §1, 33 Stat. 698.)

HISTORICAL NOTE

This section and section 665 of this title, *post*, were an act entitled "An act to extend certain provisions of the Revised Statutes of the United States to the Philippine Islands."

MEMORANDUM RELATIVE TO APPLICATIONS FOR THE EXTRADITION FROM FOREIGN COUNTRIES OF FUGITIVES FROM JUSTICE

DEPARTMENT OF STATE

Washington, September, 1921

Extradition will be asked only from a Government with which the United States has an extradition treaty, and only for an offense specified in the treaty.

All applications for requisitions should be addressed to the Secretary of State, accompanied by the necessary papers as herein stated. When extradition is sought for an offense within the jurisdiction of the State or Territorial courts, the application must come from the governor of the State or Territory. When the offense is against the United States, the application should come from the Attorney General.

In every application for a requisition it must be made to appear that one of the offenses enumerated in the extradition treaty between the United States and the Government from which extradition is sought has been committed within the jurisdiction of the United States, or of some one of the States or Territories, and that the person charged therewith is believed to have sought an asylum or has been found within the dominions of such foreign government.

The extradition treaties of the United States ordinarily provide that the surrender of a fugitive shall be granted only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her commitment for trial if the crime or offense had been there committed.

If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated copy of the record of conviction and sentence of the court is ordinarily sufficient.

If the fugitive has not been convicted, but is merely charged with crime, a duly authenticated copy of the indictment or information, if any, and of the warrant of arrest and return thereto, accompanied by a copy of the evidence upon which the indictment was found, or the warrant of arrest issued, or by original depositions setting forth as fully as possible the circumstances of the crime, are usually necessary. Many of our treaties require the production of a duly authenticated copy of the warrant of arrest in this country; but an indictment, information, or warrant of arrest alone, without the accompanying proofs, is not ordinarily sufficient. It is desirable to make out as strong a case as possible, in order to meet the contingencies of the local requirements at the place of arrest.

If the extradition of the fugitive is sought for several offenses, copies of the several convictions, indictments, or informations and of the documents in support of each should be furnished.

Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses in the language of the treaty upon which his extradition is desired, and the full name of the person proposed for designation by the President to receive and convey the prisoner to the United States. It should also contain a statement to the effect that it is made solely for the purpose of bringing about the trial and punishment of the fugitive, and not for any private purpose, and that if the application is granted, the criminal proceedings will not be used for any private purpose.

Copies of the record of conviction, or of the indictment, or information, and of the warrant of arrest, and the other papers and documents going to make up the evidence are required by the department, in the first instance, as a basis for requesting the surrender of the fugitive, but chiefly in order that they may be duly authenticated under the seal of the department, so as to make them receivable as evidence where the fugitive is arrested upon the question of his surrender.

Copies of all papers going to make up the evidence, transmitted as herein required, including the record of conviction, or the indictment, or information, and the warrant of arrest, must be duly certified and then authenticated under the great seal of the State making the application or the seal of the Department of Justice, as the case may be; and this department will authenticate the seal of the State or of the Department of Justice. For example, if a deposition is made before a justice of the peace, the official character of the justice and his authority to administer oaths should be attested by the county clerk or other superior certifying officer; the certificate of the county clerk should be authenticated by the governor or secretary of state under the seal of the State, and the latter will be authenticated by this department. If there is but one authentication, it should plainly cover all the papers attached.

All of the papers herein required in the way of evidence must be transmitted in duplicate, one copy to be retained in the files of the department, and the other, duly authenticated by the Secretary of State will be returned with the President's warrant, for the use of the agent who may be designated to receive the fugitive. As the governor of the State, or the Department of Justice, also ordinarily requires a copy, prosecuting attorneys should have all papers made in triplicate.

By the practice of some of the countries with which the United States has treaties, in order to entitle copies of depositions to be received in evidence the party producing them is required to declare under oath that they are true copies of the original depositions. It is desirable, therefore, that such agent, either from a comparison of the copies with the originals or from having been present at the attestations of the copies, should be prepared to make such declaration. When the original depositions are forwarded, such declaration is not required.

Applications by telegraph or letter are frequently made to this department for its inter-

vention to obtain the provisional arrest and detention of fugitives in foreign countries in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. Such applications should state specifically the name of the fugitive, the offense with which he is charged, the circumstances of the crime as fully as possible, and a description and identification of the accused. It is always helpful to show that an indictment has been found or a warrant of arrest has been issued for the apprehension of the accused. In Great Britain the practice makes it essential that it shall appear that a warrant of arrest has been issued in this country.¹

Care should be taken to observe the provisions of the particular treaty under which extradition is sought, and to comply with any special provisions contained therein. The extradition treaties of the United States may be found in the several volumes of the Statutes at Large, and in the compilation entitled "Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers," issued in three volumes by the Government Printing Office. Copies of particular treaties will be furnished by the department upon application.

If the offense charged be a violation of a law of a State or Territory, the agent authorized by the President to receive the fugitive will be required to deliver him to the authorities of such State or Territory. If the offense charged be a violation of a law of the United States, the agent will be required to deliver the fugitive to the proper authorities of the United States for the judicial district having jurisdiction of the offense.

Where the requisition is made for an offense against the laws of a State or Territory, the expenses attending the apprehension and delivery of the fugitive must be borne by such State or Territory. Expenses of extradition are defrayed by the United States only when the offense is against its own laws.

A strict compliance with these requirements may save much delay and expense to the party seeking the extradition of a fugitive criminal.

¹For fuller information with respect to procedure in cases of provisional arrest within British jurisdiction, see Department's memorandum of May, 1890.

PART II

JURISDICTION WITH RESPECT TO CRIME

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CONVENTION ON JURISDICTION WITH RESPECT TO CRIME

ARTICLE 1. USE OF TERMS

As the terms are used in this Convention:

- (a) A "State" is a member of the community of nations.
- (b) A State's "jurisdiction" is its competence under international law to prosecute and punish for crime.
- (c) A "crime" is an act or omission which is made an offence by the law of the State assuming jurisdiction.
- (d) A State's "territory" comprises its land and territorial waters and the air above its land and territorial waters.
- (e) A "national" of a State is a natural person upon whom that State has conferred its nationality in conformity with international law.
- (f) An "alien" is a person, either natural or juristic, upon whom the State assuming jurisdiction has not conferred its nationality or national character in conformity with international law.

ARTICLE 2. SCOPE OF CONVENTION

A State's jurisdiction with respect to crimes is defined and limited by the present Convention; but nothing in its provisions shall preclude any of the parties to this Convention from entering into other agreements, or from giving effect to other agreements now in force, concerning competence to prosecute and punish for crime, which affect only the parties to such other agreements.

ARTICLE 3. TERRITORIAL JURISDICTION

A State has jurisdiction with respect to any crime committed in whole or in part within its territory.

This jurisdiction extends, also, to

- (a) Any participation outside its territory in a crime committed in whole or in part within its territory; and
- (b) Any attempt outside its territory to commit a crime in whole or in part within its territory.

ARTICLE 4. SHIPS AND AIRCRAFT

A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character.

This jurisdiction extends, also, to

- (a) Any participation in a crime committed in whole or in part upon its public or private ship or aircraft; and

(b) Any attempt to commit a crime in whole or in part upon its public or private ship or aircraft.

ARTICLE 5. JURISDICTION OF NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted; or

(b) By a corporation or other juristic person which had the national character of that State when the crime was committed.

ARTICLE 6. PERSONS ASSIMILATED TO NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By an alien in connection with the discharge of a public function which he was engaged to perform for that State; or

(b) By an alien while employed as one of the personnel of a ship or aircraft having the national character of that State.

ARTICLE 7. PROTECTION—SECURITY OF THE STATE

A State has jurisdiction with respect to any crime committed outside its territory, by an alien, against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a right guaranteed to the alien by the law of the place where it was committed.

ARTICLE 8. PROTECTION—COUNTERFEITING

A State has jurisdiction with respect to any crime committed outside its territory, by an alien, which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority.

ARTICLE 9. UNIVERSALITY—PIRACY

A State has jurisdiction with respect to any crime committed outside its territory, by an alien, which constitutes piracy by international law.

ARTICLE 10. UNIVERSALITY—OTHER CRIMES

A State has jurisdiction with respect to any crime committed outside its territory, by an alien, other than the crimes mentioned in Articles 6, 7, 8 and 9, by reason of the presence of the alien within its territory, as follows:

(a) When committed in a place not subject to its authority but subject to the authority of another State, the act or omission which constitutes the crime must also be an offence by the law of the place where it was committed, surrender of the alien for prosecution must first have been offered to

such other State or States and the offer must remain unaccepted, and prosecution must not be barred by lapse of time in the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any State, the act or omission which constitutes the crime must also be an offence by the law of a State of which the alien is a national, surrender of the alien for prosecution must first have been offered to the State or States of which he is a national and the offer must remain unaccepted, and prosecution must not be barred by lapse of time under the law of any State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of any State of which the alien is a national.

(c) When committed in a place not subject to the authority of any State and the alien is not a national of any State.

ARTICLE 11. PASSIVE PERSONALITY

A State has jurisdiction with respect to any crime committed in a place not subject to the authority of any State, by an alien, if the crime was committed to the injury of that State, or of one of its nationals, or of a corporation or juristic person having its national character.

ARTICLE 12. IMMUNITIES

In exercising jurisdiction under this Convention, a State shall respect such immunities as are accorded by international law or international convention to other States or to institutions created by international convention.

ARTICLE 13. ALIENS--PROSECUTION AND PUNISHMENT

In exercising jurisdiction under this Convention, no State shall prosecute an alien who has not been taken into custody by its authorities as permitted by international law or international convention, prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise than by fair trial before an impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination.

ARTICLE 14. ALIENS--NON BIS IN IDEM

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien after it is proved that the alien has been prosecuted in another State for a crime requiring proof of substantially the same acts or omissions and has been acquitted, or has been convicted and has undergone

the penalty imposed, or, having been convicted, has been paroled or pardoned.

ARTICLE 15. ALIENS—ACTS REQUIRED BY LAW

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien for an act or omission which was required of that alien by the law of the place where the alien was at the time of the act or omission.

ARTICLE 16. ALIENS—ASSISTING ADMINISTRATION OF JUSTICE

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien during his presence within its territory or in a place subject to its authority, at the request of officials of that State, for the purpose of testifying before State tribunals or otherwise assisting in the administration of justice, except for crimes committed while present for such purpose.

ARTICLE 17. APPREHENSION IN VIOLATION OF INTERNATIONAL LAW

In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

ARTICLE 18. INTERPRETATION OF CONVENTION

The provisions of the present Convention shall in no case be interpreted

(a) To impose upon a State an obligation to exercise the jurisdiction herein defined and limited;

(b) To invalidate an exercise of jurisdiction asserted upon untenable grounds, if jurisdiction might have been assumed under this Convention on other grounds;

(c) To foreclose possible objections to the making of a particular act or omission a crime, based upon grounds falling outside the scope of this Convention.

ARTICLE 19. SETTLEMENT OF DISPUTES

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

INTRODUCTION

From its beginning, the international community of States has had to deal in a pragmatic way with more or less troublesome problems of penal jurisdiction. In exercising such jurisdiction, each in its own way and in accordance with such principles as national experience had developed, States became increasingly aware of the overlappings and the gaps which produced conflicts and required coöperation. The solution of problems of penal jurisdiction became primarily a matter of the avoiding or resolving of conflicts. The trend toward coöperation found expression in treaties of extradition and judicial assistance.

In the 19th century, with the increasing facility of travel, transport and communication, and with the crystallization in national codes of the several principles upon which States had become accustomed to proceed in dealing with crime, the problems of conflict between the different national systems became progressively more acute. There appeared, in consequence, an extensive literature on international aspects of the law and practice governing penal jurisdiction. John Bassett Moore's *Report on Extraterritorial Crime and the Cutting Case* (1887), was the outgrowth of an historic international controversy. More recently, in the monumental work of Maurice Travers, *Le Droit Pénal International* (1920-1922), in five volumes, there was attempted a comprehensive and scientific treatise on the whole subject. The works of Moore and Travers are among the more notable of a long list of contributions which has included every type of study, ranging from highly specialized monographs on topics of limited scope to treatises emphasizing the historical, analytical or functional aspects of the problems presented. During the same period, a significant coöperative effort found expression in the international agreements incorporated in the Treaty of Lima of 1878, the Treaty of Montevideo of 1889, and the Convention of Habana, the so-called Bustamante Code, of 1928; and the subject was studied and important resolutions adopted by the Institute of International Law in 1883 and 1931, by the International Prison Congress in 1900, by the Conference of Warsaw on the Unification of the Penal Law in 1927, and by the International Congress of Comparative Law in 1932. In short, the record of the last two generations reveals an increasing awareness of the importance of problems of penal jurisdiction for the international society of States, a growing tendency to attack those problems through coöperative effort, and a well-defined trend toward that maturity of development which marks a subject as "ripe" for codification.

The contemporary importance of problems of penal jurisdiction is suggested by the development of the literature and by the progress of coöperative effort which has been noted above. It has been indicated in a dramatic

way by the famous Cutting incident, between Mexico and the United States, and by the case of the *S.S. Lotus*, submitted by France and Turkey to the Permanent Court of International Justice. It is demonstrated most conclusively, however, by the experience of national administrations in dealing with an infinite variety of workaday matters of international import. Such experience, unfortunately, has been imperfectly recorded and insufficiently studied. Were more adequate records available, their content would probably reveal that there are few subjects of international concern with respect to which a common understanding would do more to mitigate normal friction at the international frontiers which delimit authority in the administration of national law. Whether the subject is yet "ripe" for codification may be debatable; but the desirability of a common understanding formulated in a convention or code will hardly be controverted.

The materials for a codification of this subject have, as a body, certain characteristics which should be noted. In the first place, there is a striking paucity of outstanding international precedents, the Cutting incident and the case of the *S.S. Lotus* standing almost alone as the *causes célèbres* of recent times. The practice of nations has been recorded, rather, in hundreds of national adjudications, in petty incidents, and in informal settlements of a more prosaic type. In the second place, of international legislation in the form of general treaties there are a few notable examples; but the aggregate is extremely meager in relation to the scope and importance of the general subject. In the third place, the resolutions of such private international organizations as the Institute of International Law and of such conferences as those held at Brussels, Warsaw, or The Hague, constitute a notable contribution, on the whole more important than similar contributions to the materials of codification available for most comparable subjects. In the fourth place, the literature is extensive, of high quality, and of exceptional significance for the work of codification. The combination of expert knowledge of national penal law, comparative law and international law which is revealed in the works of many of the reliable writers is impressive indeed. Finally, the materials which are clearly of the greatest significance for the work of codification are found in the national legislation on penal law and penal procedure and in the adjudications of national courts. If it is true, as a recent writer has suggested, that "international law is, in one sense, merely a summary of what governments claim as their rights or recognize as the rights of others" (Dunn, *The Protection of Nationals*, p. 21), it follows certainly that an adequate statement of the international law of penal jurisdiction must rest primarily upon a foundation built of materials from the cases, codes and statutes of national law. The best evidence of international law, in brief, is probably to be found in "the general principles of law recognized by civilized nations"; and the work of codification becomes, in one aspect at least, a search for the greatest common denominator of national law and practice with respect to a matter of international concern.

An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in the different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.

The plan of the present Convention has been determined primarily by the recognition which must be accorded to the five general principles enumerated above. Following Article 1 on the use of terms and Article 2 on the scope of the Convention, Article 3 states the territorial principle in its broadest acceptable terms. Article 4 formulates a similar principle for offences committed on public or private ships or aircraft. Article 5 states the nationality principle in its broadest acceptable terms; and Article 6 formulates a similar principle for offences committed by persons who may be assimilated to nationals for certain purposes or at certain times. The protective principle is incorporated in Article 7 for offences against the security of the state and in Article 8 for offences of counterfeiting. Article 9 states the principle of universality for the offence of piracy; and Article 10 formulates the same principle, in carefully guarded terms, for other crimes. Article 11 accepts the principle of passive personality for offences committed in a place not subject to the authority of any State. Article 12 incorporates by reference such immunities from the exercise of penal jurisdiction as are accorded by international law or international convention. Articles 13, 14, 15, and 16

incorporate essential safeguards with respect to the prosecution and punishment of aliens. Article 17 forbids the prosecution or punishment of any person of whom custody has been obtained in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated. Article 18 formulates certain general principles of interpretation; and Article 19 provides for the settlement of disputes with respect to the interpretation or application of the Convention.

It is to be emphasized that the Convention deals only with penal jurisdiction and with particular offences only as they provide a special basis for jurisdiction. It does not deal with substantive penal law. Except where certain procedural safeguards have been incorporated to circumscribe the exercise of penal jurisdiction over aliens, it does not deal with penal procedure. It is not a convention for coöperation in the suppression of crime, provision for such coöperation being left to the special conventions which are now in force or which may be concluded in the future. It is a Convention defining and limiting the penal jurisdiction of States in the broadest sense. It recognizes that States may exercise, if they choose, all the penal jurisdiction which its provisions approve; and it excludes the exercise of any penal jurisdiction which might conceivably be asserted outside the limits defined.

While the Convention thus provides each State with a definition of the limits beyond which other States may not go in assuming penal jurisdiction, it is to be emphasized further that it imposes no obligation whatever upon any State to exercise all or any part of the jurisdiction defined. States may be under an obligation to exercise penal jurisdiction in certain cases by virtue of principles of customary international law or international agreement other than those incorporated in this Convention; but the Convention imposes no such obligation. Relatively few States now exercise all of the penal jurisdiction which the Convention would permit. Certain States may be organized under constitutional limitations which would prevent them from exercising to the fullest extent permissible some of the jurisdiction which the Convention approves. The position of such States, or of others whose national policy does not require exercise to the fullest extent permissible, is in no way affected by the Convention.

The Convention is in one sense an epitome of the results of an investigation which has ranged over a wide field and which is reported at some length in the appended comment. The investigation indicates that States have much more in common with respect to penal jurisdiction than is generally appreciated, that the gulf between those States which stress traditionally the territorial principle and the States which make an extensive use of other principles is by no means so wide as has been generally assumed, that there are practicable bases of compromise, without sacrifice of any essential state interest, on most if not all of the controverted questions, and that it is feasible to attempt a definition of penal jurisdiction in a carefully

integrated instrument which combines recognition of the jurisdiction asserted by most States in their national legislation and jurisprudence with such limitations and safeguards as may be calculated to make broad definitions of competence acceptable to all. The Convention is submitted as a statement of the penal jurisdiction of States which should have the advantage, for every State, of substituting for the petty conflicts and uncertainties that have caused irritation in the past the security that comes from a common understanding of general principles.

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ARTICLE 1. USE OF TERMS

As the term is used in this Convention:

(a) A "State" is a member of the community of nations.

COMMENT

The term "State" is used in this Convention in a sense substantially similar to the sense in which it is used in the Draft Convention on Competence of Courts in Regard to Foreign States, Art. 1 (a). Research in International Law (1932), p. 475. The present Convention is concerned only with those entities which, by virtue of their nature and organization, are capable of and do in fact enjoy membership in the community of nations, and which, by virtue of such membership, are able to exercise the competence to prosecute and punish for crime which international law accords to members of the international community.

The additional requirement of maintenance of diplomatic relations with other members of the community of nations, included for obvious reasons in the Draft Convention on Diplomatic Privileges and Immunities, Art. 1 (a), Research in International Law (1932), p. 42, would appear to be unnecessary in the present Convention. Indeed, where it can be demonstrated that a "State" claiming jurisdiction is a member of the community of nations, although it does not maintain diplomatic relations with other members of the community (*e.g.*, India), there is no reason why it should not be within the scope of the present Convention.

Thus, as used in this Convention, the term "State" is not confined to communities which are completely independent in the constitutional sense. Member States of the German Reich prior to 1919 and the British Dominions and India since 1919 may be considered as members of the community of nations, and hence as "States" within the meaning of this Convention, notwithstanding possible doubts as to their status in the constitutional sense. Whenever such member States or Dominions, parties to the present Convention, act in an international capacity in a matter within the scope of this Convention, their action is governed by the principles set forth in this Convention.

On the other hand, this Convention is not concerned with political subdivisions as such. Where a State permits its international competence to be exercised in part through its political subdivisions, as in the United States of America, the activity of the subdivisions is regarded as State activity and this Convention deals with it only as State activity.

In case of political subdivisions which are also members of the community of nations, it is conceivable that the respective competences of the composite member and its subdivisions, or the respective competences of subdivisions

inter se, may be governed in part by international law. Usually, however, there is a constitutional authority, such as the Judicial Committee of the Privy Council for the British Commonwealth of Nations, which resolves such questions according to principles of internal or constitutional law. The principles of internal or constitutional law may be inspired by and practically identical with relevant principles of international law and consequently may afford the most significant of analogies; but it is to be emphasized that references to such principles are by way of analogy only and that the present Convention is not applicable *ex proprio vigore*.

In case of political subdivisions which are not members of the community of nations, such as the States of the United States of America, the respective competences of the State and its subdivisions, or of the subdivisions *inter se*, are governed solely by internal or constitutional law and the present Convention is inapplicable. Nevertheless the internal or constitutional law governing penal competence may be, and sometimes is, so similar to international law as to provide analogies of exceptional significance and utility. The interstate cases arising among States of the United States of America contribute much material which may be used in this way; and consequently they have been cited freely throughout the comment on the present Convention. The use of such materials makes it all the more essential to emphasize that the present Convention is concerned only with the competence of States which are members of the community of nations. It is not concerned with the internal organization of the State or with the distribution within the State of the competence defined.

As the term is used in this Convention:

(b) A State's "jurisdiction" is its competence under international law to prosecute and punish for crime.

COMMENT

The term "jurisdiction" is here used to describe the competence of the State. It is used in no other sense. The Convention is concerned only with the international capacity of States and consequently the term "jurisdiction" is never used to describe the competence of courts or other governmental agencies within States. Cf. Foster, "Jurisdiction," *Encyclopedia of the Social Sciences*, VIII, 471; van Praag, *Jurisdiction et Droit International Public* (1915), p. 49. The jurisdiction to prosecute and punish for crime is thus the international capacity of the State to act for a particular purpose. The term is used, in describing the international capacity to prosecute and punish for crime generally, substantially as it is used in the Draft Convention on Piracy, Art. 1 (1), *Research in International Law* (1932), p. 767, in defining a similar capacity with respect to a particular crime.

The international competence of the State may be regarded, from one point of view, as something with which international law invests States, or,

from another point of view, as the result of an absence of legal restrictions upon State activity. The opinion of the Permanent Court of International Justice in the case of the *S.S. Lotus* takes note of these two points of view as follows:

The French Government contends that the Turkish courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favor of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction wherever such jurisdiction does not come into conflict with a principle of international law. (*Publications of the Permanent Court of International Justice*, Series A, Judgment No. 9, p. 18.)

According to the French view in the *S.S. Lotus*, international law attributes competences to the several States and a State has only that competence with which it is invested by international law. See Rousseau, "*L'aménagement des compétences en droit international*," 37 *Rev. Gén. de Dr. Int. Pub.* (1930), 420. According to the Turkish view in the *S.S. Lotus*, on the other hand, it follows from the very nature of sovereignty that a State must be considered competent unless it can be shown that it is expressly restricted by a rule of international law. The Permanent Court of International Justice appears to have resolved the point, in the case presented, in favor of the Turkish view. On this question the opinion concludes:

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty. (*Publications P.C.I.J.*, Series A, Judgment No. 9, p. 19.)

The two points of view presented in the case of the *S.S. Lotus* may be regarded as essentially nothing more than two avenues of approach to a single principle, significant only as the choice between them may determine which contestant should take the initiative in proving the law in the case before the court. One avenue of approach emphasizes the idea of capacity to act in the exercise of competence, the other the idea of limitations upon capacity. Both ideas are implicit in the concept of competence and in the term which is used in this Convention to describe it. It has seemed appropriate, therefore, without further refinement, to use the term "jurisdiction" to denote the competence of States which it is the object of this Convention to determine.

The competence to be determined is the competence "to prosecute and punish for crime." "Prosecute," it should be understood, includes all the stages in a penal proceeding, from preliminary investigation, through trial, to final adjudication on appeal in the tribunal of last resort. "Punish" includes both the execution of sentence and the remission of penalty. The concept of punishment does not include those forms of coercion, such as punitive damages or imprisonment for debt, which are provided primarily to

facilitate civil reparation to injured individuals. On the other hand, the concept does include more than coercion in the form of penalties, such as fines or imprisonment. Punishment may include coercion in the form of preventive, correctional or therapeutic measures. Indeed, in modern penal legislation it is coming increasingly to include such measures.

As the term is used in this Convention :

(c) A "crime" is an act or omission which is made an offence by the law of the State assuming jurisdiction.

COMMENT

As already noted in the comment on par. (a) and par. (b) of this article, the term "State" is used throughout the present Convention and comment to designate the subject which has an international penal competence and the term "jurisdiction" to describe that penal competence. The term "crime" is used throughout to designate the object of the competence.

In the first place, since international penal competence is not concerned with the distinctions between major and minor offences which are made in various systems of national law, it is important that the term "crime" be used in a sense broad enough to include every offence (*infraction*) which is a proper object of international penal competence. It should include both the "crime" and "misdemeanor" of Anglo-American jurisprudence. In French legislation, *infraction* includes *contravention*, *délit*, and *crime*. France, Penal Code (1810), Art. 1. Corresponding terms in German legal terminology are *Übertretung*, *Vergehen*, and *Verbrechen*. See Austria, Penal Code (1852), Art. 1; Germany, Penal Code (1871), Art. 1. A "crime" is "an act or omission which is made an offence." See the opinion in *Moore v. People of the State of Illinois* (1852), 14 How. 13. On the other hand, it is to be emphasized that the term includes only those acts or omissions which are denounced as offences, *i.e.*, as acts or omissions inimical to the public interest. It never includes mere civil wrongs which may be expiated by restitution or reparation to the injured individual. In short, it describes the object of a competence whose scope may be as exactly defined, in this respect, as the distinction between criminal and civil wrongs permits.

In the second place, as the term is used in this Convention, no act or omission can be a "crime" unless it is "made an offence by the law of the State assuming jurisdiction." This limitation is of fundamental importance. On the one hand, it expressly excludes vicarious enforcement by one State of the penal laws of another. A State may claim jurisdiction only with respect to an act or omission which is made an offence by its own law. On the other hand, it excludes likewise the vicarious enforcement by a State of an international penal law. The concept of an act or omission which is denounced as a crime by international law only is outside the scope of the present Convention.

The concept of an international penal law, under which States as well as individuals might be punishable, has been the subject in recent years of a noteworthy literature. See H. H. L. Bellot, "Draft Statute for the Permanent International Criminal Court," 33 *International Law Association, Report of Conference* (1924), p. 75; Brierly, "Do We Need an International Criminal Court?," *Brit. Yearbook Int. Law* (1927), p. 81; Caloyanni, "The Permanent International Court of Criminal Justice," 2 *Rev. Int. de Dr. Pén.* (1925), p. 326; 3 *ibid.* (1926), p. 492; 5 *ibid.* (1928), p. 261; Caloyanni, "An International Criminal Court," 14 *Transactions of the Grotius Society* (1928), p. 69; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 403-441; Efremoff, "L'évolution de l'idée de la criminalité internationale," 9 *Rev. de Dr. Int.* (1932), p. 226; Lévy, "A Proposed Code of International Criminal Law," 6 *Rev. Int. de Dr. Pén.* (1929), p. 19; Pella, *La Criminalité Collective des Etats* (1925); Politis, *Les Nouvelles Tendances du Droit International* (1927), *passim*; Rappaport, "The Problem of the Inter-State Penal Law," 18 *Transactions of the Grotius Society* (1932), p. 41; Sagone, *Il Delitto Internazionale* (1927); Saldana, "La Justice Pénale Internationale," *Académie de Dr. Int., Recueil des Cours* (1925), III, pp. 227-425; H. von Weber, *Internationale Strafgerichtsbarkeit* (1934); Williams, *Chapters on Current International Law and the League of Nations* (1929), ch. 10; Premier Congrès International de Droit Pénal (Brussels, 1926), *Actes du Congrès*, p. 377; Association internationale de droit pénal, "Procès-verbaux des travaux de la commission chargée de la rédaction d'un projet de code pénal international," 7 *Rev. Int. de Dr. Pén.* (1930), p. 253; 8 *ibid.* (1931), p. 191. Such a concept would appear to have had relatively little effect upon the contemporary practice of States. Whatever significance it may come to have in the future, it is at present too immature for inclusion in a Convention which seeks primarily to reconcile contemporary conflicts and harmonize existing practices. The present Convention has been limited, therefore, to jurisdiction with respect to acts or omissions which have been denounced as offences by the law of the State assuming jurisdiction.

As the term is used in this Convention :

(d) A State's "territory" comprises its land and territorial waters and the air above its land and territorial waters.

COMMENT

The term "territory" is used to include, not only the land of the State, but also its territorial waters and the air above its land and territorial waters. The scope of the term "territory" in this Convention is thus the same as the scope of the term "territorial jurisdiction" as used in the Draft Convention on Piracy, Art. 1 (1), *Research in International Law* (1932), p. 767. This use of the term "territory" is amply justified by national legislation and international practice.

The inclusion of territorial waters finds support in such national legislation as the Penal Code of Chile (1874), Art. 5, which provides:

Chilean penal law is binding on all the inhabitants of the Republic, including aliens. Crimes committed within the territorial or adjacent sea are submitted to the regulations of this code.

The Territorial Waters Jurisdiction Act of Great Britain (1878), sec. 2, 41 & 42 Vict. c. 73, provides:

An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

See also Mass. Acts, 1858-59, p. 640; N. J. Laws, 1906, c. 260, p. 542. In *Cunard Steamship Co. v. Mellon* (1923), 262 U. S. 130, 122, it was said:

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.

See also the Treaty of Montevideo (1889), Art. 11.

The inclusion of the airspace above land and territorial waters finds support in the Air Navigation Act of Great Britain (1920), preamble, 10 & 11 Geo. V. c. 80, which asserts that "the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto." See also South Africa, Schedule to Act 16 of 1923, Art. 1. The United States Air Commerce Act (1926), c. 344, sec. 6 (a), declares that "the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone." 44 U. S. Stat. L. 568, 572. The International Convention Relating to the Regulation of Aerial Navigation (1919), Art. 1 provides:

The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention, the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto. (11 *League of Nations Treaty Series*, 174, 190.)

In a number of modern penal codes the jurisdiction to prosecute and punish for crime is expressly declared to include crimes committed in territorial waters and in the air above territorial waters. See Chile, Project of Penal Code (1929), Art. 2, No. 1; Costa Rica, Penal Code (1924), Art. 219, No. 4

(applied in Case of David Johnson Plazen, *Sentencias de la Corte de Casacion* (1928, 2° sem.), 711, *Annual Digest of Public International Law Cases*, 1927-1928, Case No. 99); Cuba, *Ley de Extranjería*, Art. 50, discussed in Bustamante, *Derecho Internacional Privado* (1931), III, pp. 35-37, and *Reglamento*, April 31, 1928, Art. 55 (discussed in Bustamante, *op. cit.*, p. 35); Cuba, Project of a Penal Code (Ortiz, 1926), Art. 33; Guatemala, Penal Code (1889), Art. 6; Mexico, Federal Penal Code (1931), Art. 5, Nos. 3 & 4; Nicaragua, Penal Code (1891), Art. 11; Panama, Penal Code (1916), Art. 1, sec. 2; Peru, Penal Code (1924), Art. 4; Poland, Penal Code (1932), Art. 3, sec. 1. See also Gold Coast Colony, Laws (1928), 1, c. 29 (Criminal Code of 1894), sec. 9; Santa Lucia, Criminal Code (1918), sec. 1273. For France, see Case of *Jally*, Sirey (1859), I, 183; *Mitras*, Sirey (1874), II, 282; and decision of Tribunal de Police de Marseille (July 11, 1907), Clunet (1908), 147. For Germany, see decision of April 22, 1880, 2 *Entscheidungen des Reichsgerichts in Strafsachen*, 17. See also *Regina v. Cunningham* (1858), 8 Cox C. C. 104; *Lewis v. Blair* (1858), 30 Scot. Jur. 508; *King v. Mickleham* (Ontario, 1905), 10 Can. Cr. C. 382; *King v. Schwab* (N. S., 1907), 12 *ibid.* 539; *King v. Tano* (British Columbia, 1909), 14 *ibid.* 440; *Commonwealth v. Luckness* (1880), 14 Phila. (Pa.) 363; *Wildenhus' Case* (1887), 120 U. S. 1; *King v. Parish* (1849), 1 Hawaii 58 (*36); *United States v. Diaz & Cumbra* (1903), 1 P.R. Fed. 186; *United States v. Bull* (1910), 15 P.I. 7; *People v. Wong Cheng* (1922), 46 P.I. 729. See also Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 20; Nachbaur, "Droit Pénal International," in de Lapradelle et Niboyet, *Répertoire de Droit International* (1930), VII, 441, sec. 45 ff; Travers, *Le Droit Pénal International* (1921), I, secs. 186-201.

This use of the term "territory" assumes, of course, that international law and conventions supply principles and rules which make it possible to determine what lands, waters, and airspaces belong to each State. Certainly such questions are quite outside the scope of the present Convention. It is clear enough that "land" includes the underlying subsoil and that "territorial waters" include the underlying land and its subsoil. It may be suggested that the term "territory" is broad enough to include the following: areas actually occupied by a State, in case of disputed or undetermined boundaries; areas held in condominium or joint occupation, such as the New Hebrides; see Politis, *Le Condominium Franco-Anglais des Nouvelles-Hebrides* (1908); Travers, *Le Droit Pénal International* (1921), II, secs. 657-659; or the Oregon territory before it was divided between Great Britain and the United States; areas administered by a State though left under the nominal sovereignty of another State, such as Bosnia-Herzegovina before annexation by Austria-Hungary; areas such as the Panama Canal Zone; see *In re Darie Carter and Coke Webb* (1922), 20 *Registro Judicial*, 985 (Panama Supreme Court), *Annual Digest*, 1919-1922, Case No. 59; areas under protectorate and without independent international status; and probably areas acquired by members of the League of Nations under Class B or Class C mandates.

The extent to which foreign territory under military occupation, in peacetime or war, may be treated as territory for the purposes of jurisdiction to punish for crime has been discussed at some length in the literature. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 23-24, 41, 189; Garraud, *Traité du Droit Pénal Française* (3d ed. 1913), I, pp. 356-357; note in Clunet (1882), 511; Manzini, *Trattato di Diritto Penale Italiano* (2d ed. 1926), I, p. 302; Nachbaur, "Droit Pénal International," in de Lapradelle et Niboyet, *Répertoire de Droit International* (1930), VII, 441, secs. 97-109; Travers, *Le Droit Pénal International* (1921), I, secs. 285-358. Territorial jurisdiction in such areas is to be distinguished, of course, from personal jurisdiction over members of the occupying force and from jurisdiction over offences against the occupying force. The Rumanian Project of a Penal Code (1926), Art. 3, asserts a territorial jurisdiction over such areas. The subject appears to be one more appropriately treated in a convention on the law of military occupation or of war than in the present Convention.

The State's embassies, legations, or consulates abroad are not assimilated to territory, for the purposes of the present Convention, though survivals of such an assimilation are to be found in the jurisdiction asserted in Chile, Project of Penal Code (1929), Art. 2, No. 2; Ecuador, Penal Code (1906), Art. 10; Mexico, Federal Penal Code (1931), Art. 5, No. 5; and Spain, Penal Code (1928), Art. 19, No. 2 (including consulates). And see *Case of Zoltán Sz.* (Hungary, Sup. Ct., 1928), *Annual Digest*, 1927-1928, Case No. 252, where a crime committed in the Hungarian legation in Vienna was treated as a crime committed in Hungary. With the practical abandonment of the fiction of extritoriality, and recognition that diplomatic immunities are personal rather than extritorial in nature, there is no longer any reasonable basis for assimilating embassies and legations to territory for the purposes of jurisdiction to punish for crime; and the same is true *a fortiori* with respect to consulates. See Tobar y Borgono, *Du Conflit International au Sujet des Compétences Pénales* (1910), p. 787.

A similar quasi-territorial competence has been suggested with respect to national sections of international expositions held abroad; but it seems clear that, apart from express delegation of territorial competence under international agreement, there is no basis for such a quasi-territorial jurisdiction in a State which maintains a national section in an exposition held in another State. See Tobar y Borgono, *op. cit.*, p. 805.

As the term is used in this Convention:

(e) A "national" of a State is a natural person upon whom that State has conferred its nationality in conformity with international law.

COMMENT

The term "national" is used in this Convention in the same sense in which it is used in the Draft Convention on Nationality, Art. 1 (b), Research in

International Law (1929), p. 22, but in a somewhat more restricted sense than in the Draft Convention on Consuls, Art. 1 (i), Research in International Law (1932), p. 227. Should a convention on nationality be ratified, such convention may determine for the contracting parties the circumstances in which a State is permitted, by creating an allegiance of the nature of nationality, to incorporate natural persons in the body of its nationals. Until such a convention is ratified, the circumstances in which it is permissible to confer nationality will continue to be determined by customary international law and existing treaties. Meanwhile, it is enough to note that the nationality which is recognized as a basis for jurisdiction in this Convention does not necessarily include every relationship which may be called nationality in some system of national law, but does include every relationship of the nature of nationality which is conferred in conformity with international law. The observations found in the comment on the Draft Convention on Nationality, Art. 1 (b), may be here incorporated by reference and made to serve as comment on Article 1 (e) of the present Convention.

As the term is used in this Convention :

(f) An "alien" is a person, either natural or juristic, upon whom the State assuming jurisdiction has not conferred its nationality or national character in conformity with international law.

COMMENT

As the term "alien" is used in this Convention, it includes all persons, either natural or juristic, who are not nationals of the State assuming jurisdiction. Such persons may or may not be nationals of other States; hence the term includes stateless persons.

ARTICLE 2. SCOPE OF CONVENTION

A State's jurisdiction with respect to crimes is defined and limited by the present Convention; but nothing in its provisions shall preclude any of the parties to this Convention from entering into other agreements, or from giving effect to other agreements now in force, concerning competence to prosecute and punish for crime, which affect only the parties to such other agreements.

COMMENT

It is the object of this Convention to incorporate a comprehensive statement of the principles which determine and limit State competence to prosecute and punish for crime. Consequently, if this Convention were ratified, the contracting parties would have in general jurisdiction as provided in this Convention and only as provided in this Convention. There would be competence to do whatever the Convention permits; there would be no competence other than that which the Convention approves.

The Convention incorporates a comprehensive statement, not because of

existing doubts with respect to fundamental doctrines, but as a means of reconciling existing conflicts in matters of less than fundamental importance. There is less disagreement on fundamental doctrines than is sometimes assumed. It is believed that the substantive provisions of the present Convention include every fundamental principle which has substantial support in contemporary practice and that such principles are formulated in terms approximating so closely to contemporary practice as to make them acceptable to States genuinely desirous of reducing the probabilities of conflict by agreement on fundamental principles. It is recognized, on the other hand, that there is considerable disagreement on matters of less than fundamental importance. A number of States now assert in principle a competence which is in some respects more comprehensive than that delimited in the present Convention and a number of States would contend at present for a competence less inclusive in certain respects. Where such conflicts of view have been revealed by a study of contemporary practice, recourse has been had frankly to the device of compromise. States which have asserted a competence in some respects more comprehensive than that delimited in the present Convention are asked to accept a little less in return for the acceptance by other States of a competence at some points a little more extensive than they have hitherto been willing to approve.

The present Convention is thus framed upon the assumption that there exists substantial agreement upon such principles as are fundamental and that it should be possible, through mutual concessions, to obtain agreement upon other principles which are not fundamental. It must be made clear, in consequence, that States are not free to obtain the advantages of this Convention and at the same time, by unwarranted inferences or implications, to repudiate the concessions which are an essential part of its fabric. There should be no possibility of inference or implication that a State may exercise a competence because it has not been expressly denied. The Convention is an integrated document. It is for these reasons that Article 2 begins with the statement that "a State's jurisdiction with respect to crimes is defined and limited by the present Convention."

The present Convention contains a comprehensive statement of the competence of States to prosecute and punish for crime. It is the summation of contemporary practices, with such modifications as have seemed essential in order to make of those practices an acceptable and harmonious whole, reduced to a *lex scripta*. But it does not contemplate the exclusion of special agreements between two or more States which have the effect among the States parties to such agreements of either restricting or enlarging their penal competences *inter se*. Consequently the present article adds: "but nothing in its provisions shall preclude any of the parties to this Convention from entering into other agreements, or from giving effect to other agreements now in force, concerning competence to prosecute and punish for crime, which affect only the parties to such other agreements."

Other agreements between two or more States, parties to the present Convention, restricting the competences *inter se* of such States, are consistent with the present Convention. It is expressly recognized in Art. 18 (a) *infra*, that the jurisdiction herein defined and limited is discretionary, not mandatory. A State is under no obligation "to exercise the jurisdiction herein defined and limited." If a State may, of its own volition, refrain from exercising as much of the jurisdiction herein defined and limited as it pleases, there is no reason certainly why it may not refrain pursuant to agreement with other States.

Other agreements between two or more States, parties to the present Convention, enlarging the competences *inter se* of such States, are likewise consistent with the present Convention under the terms of this article. So long as only the parties to such other agreements are affected, there can be no valid objection to mutual acceptance of a more comprehensive competence. Thus special agreements or conventions conceding to each of the contracting parties with respect to the nationals of other contracting parties a competence more comprehensive than is recognized in this Convention may be concluded between two States, between a limited group of States having similar penal legislation or special common interests, such as the Baltic States or certain of the Latin American Republics, or between as many States as are prepared to coöperate in the suppression of certain offences. For example, two States, each strongly committed to the protective principle (*cf.* Arts. 7 and 8, *infra*), may wish mutually to concede a special competence with respect to offences against state security or credit committed by their nationals. There is nothing in precedent or principle which forbids such a mutual concession and it should be clear that it is permissible under the present Convention. Again a limited group of States may wish to conclude among themselves such conventions as those of Lima, Montevideo, or Habana (the Bustamante Code). Such agreements should not be affected by the present Convention simply because they concede to the contracting States a special competence with respect to the nationals of other contracting States. Finally, there should be no question of conflict between this Convention and those general multilateral conventions which provide for co-operation in the control or suppression of certain acts and omissions which are of concern to the entire world, such as the slave trade, the traffic in narcotics, counterfeiting, injury to submarine cables, the white slave trade, the traffic in obscene publications, the illegal trade in arms or intoxicating liquor, and the like. Coöperation in the suppression of such offences through general international conventions of legislative effect has made significant progress and the way should be left unobstructed for further progress.

It has been urged in some quarters that offences which have been made the object of such coöperative effort should be assimilated to piracy and denounced as *delicta juris gentium*. But the conventions concluded to date do not support so advanced a position. When the protection of submarine

cables was under consideration, prior to the adoption of the treaty of March 14, 1884 (11 Martens, *Nouveau Recueil Général de Traités* (2d ser.), 281), the United States presented a draft (Draft Treaty of 1869, Art. 5) which would have treated wilful destruction of cables as a crime with respect to which jurisdiction might be allowed on the same basis as for piracy (Clark, *International Communications* (1931), pp. 133-136); but this provision was not incorporated in the treaty finally concluded. The Convention on the Suppression of Counterfeiting Currency, signed at Geneva, April 20, 1929 (112 *League of Nations Treaty Series*, 371; Hudson, *International Legislation* (1931), IV, 2692), takes a cautious step in this direction. Art. 9 provides:

Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

In so far as the above convention, or any other now in force or hereafter adopted, may include provisions making a contracting State competent to prosecute and punish nationals of other contracting States for an act or omission committed abroad, such competence is expressly recognized and affirmed by the present article. It is immaterial that the jurisdiction thus specially conceded is outside the competence defined in other articles of the present Convention.

Penal legislation in a few States provides expressly that jurisdiction shall be exercised where authorized by treaty. Italy, Penal Code (1930), Art. 7, provides:

A national or foreigner who commits any one of the following offences in foreign territory shall be punished under Italian law: . . .

5. Any other offence in respect of which special provisions of law or international conventions prescribe the applicability of Italian penal law.

See also Chile, Code of Penal Procedure (1906), Art. 2, sec. 8; and Russia, Penal Code (1903), Art. 9, par. 2; adopted in Estonia, Penal Code (1929), Art. 7, par. 2; and Lithuania, Penal Code (1930), Art. 9, par. 2. See also Latvia, Penal Code, Art. 9, par. 2.

At least one international convention, a number of national projects of penal codes, and a few national penal codes now in force go further in authorizing the prosecution and punishment of offences which the State has obligated itself by international convention to suppress. The Bustamante Code (1928), now in force as a convention between fourteen or more of the Latin American republics, provides:

Art. 307.—Moreover, those persons are subject to the penal laws of the foreign State in which they are apprehended and tried who have committed outside its territory an offense, such as white slavery, which said contracting State has bound itself by an international agreement to repress.

See also the following projects:

Brazil, Project of Penal Code (1927) Art. 5.—There shall be subject to Brazilian law everyone who commits abroad a crime which Brazil has obligated itself by convention or treaty to punish, when he is found in the country and the Federal Government requests the prosecution.

Cuba, Project of Penal Code (Ortiz, 1926), Art. 37.—Sera jugé et condamné suivant la loi criminelle cubaine, s'il ne l'a pas été à l'étranger, le citoyen ou l'étranger qui se trouvera sur le territoire national, si hors de ce territoire il a commis l'un des délits suivants: . . .

3. Tous autres délits que la République, par une convention internationale est tenue de réprimer, en quelque endroit qu'ils aient été commis.

Rumania, Project of Penal Code (1926), Art. 6, par. 2.—Ces dispositions sont applicables de même à tous les autres étrangers . . . ayant commis à l'étranger une de ces infractions à caractère international que la Roumanie s'est engagée, par traité, à réprimer.

See Czechoslovakia, Project of Penal Code (1920), Art. 7; Poland, Penal Code (1932), Art. 9, sec. h. Possibly permitting the same construction, see Russia, Penal Code (1903), Art. 9, par. 2; adopted in Estonia, Penal Code (1929), Art. 7, par. 2; Lithuania, Penal Code (1930), Art. 9, par. 2; and with modifications in Latvia, Penal Code, Art. 9, par. 2. See also Bustamante, 8 *Rev. Int. de Dr. Pénal* (1931), 295; Aloisi, 8 *ibid.*, 300; Radulesco, 9 *ibid.* (1932), 24. And see Resolutions of the First International Conference on the Unification of Penal Law (Warsaw, 1927), Art. 6, sec. h.

While such texts as the Bustamante Code (1928), Art. 307 and the national projects quoted above provide no certain criteria for determining which offences may be regarded as *delicta juris gentium* for purposes of jurisdiction, it would appear that the following may be among those contemplated by proponents of this principle of competence:

(1) Slavery and the slave trade: see the convention signed at Geneva, Sept. 25, 1926, 60 *League of Nations Treaty Series*, 253; Hudson, *International Legislation* (1931), III, 2010; see also Act of Berlin (1885), 10 Martens, *N. R. G.* (2d ser.), 414; Act of Brussels (1890), 16 *ibid.* 3; and earlier documents collected in 16 *ibid.* 30.

(2) Traffic in women and children for immoral purposes: see convention signed at Geneva, Sept. 30, 1921, 9 *League of Nations Treaty Series*, 415; Hudson, *op. cit.*, I, 726; see also Agreement for Suppression of the White Slave Traffic (Paris, 1904), 1 *League of Nations Treaty Series*, 83; and Convention for the Suppression of the White Slave Traffic (Paris, 1910), 7 Martens, *N. R. G.* (3d ser.), 252.

(3) Counterfeiting: see Convention on the Suppression of Counterfeiting Currency, signed at Geneva, April 20, 1929, 112 *League of Nations Treaty Series*, 371; Hudson, *op. cit.*, IV, 2692, quoted *supra*.

(4) Traffic in narcotics: see Convention on Traffic in Opium and Drugs, signed at Geneva, Feb. 19, 1925, 81 *League of Nations Treaty Series*, 317; Hudson, *op. cit.*, III, 1589; see also Agreement as to Prepared Opium, signed at Geneva, Feb. 11, 1925, 51 *League of Nations Treaty Series*, 337; Hudson, *op. cit.*, III, 1580; and the International Opium Convention, signed at The Hague, Jan. 23, 1912, 8 *League of Nations Treaty Series*, 189.

(5) Injury to submarine cables: see Convention of Paris, March 14, 1884, 11 Martens, *N. R. G.* (2d ser.), 281; see also Declaration of Dec. 1, 1886, 15 *ibid.* 69; and the laws collected in 11 *ibid.* 290 and 15 *ibid.* 71.

(6) Traffic in obscene publications: see Convention on the Suppression of the Circulation of and Traffic in Obscene Publications, signed at Geneva, Sept. 12, 1923, 27 *League of Nations Treaty Series*, 213; Hudson, *op. cit.*, II, 1051; see also Agreement for the Suppression of Obscene Publications, signed at Paris, May 4, 1910, 7 Martens, *N. R. G.* (3d ser.), 266.

(7) Liquor traffic: see Convention for the Suppression of Contraband Traffic in Alcoholic Liquors, signed at Helsingfors, Aug. 19, 1925, 32 *League of Nations Treaty Series*, 73; Hudson, *op. cit.*, III, 1673; see also Convention Respecting the Liquor Traffic in the North Sea, signed at The Hague, Nov. 16, 1887, 14 Martens, *N. R. G.* (2d ser.), 540; and Convention on the Liquor Traffic in Africa, signed at St. Germain-en-Laye, Sept. 10, 1919, 8 *League of Nations Treaty Series*, 11; Hudson, *op. cit.*, I, 352.

(8) Illegal trade in arms: see convention signed at Geneva, June 17, 1925, Hudson, *op. cit.*, III, 1634; 20 *Am. Jour. Int. L.* (1926), 151; see also Treaty of St. Germain-en-Laye, Sept. 10, 1919, 7 *League of Nations Treaty Series*, 331; Hudson, *op. cit.*, I, 323; and Protocol of Brussels (1908), 101 *Br. & For. St. Papers*, 176; 2 Martens, *N. R. G.* (3d ser.), 711.

It may be doubted, on the other hand, whether the principle proposed would include such offences as anarchistic crimes of violence (see Protocol of St. Petersburg, March 1/14, 1904, 10 Martens, *N. R. G.* (3d ser.), 81; and South American Police Convention, Buenos Aires, Feb. 29, 1920, Hudson, *op. cit.*, I, 448), or crimes connected with radio, such as false distress signals (see Convention of Washington, Nov. 25, 1927, 84 *League of Nations Treaty Series*, 97, Hudson, *op. cit.*, 2197). Offences against the Canadian or United States game laws, enacted pursuant to the migratory bird treaty between Great Britain and the United States (39 U. S. Stat. L. 1702), would presumably be outside the scope of the proposed principle.

The jurisdiction over piracy, dealt with in Article 9 of this Convention, is the result of a mature development of customary international law. Its scope and significance are in general well understood. Cf. Draft Convention on Piracy, Research in International Law (1932), p. 739. But it appears that the only valid or adequate basis for jurisdiction with respect to other

so-called *delicta juris gentium* is found in general international conventions for the repression of certain offences. This is a comparatively recent development. The present article at once allows the unhampered operation of conventional principles now in force and leaves unobstructed the way to further development of similar conventional principles.

It may be noted that similar provisions affirming expressly the competence of two or more contracting States to conclude among themselves special agreements or conventions to govern cases which affect only the parties to such other agreements or conventions have been incorporated in the Convention on Certain Questions Relating to the Conflict of Nationality Laws, Art. 19 *League of Nations Documents* 1930. V. 3, 24 *Am. Jour. Int. L.* (1930), Supp., 192, the Draft Convention on Nationality, Art. 21, *Research in International Law* (1929), pp. 11, 78, the Draft Convention on Consuls, Art. 33, *ibid.* (1932), pp. 189, 369, the Draft Convention on Competence of Courts in Regard to Foreign States, Art. 27, *ibid.* (1932), pp. 451, 725, and the Draft Convention on Piracy, Art. 17, *ibid.* (1932), pp. 739, 866.

ARTICLE 3. TERRITORIAL JURISDICTION

A State has jurisdiction with respect to any crime committed in whole or in part within its territory.

This jurisdiction extends also to

(a) Any participation outside its territory in a crime committed in whole or in part within its territory; and

(b) Any attempt outside its territory to commit a crime in whole or in part within its territory.

COMMENT

With this article the statement of the substantive law of penal competence begins. Articles 3 to 11, inclusive, set forth the general principles which govern the penal competence of States. Articles 12 to 17, inclusive, state general limitations or safeguards. Article 18 incorporates certain general principles of interpretation; and Article 19 provides for the settlement of disputes with respect to interpretation or application. The whole constitutes an integrated delimitation of competence and should be construed as such.

The present article states the territorial principle. It is universally recognized that States are competent, in general, to punish all crimes committed within their territory. This is the territorial principle of jurisdiction, or the principle which determines jurisdiction according to the place where the crime is committed. The present article incorporates the territorial principle in broad terms without exceeding the limits established in most modern States by national legislation and practice. The term "territory" is used throughout in the sense indicated in Article 1 (d), *supra*.

The general principle of territorial competence is too well-established to

require an extended discussion of authorities. The principle is basic, of course, in Anglo-American jurisprudence. It is incorporated in all modern codes. The following code provisions may be quoted by way of illustrations taken from the laws of different countries and from different periods in the development of modern legislation:

France, Civil Code (1803), Art. 3.—Les lois de police et de sûreté obligent tous ceux qui habitent le territoire.

Belgium, Penal Code (1867), Art. 3.—L'infraction commise sur le territoire du royaume, par des Belges ou par des étrangers, est punie conformément aux dispositions des lois belges.

Germany, Penal Code (1871), Art. 3.—The penal laws of the German Reich are applicable to all punishable actions committed on its territory, even when the actor is an alien.

Italy, Penal Code (1930), Art. 3.—Italian penal law is binding on all, nationals or foreigners, who are in the territory of the state, saving the exceptions prescribed by the domestic public law or by international law . . .

Art. 6.—Whoever commits an offence in the territory of the state shall be punished according to Italian law.

The offence is considered to be committed in the territory of the state when the action or omission constituting it occurred therein, wholly or in part, or when the event which is the consequence of the action or omission took place therein.

The territorial principle finds expression also in the following national codes: Afghanistan, Penal Code (1924), sec. 18; Albania, Penal Code (1927), Art. 3; Argentina, National Penal Code (1921), Art. 1; Austria, Penal Code (1852), Art. 37; Bolivia, Penal Code (1834), Art. 6; Brazil, Penal Code (1890), Art. 4, and Project of Penal Code (1927), Art. 2; Bulgaria, Penal Code (1896), Art. 3; Chile, Penal Code (1874), Art. 5, Code of Criminal Procedure (1906), Art. 1, and Project of Penal Code (1929), Art. 2; China, Penal Code (1928), Art. 3; Colombia, Penal Code (1890), Art. 20, sec. 1; Congo, Penal Code (1896), sec. 84; Costa Rica, Penal Code (1924), Art. 219, sec. 1; Cuba, Civil Code (1889), Art. 8 (see Bustamante, *Derecho Internacional Privado* (1931), III, p. 19), Project of Penal Code (Ortiz) (1926), Art. 33, sec. 1, Project of Penal Code (Vieites) (1926), Art. 1, No. 1; Czechoslovakia, Project of Penal Code (1926), sec. 5, No. 1; Denmark, Penal Code (1930), Art. 6, sec. 1, No. 1; Ecuador, Penal Code (1906), Art. 10; Egypt, Native Penal Code (1904), sec. 1; Estonia, Penal Code (1929), Art. 4; Finland, Penal Code (1889), Arts. 1 & 2; France, Project of Penal Code (1932), Art. 10; Germany, Project of Penal Code (1927), sec. 5; Greece, Code of Criminal Procedure (1834-5), Art. 1, and Project of Penal Code (1924), Art. 2; Guatemala, Penal Code (1889), Art. 6, sec. 1; Haiti, Extradition Law (1912), Art. 4, No. 2; Honduras, Law of Organization and Attributes of the Courts (1906), Arts. 162 & 170; Hungary, Penal Code (1878), Art. 5; India, Penal Code (1860), sec. 2; Iraq, Bagdad Penal Code (1918), sec. 2 (i); Italy, Penal

Code (1890), Art. 3; Japan, Criminal Code (1907), Art. 1; Latvia, Penal Code (Russian Penal Code of 1903, adopted 1918 & 1920), Art. 4; Lithuania, Penal Code (1930), sec. 4; Luxembourg, Penal Code (1879), sec. 3; Mexico, Federal Penal Code (1929), Art. 3, and Federal Penal Code (1931), Art. 1; Monaco, Code of Penal Procedure (1904), Art. 21; Netherlands, Penal Code (1881), Art. 2; Nicaragua, Penal Code (1891), Art. 11; Norway, Penal Code (1902), Art. 12, No. 1; Panama, Penal Code (1922), Art. 5; Paraguay, Penal Code (1914), Art. 8; Peru, Penal Code (1924), Art. 4; Poland, Penal Code (1932), Art. 3, sec. 1; Portugal, Penal Code (1886), Art. 53, No. 1; Rumania, Penal Code (1865, modified by law of Feb. 15, 1894), sec. 3, and Project of Penal Code (1926), Art. 3; Russia, Penal Code (1903), Art. 4, Soviet Penal Code (1922), Art. 1, Penal Code of R.S.F.S.R. (1926), Arts. 2, 3 & 4, Uzbek S. S. R. Criminal Code (1929), sec. 1; Salvador, Code of Criminal Procedure (1904), Art. 13; San Marino, Penal Code (1865), Art. 3; Siam, Penal Code (1908), Art. 9; Spain, Law of Organization of Judicial Power (1870), Art. 333, and Penal Code (1928), Art. 19; Sudan, Penal Code (1924), Art. 3; Sweden, Penal Code (1864), Arts. 1 & 2, Project of Penal Code (1923), ch. 1, sec. 3; Switzerland, Federal Penal Law (1853), Art. 1, Project of Penal Code (1918), Art. 3, and legislation in the cantons as follows: Aargau, Penal Code (1857), sec. 2a; Appenzell A. Rh., Penal Code (1878), Art. 1a; Basellandschaft, Penal Code (1873), sec. 1; Bern, Law of July 5, 1914, Art. 1; Fribourg, Penal Code (1924), Art. 3; Geneva, Code Crim. Proc. (1891), Art. 7; Glarus, Penal Code (1867), Art. 2a; Graubünden, Penal Code (1851), sec. 1; Luzern, Crim. Code (1861), Art. 2a; Neuchâtel, Penal Code (1891), Art. 5; Obwalden, Crim. Code (1864), Art. 2a; St. Gall, Penal Code (1857, rev. 1886), Art. 4a; Schaffhausen, Penal Code (1859), sec. 3a; Schwyz, Crim. Code (1881), sec. 1; Solothurn, Penal Code (1874), sec. 4a; Thurgau, Penal Code (1841, modified 1868), sec. 2a; Ticino, Penal Code (1873, modified 1885), Art. 2; Vaud, Penal Code (1931), Art. 5 (c); Zug, Penal Code (1882), sec. 2a; Zurich, Crim. Code (1897), sec. 3a; Turkey, Penal Code (1926), Art. 3; Uruguay, Penal Code (1889), Art. 3, and Project of Penal Code (1932), Art. 9; Vatican, *Loi sur les Sources du Droit* (1929), sec. 18; Venezuela, Penal Code (1926), Art. 3; Yugoslavia, Penal Code (1929), Art. 3.

The same general principle is incorporated in the Treaty of Montevideo on International Penal Law (1889), Art. 1, in the Resolutions of Warsaw adopted by the First International Conference on the Unification of Penal Law (1927), Art. 1, in the Bustamante Code (1928), Arts. 296 & 302, in the Resolutions of the Institute of International Law voted at Cambridge (1931), Arts. 1 & 2, and in the Resolutions adopted by the Fourth Section of the International Congress of Comparative Law at The Hague (1932), Arts. 1 & 2. The Resolutions of the Institute are as follows:

Art. 1. La loi pénale d'un Etat régit toute infraction commise sur son territoire, sous réserve des exceptions consacrées par le droit des gens.

Art. 2. Une infraction peut être considérée comme ayant été commise sur le territoire d'un Etat aussi bien lorsqu'un acte (de commission ou d'omission) qui la constitue y a été perpétré (ou tenté), que lorsque le résultat s'y est produit (ou devait s'y produire).

Cette règle est aussi applicable aux actes de participation.

The fundamental justification for the territorial principle is well understood. Lewis says:

The received rule as to the territoriality of criminal law rests on a sound basis. The territorial sovereign has the strongest interest, the greatest facilities, and the most powerful instruments for repressing crimes, whether committed by native-born subjects, or by domiciled aliens, in his territory. (*Foreign Jurisdiction and the Extradition of Criminals*, 1859, p. 30.)

Donnedieu de Vabres summarizes the justification of the principle as follows:

Cette compétence se fonde, traditionnellement, sur des raisons d'ordre *procédural*, d'ordre *répressif*, d'ordre *international*.

Il est conforme à l'intérêt d'une bonne administration de la justice qu'un délit soit jugé le plus près possible des lieux où il a été commis. C'est là, en effet, que l'activité du malfaiteur a laissé des traces, là que se rencontrent les indices, là que les témoins peuvent généralement être trouvés. Lorsqu'il est fait infraction à cette règle, on se figure difficilement les frais énormes qu'entraîne l'administration des preuves, à raison des déplacements qu'elle impose. L'usage des commissions rogatoires est possible. Mais il ne constitue qu'un pis aller. Sous un régime procédural que gouverne le principe de l'intime conviction, il ne donne pas au juge l'impression vivante, la sensation du réel que procure la comparution personnelle des témoins à l'audience. Ces observations ont déterminé les auteurs de notre Code d'instruction criminelle et notre pratique judiciaire à consacrer, en premier lieu, la compétence du *forum delicti commissi*, tout en admettant, ensuite, celle des tribunaux du domicile et du lieu d'arrestation. Une solution semblable se trouve dans la presque totalité des législations étrangères. Elle est aussi recommandable en droit international que dans les rapports de droit interne. La compétence de "l'Etat territorial" fait exactement pendant à celle du *forum delicti commissi*.

Parmi les effets de la sanction pénale, l'opinion commune des criminalistes attache aujourd'hui une importance primordiale à sa force *intimidante*, à son efficacité comme moyen de prévention sociale et collective. Cette observation milite aussi en faveur de la compétence réservée aux juges du lieu du délit, en faveur de l'intervention des lois locales. La peine est d'autant plus *utile* qu'elle est plus proche du délit, et dans le temps et dans l'espace. Bentham est, à notre connaissance, l'auteur qui, dans les temps modernes, a exprimé avec le plus de force cette vérité. Cet argument, comme le prédécent, concerne à la fois les rapports entre tribunaux d'un même pays et les relations internationales.

Mais la raison dont se prévalent le plus volontiers, en droit pénal international, les partisans de la thèse "territoriale," procède d'une certaine notion du rôle de l'Etat, en matière répressive. L'idée profondément ancrée dans la mentalité contemporaine est que l'Etat assumant seul la charge de maintenir l'ordre entre ses frontières, toute infraction aux

injonctions qu'il adresse, aux prohibitions qu'il édicte, doit être envisagée et punie surtout comme *une atteinte à son autorité*, qu'il lui appartient seul de sanctionner. Vis-à-vis des Etats étrangers, des juridictions étrangères, le délit commis sur son territoire est en quelque sorte *res inter alios acta*.

Cette conception se rattache à la constitution moderne de la société internationale, formée de grandes unités politiques dont le *territoire* est un élément essentiel.

Elle est féconde en conséquences juridiques. Elle a pour corollaires l'indifférence de la justice territoriale à l'égard de tous précédents judiciaires intervenus à l'étranger, l'application égale de la loi pénale à toutes infractions commises sur le territoire, quelle que soit la nationalité de l'agent, la préoccupation exclusive, dans l'administration de la justice pénale, de l'intérêt national.

Mais elle se heurte, chaque jour plus nettement, aux exigences nouvelles issues du commerce international, de l'interpénétration des souverainetés. (*Les Principes Modernes du Droit Pénal International*, 1928, pp. 11-13.)

The territorial principle has not only been universally accepted by States, but it has had a significant development in modern times. This development has been a necessary consequence of the increasing complexity of the "act or omission" which constitutes crime under modern penal legislation. The "act or omission" need not consist of an isolated action or failure to act. Not infrequently it appears as an event consisting of a series of separate acts or omissions. These separate acts or omissions need not be simultaneous with respect to time or restricted to a single State with respect to place. Indeed, with the increasing facility of communication and transportation, the opportunities for committing crimes whose constituent elements take place in more than one State have grown apace. To meet these conditions, the jurisdiction of crime founded upon the territorial principle has been expanded in several ways.

SUBJECTIVE APPLICATION

In the first place, national legislation and jurisprudence have developed the so-called subjective territorial principle which establishes the jurisdiction of the State to prosecute and punish for crime commenced within the State but completed or consummated abroad.

In the United States, where the penal law is a composite of the statutes and decisions of the national authority and of the several State and territorial authorities, the subjective principle has had a notable development. The federal system has made the problem of penal jurisdiction peculiarly difficult. The difficulties have been mitigated by asserting jurisdiction on a subjective test, both with respect to particular crimes and with respect to crimes in general.

The subjective test applied to establish jurisdiction of particular crimes may be illustrated by reference to the New York legislation for the punishment of dueling. The statute provides:

Sec. 1047. A person who, by previous appointment made within the state, fights a duel without the state, and in so doing inflicts a wound upon his antagonist, whereof the person injured dies; or who engages or participates in such a duel, as a second or assistant to either party, is guilty of murder in the second degree, and may be indicted, tried, and convicted in any county of the state. (New York, Cons. Laws, 1923, c. 41.)

The jurisdiction may be based, strictly speaking, upon the appointment for the duel made within the State, but it is clearly established although the duel and all its consequences occur without the State. Similar legislation, limited in its application in some cases to inhabitants or residents of the State, is found in District of Columbia, Code (amended to 1924), secs. 852-854; Kansas, Rev. Stat. (1923), sec. 62403; Kentucky, Carroll's Stat. (1922), sec. 1269; Maryland, Ann. Code (1924), Art. 27, secs. 123 & 124; Minnesota, Gen. Stat. (1923), secs. 10069, 10107-10110; Mississippi, Hem. Ann. Code (1927), sec. 884; Porto Rico, Rev. Stat. and Code (1911), secs. 5646-5651; Virginia, Code (1919), secs. 4416-4418 & 4121-4122; Washington, Rem. Comp. Stat. (1922), secs. 2394 & 2419-2422; West Virginia, Barnes Code (1923), c. 144, secs. 19-21 & 24; Wyoming, Comp. Stat. (1920), sec. 7180.

There is similar legislation in a number of the States of the United States for the punishment of prize fighting, if the appointment or engagement is made within the State, although the fight occur without the State. Some of the statutes apply only to residents of the State, while others apply to anyone. The Vermont statute, for example, provides:

Sec. 6817. A resident of the state who, by appointment or engagement made in the state, engages in such a fight without the state, shall be imprisoned in the state prison not more than five years or fined not more than five thousand dollars nor less than one thousand dollars. (Vermont, General Laws, 1917.)

Like legislation may be found in Massachusetts, General Laws (1921), c. 265, sec. 11; Missouri, Rev. Stat. (1919), sec. 3465; New York, Cons. Laws (1925), c. 41, secs. 1710-1714; North Dakota, Comp. Stat. (1913), secs. 9815-9819; South Dakota, Rev. Code (1920), secs. 3495-3498; Wisconsin, Statutes (1919), sec. 5422. It would appear that the same subjective test is applied to establish jurisdiction in Indiana legislation punishing treason (Burns Ann. Stat. 1926, sec. 2047), and possibly also in Washington legislation punishing trading without the State in the labor of a person kidnapped within the State (Rem. Comp. Stat. 1922, sec. 2411).

The basis of jurisdiction is similar in legislation which punishes leaving the State with intent to commit a crime outside the State. Thus, the New York laws punishing cruelty to animals contain the following provision:

Sec. 195. A person who leaves this state with intent to elude any of the provisions of this article or to commit any act out of this state which

is prohibited by them, or who, being a resident of this state, does any act out of this state, pursuant to such intent, which would be punishable under such circumstances, if committed within this state, is punishable in the same manner as if such act had been committed within this state. (Cons. Laws, 1923, c. 41.)

See also New York, Cons. Laws (1923), c. 41, sec. 712 (punishing masked assemblages); *ibid.*, sec. 165 (punishing criminal anarchy); *ibid.*, sec. 735 (punishing dueling). See also *In re Bigamy Sections* (Canada Sup. Ct., 1897), 1 Can. Cr. C. 172; *King v. Brinkley* (Ontario, 1907), 12 *ibid.* 454; *Huddleston v. Commonwealth* (1916), 171 Ky. 310 (leaving State to evade liquor laws); *Commonwealth v. Crass* (1918), 180 Ky. 794; and *Commonwealth v. Collier* (1918), 181 Ky. 319 (leaving State to evade law prohibiting wager). And see *Henfield's Case* (1793), Fed. Cas. 6360; *State v. Stickney* (1912), 118 Minn. 64; *Rex v. Waugh* [1909], V.L.R. 379.

From reliance upon the subjective test in establishing jurisdiction to prosecute and punish for particular crimes, a number of States of the United States have proceeded to apply the same test in defining jurisdiction of crimes generally. The following are examples:

California.—Whenever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state, such person is punishable for such crime in this state in the same manner as if the same had been committed entirely within this state. (Penal Code of 1872, amended to 1923, sec. 778a.)

Mississippi.—Where an offense is commenced in this state and consummated out of it, either directly by the accused or by any means or agency procured by or proceeding from him, he may be indicted and tried in the county in which such offense was commenced or from which such means or agency proceeded. (Hemingway's Ann. Code, 1927, sec. 1221.)

North Carolina.—If any person, being in this state, unlawfully and wilfully puts in motion a force from the effect of which any person is injured while in another state, the person so setting such force in motion shall be guilty of the same offense in this state as he would be if the effect had taken place within this state. (Cons. Stat. 1919, sec. 4604.)

See also Alabama, Code (1923), sec. 4893 (upheld and applied in *Green v. State* (1880), 66 Ala. 40); Indiana, Burns Ann. Stat. (1926), sec. 2046; Nevada, Comp. Laws (1929), sec. 10707; South Carolina, Code of Laws (1922), Code of Crim. Proc., sec. 109; Tennessee, Code (1917), sec. 6935; Wisconsin, Statutes (1919), sec. 4635a. And see Bahamas, Penal Code (1924), sec. 10; Gold Coast, Criminal Code (1894), sec. 10; Nigeria, Criminal Code (I Laws, 1923, c. 21), sec. 12; Santa Lucia, Criminal Code (1918), sec. 1274. See also New Zealand, Cons. Stat. (1908), I, No. 32, "Crimes", secs. 347-348. And see *Queen v. Holmes* [1883], 12 Q.B.D. 23 (false pretences).

Resort to a subjective test, in expanding the application of the territorial

principle, is common also in the practice of countries deriving their jurisprudence from the Civil Law. The question of the *locus* of crime has been much discussed and a subjective doctrine locating the crime where the criminal's act or omission takes place, wherever it may have its effect, has been widely approved. The subjective doctrine is frequently deduced from attachment of the criminal act to the will of the criminal actor. See Binding, *Die Normen und ihre Übertretung* (1890); Lilienthal, *Der Ort der Begangenen Handlung* (1890). It seldom appears as an exclusive test of jurisdiction, however, but rather in combination with or supplementary to the objective doctrine, discussed *infra*. See the Brazilian case of *The Tennyson* (1917), Clunet (1918), 739 (asserting Brazilian jurisdiction over an explosion on a British vessel on the high seas, the explosive instrumentalities having been placed on board in Brazilian waters); and Binding, *Strafrechtliche und Strafprozessuale Abhandlungen* (1915) p. 129-217. And see the French cases, *R.* (Trib. simple de police, Paris, May 30, 1885), Clunet (1885), 433; *Merz* (Cour de Rouen, Jan. 5, 1907), Clunet (1907), 722; *Thérond* (Cass., June 17, 1910), 6 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* 834; and the Italian case, *Zondini* (Cass. Rome, Dec. 6, 1893), Clunet (1898), 417.

The Spanish Law of Organization of the Judicial Power 1870 asserted jurisdiction over crimes commenced within the State but consummated abroad only if the acts done in Spain were punishable. The provision was as follows:

Art. 355. The cognizance of crimes begun in Spain and consummated or frustrated in foreign countries falls to Spanish Courts and Judges, in case the acts done in Spain constitute a crime in themselves, and only in respect to those [acts].

See also Spain, Penal Code (1928), Art. 18; Honduras, Law of Organization and Attributes of the Courts (1906), Art. 172. The Ortiz Project of a Penal Code for Cuba (1926), on the other hand, asserts jurisdiction on the subjective principle without the qualification imposed in the Spanish codes. The provision is as follows:

Art. 38. La loi criminelle cubain s'appliquera si le ministère public le requiert: 1. Aux délits qui, ayant eu leur commencement d'exécution sur le territoire de la République, sont consommés, manqués ou continués à l'étranger, même si les actes accomplis sur le territoire national n'ont pas de sanction criminelle, pourvu que les faits incriminés le soient dans leur ensemble.

It is not to be doubted that States are competent internationally to apply an unqualified subjective test. An inference of international incompetence is not to be drawn from the fact that a few States have elected to impose qualifications in their national legislation.

OBJECTIVE APPLICATION

In the second place, national legislation and jurisprudence have developed the so-called objective territorial principle which establishes the jurisdiction

of the State to prosecute and punish for crime commenced without the State but consummated within its territory. Moore says:

The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. (*Report on Extraterritorial Crime and the Cutting Case*, 1887, p. 23; *U. S. For. Rel.*, 1887, 757, 771.)

Hyde says:

The setting in motion outside of a State of a force which produces as a direct consequence an injurious effect therein, justifies the territorial sovereign in prosecuting the actor when he enters its domain. (*International Law*, 1922, I, 422.)

And the same principle has been applied by the Permanent Court of International Justice in the case of the *S.S. Lotus*, where an act or omission done within the jurisdiction of one State produced unintended effects within the jurisdiction of another State. *Publications P.C.I.J.*, Series A, Judgment No. 9; Dickinson, *Cases*, 656; Hudson, *Cases*, 719.

The objective principle has been developed in Great Britain and the United States, in decision and statute, both with respect to particular crimes and with respect to crimes in general. It has likewise had a significant development in the legislation and judicial decisions of States deriving their jurisprudence from the Civil Law.

The objective test as invoked to sustain jurisdiction of particular crimes may be illustrated by reference to American and British cases dealing with the offence of obtaining by false pretenses. *People v. Adams* (1846), 3 Den. (N. Y.) 190, (1848), 1 Comst. (N. Y.) 173, is a leading American case. The accused in Ohio had made false representations through an innocent agent in New York whereby money was obtained fraudulently in New York from a New York firm. The New York courts held that they had jurisdiction although the accused had been at all times during the commission of the offence in Ohio. The New York Supreme Court said:

The fraud may have originated and been concocted elsewhere, but it became mature and took effect in the city of New York, for there the false pretences were used with success. . . . The crime was therefore committed in the city of New York. . . . Personal presence, at the place where a crime is perpetrated, is not indispensable to make one a principal offender in its commission. (3 Den. (N. Y.) 190, 206-7.) This in no sense affirms or implies an extension of our laws beyond the territorial limits of the state. The defendant may have violated the law of Ohio by what he did there, but with that we have no concern. . . . He was indicted for what was done here, and done by himself. True, the defendant was not personally within this state, but he was here in purpose and design, and acted by his authorized agents. . . . Here the crime was perpetrated within this state, and over that our courts have an undoubted jurisdiction. This necessarily gives them jurisdiction over the criminal. *Crimen trahit personam*. (3 Den. N. Y., 190, 210.)

In the case of *Queen v. Nillins* (1884), 53 L.J.M.C. 157, the Queen's Bench Division of the English High Court of Justice made an application of the same principle in passing upon an application for habeas corpus by one held for extradition to Germany to answer a charge of obtaining goods by false pretenses in Germany. While the letters containing the false pretenses were written in England, and forged bills of exchange given in payment for the goods were posted there, the goods were obtained in Germany. The petitioner contended that the crime was committed, if committed at all, in England. Extradition to Germany was allowed, however, on the ground that the crime was committed in Germany where the goods were obtained. See, to the same effect, *Reg. v. Jacobi and Hiller* (1881), 46 L. T. 595 n. (false pretenses); *King v. Godfrey* [1923], 1 K. B. 24 (false pretenses); *Lamar v. United States* (1916), 240 U. S. 60 (false personation); *Updike v. People* (Col. 1933), 18 P. (2d) 472 (false pretenses); and *State v. Devot* (1925), 66 Utah, 307 (false pretenses). See also *Rex v. Muntion* (1793), 1 Esp. 62 (defrauding the government); *Reg. v. Taylor* (1865), 4 F. & F. 511 (uttering forged instruments); *King v. Oliphant* [1905], 2 K. B. 67 (falsification of accounts); and the Scotch cases of *H. M. Advocate v. Bradbury* (1872), 2 Couper, 311; *H. M. Advocate v. Allan* (1872), 2 Couper, 402; and *H. M. Advocate v. Witherington* (1881), 8 Sess. Cas. (Rettie), 41 (all three for falsehood, fraud, and willful imposition).

The same principle has been applied in the prosecution of many other offences. Thus, in *State v. Wellman* (1918), 102 Kan. 503, the jurisdiction to prosecute in Kansas for abandonment was sustained in a case in which the wife and child of the accused had left him in Missouri, because of his cruelty and failure to support, and had gone to Kansas, where the wife obtained a divorce. It was held that the failure to provide for the child occurred in Kansas; the offence was not the ill-treatment or failure to support in Missouri, but the abandonment in Kansas. See, to the same effect, *In re Fowles* (1913), 89 Kan. 431; *State v. Sanner* (1910), 81 Ohio St. 393; *Commonwealth v. Hart* (1909), 12 Pa. Super. 605; and *State v. Beam* (1921), 181 N. C. 597; see also *Fry v. State* (1927), 36 Ga. App. 312; and *Noodleman v. State* (1914), 74 Tex. Cr. 611.

In *State v. Morrow* (1893), 40 S. C. 221, a conviction in South Carolina for procuring an abortion was sustained in a case in which the accused had mailed pills from Washington to a woman in South Carolina, with advice as to their use, with the result that the woman took the pills in South Carolina and died following the abortion.

In *Simpson v. State* (1893), 92 Ga. 41, in which the accused had stood on the South Carolina bank of the Savannah River and shot at a person in a boat on part of the river within the boundaries of Georgia, the bullet missing the objective and striking the water on the Georgia side, it was held that the Georgia courts had jurisdiction of a prosecution for assault with intent to murder. The opinion of the court contains a very extreme statement of the theory of constructive presence. It was said:

Of course the presence of the accused within this State is essential to make his act one which is done in this State; but the presence need not be actual. It may be constructive. The well established theory of the law is, that where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. . . . So, if a man in the State of South Carolina criminally fires a ball into the State of Georgia, the law regards him as accompanying the ball, and as being represented by it up to the point where it strikes. . . . The act of the accused did take effect in this State. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was therefore, in a legal sense, after the ball crossed the State line up to the moment it stopped, in Georgia. (92 Ga. 41, 43-46.)

See also *County Council of Fermanagh v. Farrendon* [1923], 2 Ir. Rep. 180, *Annual Digest*, 1923-1924, Case No. 55.

In *Ford v. United States* (1927), 273 U. S. 593, aliens were prosecuted in the United States for conspiring abroad with persons inside the United States to violate the United States prohibition and tariff laws. Quoting with approval from the opinion in *Strassheim v. Daily* (1911), 221 U. S. 280, 285, to the effect that "acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power," the United States Supreme Court sustained the jurisdiction on the objective principle. Delivering the opinion of the court, Chief Justice Taft concluded:

The overt acts charged in the conspiracy to justify indictment under section 37 of the Criminal Code were acts within the jurisdiction of the United States, and the conspiracy charged, although some of the conspirators were corporeally on the high seas, had for its object crime in the United States and was carried on partly in and partly out of this country, and so was within its jurisdiction under the principles above settled. (273 U. S. 593, 624.)

See the similar decisions taking jurisdiction over conspiracy on the objective principle in *U. S. v. Downing* (1931), 51 F. (2d), 1030; *Noyes v. State* (1879), 41 N. J. L. 418; *State v. Faunce* (1917), 91 N. J. L. 333; and see also *Hyde v. U. S.* (1912), 225 U. S. 347; *Brown v. Elliott* (1912), 225 U. S. 392; *Grayson v. U. S.* (1921), 272 Fed. 553; *Lucas v. U. S.* (1921), 275 Fed. 405; and *Baker v. U. S.* (1927), 21 F. (2d), 903.

For further applications of the objective principle, see *Reg. v. Blythe* (1895), 4 British Columbia L. R. 276 (abduction); *State v. Grady* (1867), 34 Conn. 118 (accessory to theft); *State v. Chapman* (1871), 6 Nev. 320 (accessory to robbery); *Benson v. Henkel* (1905), 198 U. S. 1 (bribery); *Carter v. State* (1915), 143 Ga. 632 (embezzlement); *Queen v. Bull* (1845), 1 Cox C. C. 281 (forgery); *Commonwealth v. Blanding* (1825), 3 Pick. (Mass.) 304 (libel); *King v. Coombes* (1785), 1 Leach 388 (murder); *State v. Hall* (1894), 114

N. C. 909 (murder); *Claramont v. United States* (1928), 26 F. (2d), 797 (procuring landing of excluded alien); *Commonwealth v. Gillespie* (1822), 7 Serg. & Rawle (Pa.), 469 (selling lottery tickets); *United States v. Steinberg* (1932), 62 F. (2d), 77 (using the mails to defraud). Compare *Beattie v. State* (1904), 73 Ark. 428; and *People v. International Nickel Co.* (1915), 168 App. D. (N. Y.) 245. There are, of course, a great number of British and American venue cases which have applied the same objective test.

The development of the objective principle in judicial decision has been supplemented by legislation providing for the same jurisdictional test in case of particular offences. Legislation expanding the jurisdiction of larceny affords a noteworthy example. There has been controversy as to the competence of the State to prosecute for larceny one who has stolen goods abroad and brought the stolen goods within the State. For cases supporting competence, see *Sullivan v. State* (1913), 109 Ark. 407; *Foster v. State* (1911), 62 Fla. 52; *State v. Bennett* (1863), 14 Ia. 479; *Worthington v. State* (1882), 58 Md. 403; *Commonwealth v. White* (1877), 123 Mass. 430; *Commonwealth v. Parker* (1896), 165 Mass. 526 (embezzlement); *State v. Morrill* (1896), 68 Vt. 60. For cases *contra*, see *Territory v. Hefley* (1893), 33 Pac. (Ariz.) 618; *Gilbert v. Steadman* (1792), 1 Root (Conn.) 403; *Beal v. State* (1860), 15 Ind. 378; *Van Buren v. State* (1902), 65 Neb. 223; *People v. Gardner* (1807), 2 Johns. (N. Y.) 477; *State v. Brown* (1794), 1 Hay. (N. Y.) 100; *Strouther v. Commonwealth* (1895), 92 Va. 789; *Reg. v. Madge* (1839), 9 C. & P. 29; *Reg. v. Debruiel* (1861), 11 Cox C. C. 207; *Reg. v. Carr* (1877), 15 Cox C. C. 131 n. In a number of States of the United States this controversy has been resolved by expanding the definition of larceny to include possession within the State of property stolen outside the State. See, for example, the following statutes or code provisions:

Missouri, Rev. Stat. (1919), sec. 3685.—Every person who shall steal, or obtain by robbery, the property of another in any other state or country, and shall bring the same into this state, may be convicted and punished for larceny in the same manner as if such property had been feloniously stolen or taken in this state, and in any such case the larceny may be charged to have been committed, and every such person may be indicted and punished, in any county into or through which such stolen property shall have been brought.

New York, Cons. Laws (1923), c. 41, sec. 1930.—The following persons are liable to punishment within the state: . . .

(2) A person who commits without the state any offense which, if committed within the state, would be larceny under the laws of the state, and is afterwards found, with any of the property stolen or feloniously appropriated within this state.

Monaco, Code of Penal Procedure (1904), Art. 8.—Pourra également être poursuivi et jugé dans la Principauté l'étranger qui se sera rendu coupable au dehors: . . . 2. D'un crime ou d'un délit commis même au détriment d'un autre étranger, s'il est trouvé dans la Principauté en possession d'objets acquis au moyen de l'infraction.

Similar to the Missouri legislation, quoted above, see Kansas, Rev. Stat. (1923), secs. 21-103; New Mexico, Stat. (1915), sec. 1530; Rhode Island, Gen. Laws (1923), secs. 6330 & 6331. In *Hemmaker v. State* (1849), 12 Mo. 453, arising under the Missouri legislation, goods having been stolen on an ocean vessel in New Orleans harbor and later brought within the State, jurisdiction to prosecute for larceny was sustained. See also *Reg. v. Panse* (1897), 61 J. P. 536; *R. v. Graham* (1901), 65 J. P. 248. Other States have statutes which are similar to, but somewhat less liberal than, the Missouri statute. And see Field, *Outlines for an International Code* (2d ed. 1876, Art. 643, sec. 1; Fiore, *International Law Codified* (Borchard's transl. 1918), Art. 298.

Further illustration of the same tendency is found in legislation expanding the jurisdiction of bigamy by providing for prosecution where a second marriage, contracted outside the State, is followed by cohabitation within the State. Thus, Missouri, Rev. Stat. (1919), sec. 3508, provides:

Every person, having a husband or wife living, who shall marry another person, without this state, in any case where such marriage would be punishable if contracted or solemnized within this state, and shall afterward cohabit with such other person within this state, shall be adjudged guilty of bigamy, and punished in the same manner as if such second marriage had taken place within this state.

Similar legislation has been enacted in Delaware, Rev. Stat. (1915), sec. 4785; Kansas, Rev. Stat. (1923), sec. 21-903; and North Carolina, Cons. Stat. (1919), sec. 4342. Decided under the above enactments, see *State v. Bacon* (1920), 112 Atl. (Del.) 682; and *State v. Stewart* (1906), 194 Mo. 345. Compare *State v. Cutshall* (1892), 110 N. C. 538, arising under an earlier statute. Note, also, the type of legislation with respect to kidnapping which is exemplified in the following provisions from New York, Cons. Laws (1923), c. 41, sec. 1930:

The following persons are liable to punishment within the state: . . .

(4) A person who, being out of the state, abducts or kidnaps by force or fraud, any person contrary to the laws of the place where such act is committed, and brings, sends or conveys such person within the limits of this state. and is afterwards found therein.

See also Minnesota, Gen. Stat. (1923), sec. 9909, No. 4; North Dakota, Comp. Laws (1913), sec. 9206, No. 3; Oklahoma, Comp. Stat. (1921), sec. 1510, No. 3. See, further, Massachusetts, Gen. Laws (1921), c. 273, secs. 1, 2, 3, 15, 20 & 21 (abandonment); Washington, Rem. Comp. Stat. (1922), sec. 2333 (bribery in connection with public works contracts); Texas, Penal Code (1925), Art. 1009 (punishing forgery outside the State of titles to Texas land), applied in *Hanks v. State* (1882), 13 Tex. App. 289; and *ibid.* Art. 1039 (punishing monopolies or trusts formed outside the State in restraint of trade within the State).

From legislation expanding competence with respect to particular offences,

of the type noted above, it is a short step to legislation asserting the objective principle of territorial jurisdiction for all crimes. The latter type of legislation has been widely adopted both in America and in countries deriving their jurisprudence from the Civil Law. The following American statutes are sufficiently typical:

New York, Cons. Laws (1923), c. 41, sec. 1930.—The following persons are liable to punishment within the state: . . .

(5) A person who, being out of the state, and with intent to cause within it a result contrary to the laws of this state, does an act which in its natural and usual course results in an act or effect contrary to its laws.

Illinois, Criminal Code (Cahill's Rev. Stat., c. 38, 1927), par. 733.—When the commission of an offense commenced without this State is consummated within this State, the offender shall be liable to punishment therefor in this State, though he was without the State at the time of the commission of the offense charged, if he consummated the offense within this State through the intervention of any innocent or guilty agent, or any means proceeding directly or indirectly from himself; and in any such case he may be tried and punished in the county where the offense was consummated.

See also California, Penal Code (1872, as amended to 1923), sec. 778; Indiana, Burns Ann. Stat. (1926), sec. 2033; Iowa, Code (1924), sec. 13450; Minnesota, Gen. Stat. (1923), sec. 9909, Nos. 3 & 5; Mississippi, Hemingway's Ann. Code (1927), sec. 1220; Montana, Rev. Codes (1921), sec. 11704; Nevada, Comp. Laws (1929), sec. 10706; North Dakota, Comp. Laws (1913), secs. 9206, No. 5, & 10502; Oklahoma, Comp. Stat. (1921), sec. 2426; Oregon, Laws (1920), sec. 1381; see *State v. Owen* (1926), 119 Ore. 15; South Dakota, Rev. Code (1919), sec. 4506; Tennessee, Code (1917), sec. 6934; Utah, Comp. Laws (1917), sec. 8645; Washington, Rem. Comp. Stat. (1922), sec. 2254, see *State v. Piver* (1913), 74 Wash. 96; Hawaii, Rev. Laws (1925), sec. 3910. And see Nigeria, I Laws, c. 21 (Criminal Code, 1923), sec. 12 (jurisdiction limited to cases where act intended to have an effect in Nigeria); Santa Lucia, Criminal Code (1918), sec. 65.

Among the codes of other countries which affirm the same objective principle, the following may be quoted:

Argentina, National Penal Code (1921), Art. 1.—This code will be applied: 1. To crimes committed or whose effects are due to be produced on the territory of the Argentine Nation or in places subject to its jurisdiction.

Mexico, Federal Penal Code (1931), Art. 2.—It will likewise be applied: To crimes which are begun, prepared, or committed abroad, when they produce or seek to have effects in the territory of the Republic.

Norway, Penal Code (1902), sec. 12, No. 4.— . . . Dans le cas où la répression a pour objet les conséquences intentionnelles ou fortuites d'un acte, ou que ces conséquences servent à mesurer la peine, cet acte

est considéré comme commis également là où les conséquences se sont produites ou l'intention était qu'elles se produissent.

See also Denmark, Penal Code (1930), sec. 9; and Brazil, Project of Penal Code (1927), Art. 10. And see Austrian Supreme Court decision of Oct. 26, 1914, in *Clunet* (1917), 288; French cases reported in *Clunet* (1892), 1144 and (1911), 1192; and German decisions of Feb. 3, 1881, 3 *Entscheidungen des Reichsgerichts* (Str.) 316 (jurisdiction over sending prohibited newspapers from England to Germany); and of March 18, 1889, 19 *ibid.* 147.

In some instances the objective principle is pressed to a point at which its application is distinguished with difficulty from the application of the "principle of protection" upon which Articles 7 and 8, *infra*, are based. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 103-105, and references there cited. New York, Cons. Laws (1923), c. 41, sec. 1933, provides:

A person who commits an act without this state which affects persons or property within this state, or the public health, morals, or decency of this state, and which, if committed within this state would be a crime, is punishable as if the act were committed within this state.

See also Hawaii, Rev. Laws (1925), sec. 3909; and Washington, Rem. Comp. Stat. (1922), sec. 2254, No. 5. And see Texas, Penal Code (1925), Art. 1009 (punishing forgery outside the state of titles to Texas land), applied in *Hanks v. State* (1882), 13 Tex. App. 289. A striking example is the case of *B.*, in which the German Reichsgericht approved (Dec. 23, 1889), the prosecution of one who shouted "Vive la France" in France near the German border and was convicted of sedition on the ground that the cry was heard in Germany and hence took effect there as a crime. 20 *Entscheidungen des Reichsgerichts* (Str.) 146; *Clunet* (1890), 498. Certainly the gap between extreme applications of the objective principle and the protective principle as formulated in Articles 7 and 8, *infra*, is very narrow indeed.

COMBINED SUBJECTIVE AND OBJECTIVE APPLICATIONS

The text of the present article conforms to the modern trend by combining, as complementary, the subjective and objective applications of the territorial principle in a formula widely approved in national legislation and in the drafts of various international bodies. National experience has demonstrated that neither the subjective nor the objective application, taken alone, can be made sufficiently comprehensive to serve as a rationalization of contemporary practice. Where national legislation has been limited to an assertion of territorial jurisdiction over crime committed within the State, judicial practice and legal literature have been forced to the conclusion that a crime is committed wherever any essential element of the crime is accomplished. See Olshansen, *Kommentar zum Strafgesetzbuch für das Deutsche Reich* (11th ed. 1927), p. 58 ff. Such a development has been particularly notable in France, where the conception of the indivisibility of a crime consisting of

many connected acts or omissions has been a means of expanding jurisdiction. Donnedieu de Vabres, *Les Principes Modernes du Droit International Pénal* (1928), p. 44 ff. The modern formula, incorporated in this article, recognizes that there is territorial jurisdiction of any crime which is committed in whole or in part within the territory. A crime is committed "in whole" within the territory when every essential constituent element is consummated within the territory; it is committed "in part" within the territory when any essential constituent element is consummated there. If it is committed either "in whole or in part" within the territory, there is territorial jurisdiction.

The combination of the subjective and the objective tests to establish jurisdiction over particular offences committed in whole or in part within the territory is exemplified in American statutes with respect to homicide. Thus the laws of Massachusetts (Gen. Laws, 1921, c. 277), provide as follows:

Sec. 61. If a mortal wound is given, or if other violence or injury is inflicted, or if poison is administered, on the high seas or on land either within or without the commonwealth by means whereof death ensues in any county thereof, the homicide may be prosecuted and punished in the county where the death occurs.

Sec. 62. If a mortal wound is given, or if other violence or injury is inflicted, or if poison is administered, in any county of the commonwealth, by means whereof death ensues without the commonwealth, the homicide may be prosecuted and punished in the county where the act was committed.

Similar legislation is found in England, 9 Geo. IV, c. 31, sec. 8; Delaware, Rev. Stat. (1915), secs. 4699 & 4701; Georgia, Code (1910), secs. 27-28; Maine, Rev. Stat. (1917), c. 133, sec. 4; Michigan, Comp. Laws (1929), secs. 17123-17124; Missouri, Rev. Stat. (1919), secs. 3726-3727; Nebraska, Comp. Stat. (1922), sec. 10053; New Jersey, Comp. Stat. (1910), Crim. Proc., sec. 60; North Carolina, Cons. Stat. (1919), sec. 4605; Oklahoma, Comp. Stat. (1921), sec. 2439; Oregon, Laws (1920), sec. 1382; Pennsylvania, Stat. (1920), sec. 8122; Rhode Island, Gen. Laws (1923), sec. 6329; South Carolina, Code of Laws (1922), Code of Crim. Proc., secs. 108-109; Virginia, Code (1919), secs. 4398 & 4770; West Virginia, Barnes Code (1923), c. 144, sec. 6; Bermuda, Acts of the Legislature (1931), I, ch. 4, sec. 18; New South Wales, Act 40 of 1900, sec. 25; Trinidad and Tobago, Laws (rev. ed. 1925), I, ch. 8, sec. 9. The leading American cases under such statutes are perhaps *Commonwealth v. Macloon* (1869), 101 Mass. 1, upholding conviction where deceased was wounded on board a British vessel on the high seas and died in Massachusetts; and *Tyler v. People* (1860), 8 Mich. 320, in which deceased was wounded on board an American vessel in Canadian waters and died in Michigan. See also *Hunter v. State* (1878), 40 N.J.L. 495; *State v. Lang* (1931), 154 Atl. (N. J.) 864; [compare *State v. Carter* (1859), 27 N.J.L. 499, holding that under the New Jersey statutes jurisdiction did not extend to manslaughter where the victim died within the State]; *State v. Caldwell*

(1894), 115 N. C. 794; *Covington v. Commonwealth* (1923), 136 Va. 665; *Ex parte McNeeley* (1892), 36 W. Va. 84; and *Moran v. Territory* (1904), 14 Okla. 544.

A somewhat similar combination of jurisdictional criteria is found also in the legislation of American States for the punishment of dueling. Thus Illinois, (Cahill's Rev. Stat. 1927, c. 38), provides:

Par. 176. Whoever, being an inhabitant or resident of this state, by previous appointment or engagement made within the same, fights a duel without the jurisdiction of the State, and in so doing inflicts a mortal wound upon any person, whereof such person afterwards dies within this State, and every second engaged in such duel, shall be deemed guilty of murder within this State, and may be indicted, tried, and convicted in the county where such death shall happen.

See also Arizona, Rev. Stat. (1913), Penal Code, secs. 810-811; California, Penal Code (1872, amended to 1923), secs. 779-780; Idaho, Comp. Stat. (1919), sec. 8687; Indiana, Burns Ann. Stat. (1926), sec. 2034; Iowa, Code (1924), sec. 13456; Maine, Rev. Stat. (1917), c. 120, secs. 7-12; Massachusetts, General Laws (1921), c. 265, secs. 3-5; Michigan, Public Acts (1931), No. 328, secs. 319-320; Montana, Rev. Codes (1921), secs. 11705-11706; Nevada, Comp. Laws (1929), sec. 10708; North Dakota, Comp. Laws (1913), secs. 10503-10504, 9534-9535, 9542-9543; Oklahoma, Comp. Stat. (1921), secs. 2427-2428, 1728; Rhode Island, Gen. Laws (1923), secs. 6019-6026; South Dakota, Rev. Code (1919), sec. 4507; Tennessee, Thompson's Shannon's Code (1917), sec. 6941; Utah, Comp. Laws (1917), secs. 8646-8647; Vermont, Gen. Laws (1917), secs. 6809-6812; Wyoming, Comp. Stat. (1920), sec. 7068.

American statutes also punish the traffic in women for immoral purposes when any part of the acts incriminated is committed within the State. See Kentucky, Carroll's Stat. (1922), sec. 1215b; New Hampshire, Public Laws (1926), c. 386, secs. 10 & 11; Utah, Comp. Laws (1917), secs. 8095-8096; West Virginia, Barnes Code (1923), c. 144, sec. 16b, Nos. 1 & 2.

The expansion of territorial jurisdiction to comprehend any crime committed in whole or in part within the territory of the State has been asserted in general terms in the modern legislation of a number of countries. For the United States the following statutes may be taken as typical:

New York, Cons. Laws (1923), c. 41, sec. 1930.—The following persons are liable to punishment within the state:

(1) A person who commits within the state any crime, in whole or in part.

Wisconsin, Statutes (1919), sec. 4635a.—Any person who commits an act or omits to do an act which act or omission constitutes a part of a crime by the laws of this state shall be punished the same as if he had committed the whole of such crime within this state.

See also Arizona, Rev. Stat. (1913), Penal Code, sec. 25, No. 1; California, Penal Code (1872, amended to 1923), sec. 17, No. 1; Idaho, Comp. Stat.

(1919), sec. 8091, No. 1; Minnesota, Gen. Stat. (1923), sec. 9909, No. 1; Montana, Rev. Codes (1921), sec. 10830, No. 1; North Dakota, Comp. Laws (1913), sec. 9206, No. 1; Oklahoma, Comp. Stat. (1921), sec. 1510, No. 1; Porto Rico, Rev. Stat. and Codes (1911), sec. 5444, No. 1; Utah, Comp. Laws (1917), sec. 7916, No. 1; Washington, Rem. Comp. Stat. (1922), sec. 2254, No. 1; New Zealand, 1 Cons. Stat. (1908), Act 32 "Crimes", sec. 4; Queensland, Criminal Code Act (1899), sec. 12; Tasmania, Criminal Code (1924), sec. 8. Compare United States Judicial Code, sec. 42 (36 U. S. Stat. L. 1100), providing for trial in either district in case of offences begun in one judicial district and completed in another.

As exemplifying the same expansion of territorial competence in countries deriving their jurisprudence from the Civil Law, the following provisions of projects or codes in force may be quoted:

China, Penal Code (1928), Art. 4.—Une infraction commise à l'intérieur du territoire de la République, mais dont les effets se produisent hors de ce territoire, ou une infraction commise hors du territoire de la République, mais dont les effets se produisent à l'intérieur de ce territoire, est considérée comme une infraction commise à l'intérieur du territoire de la République.

Cuba, Project of Penal Code (Ortiz, 1926), Art. 32.—Tout délit ou faute sera réputé commis au point de vue du présent Code et de la juridiction compétent, tant au lieu où l'auteur a accompli l'acte ou l'un de ses éléments constitutifs qu'au lieu où le résultat complet s'est produit, et au cas où il n'y a pas eu consommation, où le résultat aurait dû se produire d'après l'intention notoire du délinquant.

Germany, Project of Penal Code (1927), sec. 8.—An act is committed at each place in which the elements (*Tatbestand*) of the punishable action have been realized in whole or in part, or where, in the case of attempt, they were to be realized according to the intention of the actor.

Italy, Penal Code (1930), Art. 6, par. 2.—The offence is considered to be committed in the territory of the State when the action or omission constituting it occurred therein, wholly or in part, or when the event which is the consequence of the action or omission took place therein.

See also Costa Rica, Penal Code (1924), Art. 219, sec. 7; Czechoslovakia, Project of Penal Code (1926), sec. 8; Denmark, Penal Code (1930), Art. 9; France, Project of Penal Code (1932), Art. 11; Poland, Penal Code (1932), Art. 3, sec. 2; Sudan, Penal Code (1924), Art. 4, sec. 1; Switzerland, Project of Penal Code (1918), Art. 8 (see also Bern, Law of July 5, 1914, Art. 1; Fribourg, Penal Code (1924) Art. 3).

Legislation asserting jurisdiction over any crime committed in whole or in part within the State has been construed and applied by the courts in some noteworthy cases. From the United States the following cases may be noted. In *People v. Botkin* (1901), 132 Cal. 231, the accused sent poisoned candy by mail from California to Delaware, where it was eaten by the deceased. The jurisdiction of the California courts was sustained under a

statute like that of New York, Cons. Laws (1923), c. 41, sec. 1930, No. 1, quoted *supra*. See same case (1908), 9 Cal. App. 244. In *People v. Sansom* (1918), 37 Cal. App. 435, the accused was convicted in California of uttering a forged check, though parts of the crime were committed in Arizona and Mexico. See also, upholding jurisdiction under this provision, *People v. Chapman* (1921), 55 Cal. App. 192; and *People v. Lakeman* (1923), 61 *ibid.* 368. Jurisdiction under the Idaho statute in a case of obtaining by false pretences was upheld in *State v. Sheehan* (1921), 33 Idaho, 553. In *People v. Zayas* (1916), 217 N. Y. 78, the jurisdiction of the New York courts was sustained, under the statute, where property had been delivered to the accused in Pennsylvania as a result of false pretences in New York. In *People v. Licenziata* (1921), 199 App. D. (N. Y.) 106, the accused sold wood alcohol in New York for beverage purposes and the liquor was taken by the purchaser into Massachusetts where it came into the possession of another who drank it and died. The accused was convicted of manslaughter in New York. It was held that the act done in New York was unlawful in itself, constituted a part of the crime, and so founded the jurisdiction of the New York courts. See also *People v. Bihler* (1913), 154 App. D. (N. Y.) 618.

In *People v. Werblow* (1925), 241 N. Y. 55, on the other hand, the attempt to establish jurisdiction under the New York statute failed. The accused and two brothers had conspired in New York to defraud a New York corporation having a London branch. One brother in New York sent letters and cablegrams to the accused in China and received others from him. The other brother went to London and received messages there from the one in New York. Then the accused in China sent forged cablegrams to the London branch as a result of which the recipient paid a large sum to the brother in London. When the accused returned to New York, he was convicted on an indictment charging grand larceny by obtaining money by false pretences. The Court of Appeals reversed this conviction on the ground that what was done in New York did not amount to a part of the crime charged. Delivering the opinion of the court, Judge Cardozo said:

We are now asked to go farther and to hold that a conspiracy formed in New York gives jurisdiction under the statute to punish for a larceny abroad if only some overt act can be found to have been here committed in furtherance of the conspiracy, even though the act is not a constituent of the executed larceny.

Such a reading of the statute strains it to the breaking point. We think a crime is not committed either wholly or partly in this state unless the act within this state is so related to the crime that if nothing more had followed, it would amount to an attempt. We do not mean that this construction of the statute is the consequence of some inherent limitation upon the power of the Legislature. (241 N. Y. 55, 61.)

The court intimated, however, that if the indictment had been for conspiracy the jurisdiction might have been sustained under the statute. See also *People v. Doud* (1923), 202 N.Y.S. 579, holding that no part of the crime

charged had been committed within the State. A similar position was taken by the French courts Feb. 5, 1857, D. P. (1857), I, 132; and June 29, 1906 (Trib. Corr. de la Seine), Clunet (1907), 130; and also by the Italian Court of Cassation of Florence, March 26, 1879, Clunet (1881), 449.

The present article sets no such limitation upon the meaning of "committed in whole or in part" as is suggested by the case of *People v. Werblow*. The court in *People v. Werblow* concluded that the legislature had not intended to assert jurisdiction unless the part of the crime committed within the State amounted at least to an attempt, but it carefully refrained from intimating that the legislature would have been incompetent to enact a more comprehensive statute. It seems clear that a State is competent internationally, subject to limitations covered by later articles, to take jurisdiction of acts or omissions committed in part within the State, even though the part committed within the State amounts to something less than an attempt and is punishable only because of its association with acts or omissions committed outside the State. A State may not wish to exercise such competence to its fullest extent. But the competence exists. The phrase "committed in whole or in part" is to be construed literally.

The United States statutes and cases are reviewed in Berge, "Criminal Jurisdiction and the Territorial Principle," 30 *Mich. Law Rev.* (1931), 238. See also Lé vitt, "Jurisdiction over Crimes," 16 *Jour. Am. Inst. of Crim. Law and Criminology* (1925), 316. Earlier discussions of the United States materials may be found in Bishop, *Criminal Law* (9th ed. 1923), I, secs. 110, 112-116, 136-141; and Wharton, *Conflict of Laws* (3d ed. 1905), II, secs. 811-812, 823-826a.

The courts of other countries have made substantial progress in developing an equally comprehensive definition of territorial jurisdiction, even in the absence of such legislation as that reviewed above. For France, with respect to fraud, see the decisions of the Court of Cassation of Jan. 6, 1872, 77 *Bull. Crim.* 8; March 11, 1880, 85 *ibid.* 97; Dec. 18, 1908, Sirey (1913), I, 116; Aug. 31, 1911, *Rev. de Dr. Int. Privé* (1912) 360; of the Tribunal de Bayonne, Dec. 29, 1887, Clunet (1887), 517; and of the Tribunal d'Avignon, Oct. 23, 1911, *ibid.* (1912), 827; with respect to defamation, the decisions reported in Clunet (1901), 990, and Sirey (1908), I, 553; with respect to extortion, the decisions reported in Clunet (1885), 433; with respect to revelation of trade secrets, the decisions reported in Sirey (1904), I, 105; and with respect to espionage, the decisions reported in Clunet (1912), 1162. See also, for the French law and cases, Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), 43-45, 47-48; Travers, *Le Droit Pénal International* (1920), I, secs. 108-180; Travers, "Compétence Criminelle," in de Lapradelle et Niboyet, *Répertoire de Droit International* (1929), IV, 360, 383-388. Some of these cases the French law regards as governed by the principle of *indivisibilité*. See Nachbaur, "Droit Pénal International," in de Lapradelle et Niboyet, *Répertoire de Droit International* (1930), VII,

441, 442-444; Donnedieu de Vabres, *op. cit.*, 44-45; Travers, *op. cit.*, II, sec. 976 ff. (1921). In others, jurisdiction may be based upon the principle of *connexité*. See the above references and such cases as that of *Stuur* (French Court of Cassation, Aug. 24, 1876), Sirey (1877), I, 385, assuming jurisdiction over a forgery in Brazil which was used in France, and over the burning of a ship on the high seas since the burning was to hide the forgery. The text of the present article would include cases of *indivisibilité* where part of the crime is committed within the State, but would exclude crimes committed wholly abroad though connected with a crime committed in whole or in part within the State, unless the connected crimes were regarded as merely parts of a single crime. See further Garraud, *Traité Théorique et Pratique du Droit Pénal Français* (3d ed. 1913), I, sec. 171; and Ortolan, *Eléments du Droit Pénal* (4th ed., 1875), I, sees. 950-955.

For Germany, note the decision of the Reichsgericht of Dec. 15, 1908, taking jurisdiction of the crime of selling in Austria seditious songs which were brought into Germany, reported in *Clunet* (1911), 285; and the decisions of May 12/19, 1884, 10 *Entscheidungen des Reichsgerichts* (Str.) 420; Feb. 11, 1886, 13 *ibid.* 337. See also 49 *ibid.* 422; and 50 *ibid.* 423. And see the German literature cited *infra*.

For Switzerland, note the case of *Rabbat and Limoge*, in which jurisdiction was sustained over a crime committed in part in Switzerland, although France sought extradition, reported in 13 *Rev. de Dr. Int. Privé* (1917), 605; and see Court of Cassation of Vaud, Feb. 27, 1906, in *Clunet* (1907), 518. For Belgium, see Court of Cassation, Oct. 29, 1928, in *Clunet* (1929), 772. For Italy, see Manzini, *Trattato di Diritto Penale Italiano* (2d ed. 1926), I, sec. 168. For Japan, see *Naokawa v. Chuan* (1925), *Annual Digest*, 1925-1926, Case No. 104. For Luxembourg, see Supreme Court, May 8, 1926, in *Clunet* (1929), 481. Laws and cases from some other States are noted in Travers, *op. cit.*

The whole question of the *locus* of crime for the purpose of territorial jurisdiction has been much discussed in Europe. The contribution of the German writers has been especially significant. See Kitzinger, "Ort und Zeit der Handlung", *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1908), Allg. Teil, I, pp. 135-223; and Heymann, *Territorialitätsprinzip und Distanzdelikt* (1914). See also Bar, *Gesetz und Schuld in Strafrecht* (1906), p. 134 ff; Bar and Brusa, in *Annuaire de l'Inst. de Dr. Int.* (1883-1885), VII, 123; Binding, *Handbuch des Strafrechts*, (1885) I; Hegler, *Prinzipien des internationalen Strafrechts* (1906); Hippel, "Zeit und Ort der Tat", 37 *Zeitschrift für die Gesamte Strafrechtswissenschaft* (1916), 1; Kohler, *Internationales Strafrecht* (1917), pp. 109-137; Meili, *Lehrbuch des Internationalen Strafrechts und Strafprozessrechts* (1910); Rühle, *Ort und Zeit der Handlung im Strafrecht* (1929); Tafel, *Die Geltung des Territorialprinzips im deutschen Reichsstrafrecht* (1902).

It was contended in the case of the *S.S. Lotus*, before the Permanent Court

of International Justice, *Publications P.C.I.J.*, Series A, No. 9, that an objective application of the territorial principle is improper where an act or omission committed in one State produces unintended effects within the territorial jurisdiction of another State. And this view was vigorously defended by the dissenting judges. Thus, Judge Loder said:

It is clear that the place where an offence has been committed is necessarily that where the guilty person is when he commits the act. The assumption that the place where the effect is produced is the place where the act was committed is in every case a legal fiction. It is, however, justified where the act and its effect are indistinguishable, when there is a direct relation between them; for instance, a shot fired at a person on the other side of a frontier; a parcel containing an infernal machine intended to explode on being opened by the person to whom it is sent. The author of the crime intends in such cases to inflict injury at a place other than that where he himself is.

But the case which the Court has to consider bears no resemblance to these instances. The officer of the *Lotus*, who had never set foot on board the *Boz-Kourt*, had no intention of injuring anyone, and no such intention is imputed to him. The movements executed in the navigation of a vessel are only designed to avoid an accident. . . .

In these circumstances, it seems to me that the legal fiction whereby the act is held to have been committed at the place where the effect is produced must be discarded. (*Publications P.C.I.J.*, Series A, Judgment No. 9, p. 37.)

While the view of the dissenting judges finds support, in case of collisions between ships under different flags, in the British decision in *Queen v. Keyn* (1876), 2 Ex. D. 63, and the French decision in the *Ortigia—Oncle-Joseph*, Clunet (1885), 286, the contrary view is supported in the same type of case by the Italian decision in the *Ortigia—Oncle-Joseph*, Clunet (1885), 287, and the Belgian decision in the *Ekkbatana—West-Hinder*, Clunet (1914), 1327. The decision in the *S.S. Lotus* clearly supports the conclusion that no principle of international law forbids the localization of an offence, consisting of unintended injury caused through negligence, at the place where the negligence takes effect. This conclusion is in harmony with tendencies clearly manifested in modern legislation. It is approved in modern draft codes, projects, and resolutions. The present article accepts this conclusion and makes no distinction between an act and an omission to act or between an intended and an unintended result.

The situation envisaged, and the scope of the competence which the present article is intended to define, may perhaps be clarified by illustration. Let us suppose that A, in State X, shoots B, who is in State Y, and that B goes into State Z and dies as a result of the wound inflicted. Suppose, further, that B's body is taken into State W where an autopsy is performed. Under the present Article, State X has jurisdiction to prosecute and punish A for homicide since the act was committed there in part. State Y also has jurisdiction, for the same reason, since the bullet struck B in State Y. State

Z has jurisdiction, either on the ground that the homicide was committed in part in State Z where B died as a result of the wound, or upon the ground that the consequence of A's act, being a constituent element of the crime, occurred in State Z. As a matter of fact, contemporary national legislation quite commonly asserts a jurisdiction to prosecute and punish for homicide on the sole ground that the victim died within the territory. On the other hand, State W has no jurisdiction to prosecute and punish for the homicide, on the ground that the victim's body is within the State or that the autopsy has been performed there, since the criminal act was not committed in whole or in part in State W.

The most thorough study of the general subject of jurisdiction of crime is found in the work of Travers, who demonstrates clearly that the commission of the crime in whole or in part within the territory is sufficient to found territorial competence. *Le Droit Pénal International* (1920), I, secs. 108-180. The proposition of Travers is concisely expressed in his draft for insertion in a penal code (*op. cit.*, V, sec. 2739), which reads as follows:

Art. 1. La loi pénale est applicable à toutes les infractions et toutes les tentatives d'infraction par elle prévues lorsque s'est réalisé, sur le territoire, en tout ou en partie, soit un élément constitutif de ladite infraction ou de ladite tentative, soit un fait influant sur la qualification même ou sur la quotité de la peine et tenant à l'activité de l'agent.

It is to be noted, finally, that the comprehensive statement of territorial competence incorporated in the present article is in substantial accord with the drafts recently approved by experts in international conference. The pronouncement of the International Conference on the Unification of Penal Law at Warsaw (1927) is made especially significant by the fact that the Conference membership was recruited primarily from national code commissions and other national bodies having first-hand experience in the drafting of penal legislation. Resolutions voted unanimously by this Conference provide in part as follows:

Art. 1. Les lois pénales de l'Etat . . . (x) s'appliquent à quiconque commet une infraction sur le territoire . . . (x) . . .

L'infraction sera considérée comme ayant été commise sur le territoire de l'Etat . . . (x), quand un acte d'exécution a été tenté ou accompli sur ce territoire ou quand le résultat de l'infraction s'est produit sur ce territoire.

Resolutions voted more recently by the Fourth Section of the International Congress of Comparative Law at The Hague (1932) include the following:

Art. 2. Une infraction est considérée comme ayant eu lieu sur le territoire, lorsqu'un des actes d'omission ou de commission qui la constituent y a été perpétré ou tenté.

At its Munich session in 1883, the Institute of International Law approved a closely restricted definition of the territorial principle, but incorporated,

nevertheless, a concession of considerable significance in view of the developments in national jurisprudence and legislation since that date. The concession is formulated in Art. 6 of the Munich resolutions as follows:

Lorsque la loi pénale d'un pays, compétente d'après la principe de la territorialité (Art. 1-3), considère comme infraction une et indivisible dans le sens juridique, des actes commis en partie au dedans des frontières et en partie au dehors, la justice pénale de ce pays pourrait juger et punir même les actes commis à l'étranger.

Il y aurait donc une compétence pénale double ou même multiple, dont l'une, dûment exercée par prévention, exclurait l'autre et serait respectée partout, sauf les cas de délit contre la sûreté de l'Etat et des infractions mentionnées à l'article 8.

In view of the position taken in 1883, there is peculiar significance in the very broad statement of the territorial principle which the Institute approved by an overwhelming majority at its Cambridge session of 1931, reproduced *supra*. The Cambridge resolutions may well be quoted again. "*Prenant en considération l'évolution de la science du droit pénal international et du droit positif*," the Institute voted:

Art. 1. La loi pénale d'un Etat régit toute infraction commise sur son territoire, sous réserve des exceptions consacrées par le droit des gens.

Art. 2. La loi d'un Etat peut considérer une infraction comme ayant été commise sur son territoire aussi bien lorsqu'un acte (de commission ou d'omission) qui la constitue y a été perpétré (ou tenté) que lorsque le résultat s'y est produit (ou devait s'y produire).

Cette règle est aussi applicable aux actes de participation.

PARTICIPATION

Up to this point the comment has been addressed to the general proposition that "a State has jurisdiction with respect to any crime committed in whole or in part within its territory." It is now to be noted, in the language of the Institute's resolutions quoted above, that this rule is applicable also to acts of participation (accessoryship, aiding and abetting, *complicité*). It should be clear that jurisdiction with respect to crime committed in whole or in part within the territory includes any act or omission committed within the territory which amounts to participation in a crime committed in whole or in part outside the territory and any act or omission committed outside the territory which amounts to participation in a crime committed in whole or in part within the territory. The two types of situation may be considered separately.

As regards participation within the territory in a crime committed in whole or in part outside the territory, the acts of commission or omission within the territory, amounting to a participation, may be regarded as separate crimes committed within the territory. It is really immaterial where the principal crime is committed. It is to be observed that practice

in some European States, notably in France, does not permit jurisdiction over participation locally where the principal crime is committed abroad. See the decisions discussed in Déprez, *De la Complicité au Point de Vue International* (1913), condemning vigorously the refusal to take jurisdiction; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 46; Travers, *Le Droit Pénal International* (1921), II, sec. 1024 ff. But whether a State wishes to exercise such jurisdiction or not, it seems clear that competence must be acknowledged. There are other States which provide specifically for the exercise of such jurisdiction. See Great Britain, 24 & 25 Vict. c. 94, sec. 7; India, Penal Code (1860), sec. 108A; Rumania, Project of Penal Code (1926), Art. 6; Sudan, Penal Code (1924), Art. 4, No. 1, ii. Some of the States of the United States have similar legislation. And it appears that the common law in the United States has been held to support the same conclusion. See Wharton, *Criminal Law* (12th ed. 1932), I, sec. 333, citing cases. From the viewpoint of international law, there seems to be no doubt that a State may take jurisdiction of participation within its territory wherever the principal crime may be committed.

As regards participation abroad in a crime committed in whole or in part within the territory, the State's jurisdiction may likewise be deduced from the general proposition that "a State has jurisdiction with respect to any crime committed in whole or in part within its territory" if the participation is to be regarded as a part of the crime. If participation were commonly so regarded, it would seem unnecessary to deal with it in special terms. As a matter of national practice, however, participation is commonly treated as an offence separate and complete in itself. It is essential that it receive separate attention, therefore, and the present article expressly includes within the scope of the general proposition "any participation outside its territory in a crime committed in whole or in part within its territory." The rule thus formulated finds support in many statutes and decisions. The following statutes of States of the United States may be noted:

California.—The following persons are liable to punishment under the laws of this state: . . . 3. All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.

Every person, who, being out of this state, causes, aids, advises, or encourages any person to commit a crime within this state, and is afterwards found within this state, is punishable in the same manner as if he had been within this state when he caused, aided, advised, or encouraged the commission of such crime. (Penal code of 1872, amended to 1923, secs. 27, 778b.)

New Hampshire.—Whenever a crime shall have been committed in this state, and any person without this state shall have been accessory thereto before the fact, such accessory may be tried and punished in the county where the crime was committed, in the same manner as if the acts done by him had been done in this state. (Public Laws, 1926, c. 395, sec. 8.)

Like the California statute, see Hawaii, Rev. Laws (1925), sec. 4033; Idaho, Comp. Stat. (1919), sec. 8091, No. 3; Minnesota, Gen. Stat. (1923), sec. 9909, No. 3; Montana, Rev. Codes (1921), sec. 10730, No. 3; New York, Cons. Laws (1923), c. 41, sec. 1930, No. 3; North Dakota, Comp. Laws (1913), sec. 9206, No. 4; Oklahoma, Comp. Stat. (1921), sec. 1510, No. 4; Porto Rico, Rev. Stat. and Codes (1911), sec. 5444, No. 3; Utah, Comp. Laws (1917), sec. 7916, No. 3; Washington, Comp. Stat. (1922), sec. 2254, No. 3. Similar legislation is found also in Bermuda, Acts of the Legislature (1931), I, c. 4, sec. 19; Jamaica, The Administration of Criminal Justice Law (1928), sec. 24; Laws of Nigeria (1923), I, c. 21, Criminal Code, sec. 13; Queensland, Criminal Code Act of 1899, sec. 14; Egypt, Native Penal Code (1904), Art. 2, sec. 1; and Sudan, Penal Code (1924), Art. 4, No. 1, i.

The same principle has been applied in the United States in judicial decisions. In *State v. Grady* (1867), 34 Conn. 118, where a theft in Connecticut occurred as a result of a conspiracy formed in New York, the Connecticut court upheld jurisdiction over those of the defendants who had aided in New York the committing of the theft in Connecticut. In *State v. Chapman* (1871), 6 Nev. 320, the Nevada courts sustained jurisdiction over a defendant who had aided in California the committing of a robbery in Nevada. See also *Elliott v. State* (1919), 77 Fla. 611, upholding jurisdiction but reversing the conviction for other errors; and *Latham v. United States* (1924), 2 F. (2d), 208, *Annual Digest* (1923-1924), Case No. 56. *Contra*, however, see *State v. Chapin* (1856), 17 Ark. 561; *Johns v. State* (1862), 19 Ind. 431; and *State v. Wyckoff* (1864), 31 N.J.L. 65.

A similar principle has been applied in countries deriving their jurisprudence from the Civil Law. A notable line of decisions of the Court of Cassation of France has upheld French territorial jurisdiction over participation abroad in crimes committed in France. One of the best known is the case of *Philippe*, Sept. 7, 1893, Sirey (1894), I, 249, Clunet (1893), 1161, in which the French court took jurisdiction over a defendant who had received in Belgium property which had been stolen in France, the court saying:

lorsqu'un crime ou un délit est commis en France, la compétence de la justice française pour connaître du fait principal s'étend nécessairement à tous les faits de complicité, même s'ils se sont produits en pays étranger. (Sirey, 1894, I, 249, 250.)

Similar cases are those of *Laterner*, March 13, 1891, Sirey (1891), I, 240 (theft in France, *complicité* in London); and *Wyzogrocki*, Feb. 17, 1893, Clunet (1894), 118. In the case of *Holden*, Feb. 24, 1883, Sirey (1885), I, 95, an alien committed abroad certain falsifications and forgeries which were used in France and was convicted as an accomplice to their use in France. See also, *Micheli, Chauvet et Martin*, Apr. 30, 1908, Sirey (1908), I, 553. For further information as to French practice, see Déprez, *De la Complicité au Point de Vue International* (1913), pp. 69-95; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), 46; Nachbaur,

"*Droit Pénal International*," in de Lapradelle et Niboyet, *Répertoire de Droit International* (1930), VII, 441, 447-448; Travers, *Le Droit Pénal International* (1921), II, secs. 1008-1014. The Austrian courts have upheld jurisdiction over participation abroad in crime committed on Austrian territory, in the case of *Stefan H.*, Apr. 27, 1894, 51 *Zeitschrift für Internationales Privat- und Strafrecht* 522; Clunet (1896), 197. So have the Belgian courts: see Haus, *Principes Généraux du Droit Pénal Belge* (1869), 144; the case of *Govaert, Pasicrisie belge* (1925), 189, syllabus in 20 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1925), 553. For Germany, see decisions of June 24, 1884, 11 *Entscheidungen des Reichsgerichts* (Str.) 20; Dec. 30, 1889, 20 *ibid.* 169; June 14, 1894, 25 *ibid.* 424; and *R. v. Hippel, Deutsches Strafrecht* (1930), II, 72. Italian practice is to the same effect: see the cases of *Camponovo*, June 12, 1890, Clunet (1892), 290, *ibid.* (1893), 632, taking jurisdiction of an alien who had participated abroad in the crime of smuggling in Italy; and *Tarnowski e Prilukoff*, Nov. 6, 1909, 62 *Giur. Ital.* (1910), II, 70, taking jurisdiction over an alien for participation abroad in a homicide committed in Italy. See also Diena, *Principii di Diritto Internazionale* (2nd ed. 1914), I, pp. 288-289; and Manzini, *Trattato di Diritto Penale Italiano* (2nd ed. 1926), I, p. 319.

Recognition of the same principle is implicit in the extradition laws of certain countries in which provision is made for the surrender of those who have committed within the territory acts amounting to participation in crimes committed abroad. The laws of Sweden, for example, have provided:

Lorsque l'extradition d'un individu est réclamée pour complicité d'une infraction commise hors de Suède, l'extradition doit être accordée, malgré les dispositions de l'article 2 du chapitre 1^{er} de la loi pénale, même si l'acte de complicité soit être réputé commis en Suède ou bien à bord d'un navire suédois hors de Suède. (*Annuaire de Législation Etrangère*, 1913, pp. 481, 482.)

The International Prison Congress of 1900 adopted a resolution affirming jurisdiction over participation abroad in crimes committed within the territory in the following terms:

IV. La loi pénale du pays où une infraction a été commise est applicable non seulement à cette infraction elle-même, mais aussi à tous les actes de participation, eussent-ils été accomplis à l'étranger ou par des étrangers. (*Actes du Congrès Pénitentiaire International de Bruxelles*, 1901, I, 177, 178.)

The resolutions of the Institute of International Law, adopted at Cambridge in 1931 and supporting the same proposition, have already been quoted.

ATTEMPT

Likewise included within the scope of the general proposition that "a State has jurisdiction with respect to any crime committed in whole or in part within its territory" is "any attempt outside its territory to commit a

crime in whole or in part within its territory." As in case of participation, discussed above, there is no difficulty with respect to attempt within the territory to commit a crime outside. As regards attempt outside the territory to commit a crime within, if the attempt succeeds there is jurisdiction on the ground that a crime has been committed at least in part within the territory. If the attempt fails, however, territorial jurisdiction at the place where the crime was to have been consummated requires an explicit recognition. Such an explicit recognition is incorporated in par. (b) of the present article.

Contemporary practice appears to warrant the inclusion. The following penal codes or projects of codes may be quoted:

Brazil, Project of Penal Code (Sa Pereira, 1927), Art. 10.—An attempt committed abroad is deemed committed in the country, when it was the intention of the perpetrator that its effects should take place within it.

Czechoslovakia, Project of Penal Code (1926), sec. 8.—L'acte est réputé commis à l'endroit où l'agissement punissable a été exécuté. L'acte est aussi réputé commis sur le territoire de la République lorsqu'au moins le résultat prévu par la loi s'est produit sur le dit territoire ou qu'il s'y serait produit si l'acte n'en était resté à la tentative.

Germany, Project of Penal Code (1927), sec. 8.—An act is committed at each place in which the elements of the punishable action have been realized in whole or in part, or where, in the case of attempt, they were to be realized according to the intention of the actor.

Norway, Penal Code (1902), sec. 12, No. 4B.—Dans le cas où la répression a pour objet les conséquences intentionnelles ou fortuites d'un acte, ou que les conséquences servent à mesurer la peine, cet acte est considéré comme commis également là où les conséquences se sont produites ou l'intention était qu'elles se produissent.

Poland, Penal Code (1932), Art. 3, sec. 2.—L'infraction est considérée comme commise sur le territoire de l'Etat Polonais, sur un navire ou aéronef polonais, si l'auteur y a accompli l'action ou l'omission délictueuses ou lorsque l'effet délictueux s'y est produit ou devait s'y produire suivant l'intention de l'auteur.

Switzerland, Project of Penal Code (1918), Art. 8.—Une tentative est réputée commise tant au lieu où son auteur l'a faite, qu'au lieu où, d'après le dessein de l'auteur, le résultat devait se produire.

Similar provisions are found in Argentina, Penal Code (1921), Art. 1, sec. 1; Chile, Project of Penal Code (1929), Art. 5; Costa Rica, Penal Code (1924), Art. 219, No. 7; Cuba, Project of Penal Code (Ortiz, 1926), Art. 32; Denmark, Penal Code (1930), sec. 9; France, Project of Penal Code (1932), Art. 11; Mexico, Penal Code (1931), Art. 2; and the Swiss Canton of Bern, Law of July 5, 1914, Art. 1.

While there appears to be very little law in the United States on the subject, Wharton, *Criminal Law* (12th ed. 1932), I, sec. 233, says:

It is clear that such attempt is cognizable in the place where, if not interrupted, it would have been executed; and from the very nature of things, it must be cognizable in the place where the preliminary overt acts constituting the attempt are committed.

The type of situation in which par. (b) of the present article might be invoked appropriately may be illustrated by a hypothetical case. Suppose that A, in State X, mails poisoned candy to B, in State Y, for the purpose of killing B; but suppose that the postal authorities of State X intercept the poisoned candy before it reaches State Y. If A should be tried in State X, State Y would be incompetent under Article 14, *infra*, to try A again for the same offence; but, if A should escape prosecution in State X, then State Y would have jurisdiction under the present article to prosecute and punish for the attempt to commit murder within its territory. Again, suppose that A in State X should shoot at B in State Y, intending to kill B, but that the weapon should prove to have been loaded, without A's knowledge, with a harmless blank cartridge. State Y would have jurisdiction under par. (b) of the present article to prosecute and punish A for an attempt to commit murder within its territory.

The definition of "attempt" in criminal law is of course outside the scope of the present Convention. It may be observed that a criminal attempt is in general a deliberate act done with intent to cause injury to someone or with intent to violate the penal law. It is such an act done outside the territory with intent to commit a crime in whole or in part inside the territory that par. (b) recognizes as within the territorial competence. On attempts, in general, see Arnold, "Criminal Attempts—The Rise and Fall of an Abstraction," 40 *Yale Law Jour.* (1931), 53; Beale, *A Selection of Cases and Other Authorities upon Criminal Law* (3d ed. 1915), pp. 102-132; Beale, "Criminal Attempts," 16 *Harv. Law Rev.* (1903), 491; Bishop, *Criminal Law* (9th ed. 1923), I, secs. 724-772a; Curran, "Criminal and Non-Criminal Attempts," 19 *Georgetown Law Jour.* (1931), 185, 316; Sayre, *A Selection of Cases on Criminal Law* (1927), pp. 318-345; Strahorn, "The Effect of Impossibility on Criminal Attempts," 78 *Univ. Pa. Law Rev.* (1930), 962; Waite, *Cases on Criminal Law and Procedure* (1931), pp. 160-183. See also Ferri, *Principii di Diritto Criminale* (1928), pp. 540-550, 636-640; Frank, "Vollendung und Versuch," *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1908), Allg. Teil, V, 163-268; Garraud, *Traité Théorique et Pratique du Droit Pénal Français* (3d ed. 1913), I, pp. 486-506; Hippel, *Deutsches Strafrecht* (1930), II, pp. 392-437; Manzini, *Trattato di Diritto Penale Italiano* (2d ed. 1926), II, pp. 261-305. And see *Conférence Internationale d'Unification du Droit Pénal* (Warsaw, 1927), *Actes de la Conférence*, *passim*.

ARTICLE 4. SHIPS AND AIRCRAFT

A State has jurisdiction with respect to any crime committed in whole or in part upon a public or private ship or aircraft which has its national character.

This jurisdiction extends, also, to

(a) Any participation in a crime committed in whole or in part upon its public or private ship or aircraft; and

(b) Any attempt to commit a crime in whole or in part upon its public or private ship or aircraft.

COMMENT

This article recognizes that a State has, with respect to its public or private ships or aircraft, while in its own territorial waters or air, on the high seas or in the "free air," or in foreign territorial waters or ports or air, a jurisdiction as extensive as that recognized in Article 3, preceding, with respect to the State's territory. Ships and aircraft are not territory. It is recognized, nevertheless, that a State has with respect to such ships or aircraft a jurisdiction which is similar to its jurisdiction over its territory. Thus the State's jurisdiction includes crime committed in whole or in part upon such ships or aircraft, participation in crime committed in whole or in part upon such ships or aircraft, and attempts to commit crime in whole or in part upon such ships or aircraft. In case of crime in foreign territorial waters or air, it should be noted, the jurisdiction herein defined is concurrent with the jurisdiction which Article 3 concedes to the littoral or subjacent State. *Cf.* Art. 1 (d), *supra*. It is also to be noted that the provisions of Article 14, *infra*, incorporating the principle of *non bis in idem*, limit the State with respect to crime on its vessels or aircraft if the accused is an alien and has already been tried by the littoral or subjacent State.

The propriety of this assimilation of ships to territory is almost universally recognized. The earlier discussions of ships on the high seas or in foreign waters developed the idea that a ship might be regarded, for the purpose of jurisdiction, as a kind of "floating island" of the flag State. See, for example, the case of the *Costa Rica Packet*, between Great Britain and the Netherlands, in which F. de Martens as arbitrator said:

Qu'en haute mer, même les navires marchands constituent des parties détachées du territoire de l'Etat dont ils portent le pavillon et, en conséquence, ne sont justiciables des faits commis en haute mer qu'aux autorités nationales respectives. (Clunet, 1897, 624, 625.)

While most modern jurists reject this analysis, as founded upon an unsupportable fiction, the jurisdiction of the flag State over crimes committed on board is justified on grounds of convenience. Thus Hyde says:

The relation between a vessel and the country to which it belongs is sufficiently close to justify the latter to assert a right of jurisdiction with respect to the ship and its occupants. (*International Law*, 1922, I, 406.)

See Hall, *International Law* (8th ed. 1924), p. 301. A similar view was taken by two judges of the Permanent Court of International Justice in their dissenting opinions in the case of the *S.S. Lotus*:

A merchant ship being a complete entity, organized and subject to the control of the State whose flag it flies, and having regard to the absence of all territorial sovereignty on the high seas, it is only natural that as far as concerns criminal law this entity should come under the jurisdiction of that State. (Loder, J., dissenting, *Publications P.C.I.J.*, Series A, Judgment No. 9, p. 39.)

The jurisdiction over crimes committed on a ship at sea is not of a territorial nature at all. It depends upon the law which for convenience and by common consent is applied to the case of chattels of such a very special nature as ships. (Finlay, J., dissenting, *Publications P.C.I.J.*, Series A, Judgment No. 9, p. 53.)

The point suggested by Judge Loder, that a ship is a self-contained unit under the control and command of its own officers, has doubtless contributed much to the general recognition of the flag State's jurisdiction over its own ships. And the jurisdiction which became well established with respect to ships was extended by analogy to include aircraft when the development of aviation made the jurisdiction of aircraft a practical problem.

Whatever its theoretical basis, the jurisdiction of the State over crime on its seagoing vessels, public and private, has become well established in international law. This jurisdiction was acknowledged by all the judges of the Permanent Court of International Justice, in the case of the *S.S. Lotus*, although they differed a little as to the reasons for the principle. The majority opinion was explicit in its assertion of the principle applicable to the case presented. It was said:

A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies. . . . It follows that what occurs on board a vessel on the high seas must be regarded as if it had occurred on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag, or in foreign territory, the same principle must be applied as if the territories of two different states were concerned. (*Publications P.C.I.J.*, Series A, Judgment No. 9, p. 25.)

Reference may also be made to the dissenting opinions of Judge Nyholm and Judge Moore:

International law recognizes that a vessel is to be regarded as a part of the territory and subject to the jurisdiction exercised thereon. (Nyholm, J., dissenting, *Publications P.C.I.J.*, Series A, Judgment No. 9, p. 62.)

It is universally admitted that a ship on the high seas is, for jurisdictional purposes, to be considered as a part of the territory of the country to which it belongs; and there is nothing in the law or in the reason of the thing to show that, in the case of injury to life and property on board a ship on the high seas, the operation of this principle differs from its operation on land. (Moore, J., dissenting, *Publications P.C.I.J.*, Series A, Judgment No. 9, p. 69.)

Further support for the general principle is found in its widespread acceptance by jurists and writers from all parts of the world. See Antokoletz, *Derecho Internacional Publico* (1925), II, sec. 291; Baty, *The Canons of International Law* (1930), pp. 54-71; Bevilacqua, *Direito Publico Internacional* (1911), I, sec. 62; Bluntsehli, *Das Moderne Völkerrecht* (1878), sec. 317 ff.; Calvo, *Le Droit International* (5th ed. 1896), I, sec. 450 ff.; Cruchaga Tocrnal, *Nociones de Derecho Internacional* (3d ed. 1923), I, secs. 471, 473, 474, 479; Despagnct, *Cours de Droit International Public* (4th ed. 1910), secs. 266, 267; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 20-21, 36-39; Fauchille, *Traité de Droit International Public* (1925), I, pt. 2, pp. 888-1172; Fiore, *Traité de Droit Pénal International* (Antoine's transl. 1880), secs. 10-21; Fiore, *International Law Codified* (Borchard's transl. 1918), sec. 309; Gidel, *Le Droit International Public de la Mer* (1932), I, Bk. 3; Hall, *International Law* (8th ed. 1924), p. 301 ff.; Holtzendorff, *Handbuch des Völkerrechts* (1887), II, sec. 94; Jordan, "De la juridiction compétente à l'effet de connaître des crimes et délits commis en haute mer sur les navires de commerce," *Rev. de Dr. Int. Privé* (1908), p. 341; Liszt, *Das Völkerrecht* (12th ed. 1925), pp. 147-9; F. de Martens, *Traité de Droit International* (Léo's transl. 1887), I, p. 497, and II, pp. 336-338; Moore, *Digest of International Law* (1906), I, pp. 930-938; Olivart, *Derecho Internacional Publico* (1903), I, pp. 212-215, 282, 289-290; Oppenheim, *International Law* (4th ed. 1928), I, secs. 146, 190c, 264, 450; Ortolan, *Règles Internationales et Diplomatie de la Mer* (4th ed. 1864), I, pp. 261-278; Pradier-Fodéré, *Traité de Droit International Public* (1891), V, secs. 2401 ff., and 2434 ff.; Rivier, *Principes du Droit des Gens* (1896), I, pp. 141-142, 240, 333-335; Testa, *Le Droit Public International Maritime* (Bontiron's transl. 1886), p. 104 ff.; Travers, *Le Droit Pénal International* (1920), I, secs. 238-279; Vattel, *Law of Nations* (1758), Bk. I, sec. 216; Westlake, *International Law* (1904), I, pp. 163-164, 175; Wharton, *Conflict of Laws* (3d ed. 1905), II, secs. 816-817.

There is general agreement that with respect to crimes committed on the high seas the jurisdiction of the flag State extends to both public and private vessels and to both nationals and aliens. This jurisdiction is asserted in most of the national penal codes. See, in addition to those cited below as asserting a still more comprehensive jurisdiction, the following: Argentina, Code of Penal Procedure (1888), Art. 23, No. 1; Brazil, Penal Code (1890), Art. 4; Chile, Code of Penal Procedure (1906), Art. 2, No. 4, Project of Penal Code (1929), Art. 2, No. 1; Costa Rica, Penal Code (1924), Art. 219, Nos. 1 and 2; Cuba, Project of Penal Code (Ortiz, 1926), Art. 33, No. 4; Denmark, Penal Code (1866), sec. 3 (understood to be in force in Iceland); Denmark, Penal Code (1930), sec. 6, pt. 1, No. 2; Ecuador, Penal Code (1906), Art. 10; Great Britain, Merchant Shipping Act (1894), 57 & 58 Viet. c. 60, sec. 686; Guatemala, Penal Code (1889), Art. 6, No. 1; Hungary, Law XVI (1879); Norway, Penal Code (1902), sec. 12, No. 1; Portugal,

Penal Code (1886), Art. 53, No. 2; Treaty of Montevideo on International Penal Law (1889), Art. 8.

There is likewise general agreement that a State has jurisdiction over all crimes committed on its warships in foreign waters. Jurisdiction over crimes committed on national warships in foreign ports is expressly affirmed in Brazil, Penal Code (1890), Art. 4; Chile, Code of Penal Procedure (1906), Art. 2, No. 4, Project of Penal Code (1929), Art. 2, No. 1; Costa Rica, Penal Code (1924), Art. 219, No. 1; Cuba, Project of Penal Code (Ortiz, 1926), Art. 33, No. 4; Portugal, Penal Code (1886), Art. 53, No. 2. National codes which limit this competence over crimes committed on national warships in foreign ports to crimes committed by a person connected with the vessel are distinctly exceptional. See Colombia, Penal Code (1890), Art. 20, No. 6; Peru, Penal Code (1924), Art. 4; and Treaty of Montevideo on International Penal Law (1889), Art. 9.

There is not the same approach to unanimity, however, with respect to crimes committed on private merchant vessels in foreign ports. See Fedozzi, "*Des délits à bord des navires marchands dans les eaux territoriales étrangères*," 4 *Rev. Gén. de Dr. Int. Pub.* (1897), 202. Many States, including perhaps the most important maritime countries, assert in the broadest terms a competence with respect to crimes committed on their vessels, both public and private, whether on the high seas or in foreign territorial waters. The following may be noted by way of example:

Germany, Project of Penal Code (1927), sec. 5, par. 2.—The penal laws of the Reich apply to acts which are committed on a German ship or aircraft, even if the ship or aircraft at the time of the act is not within the territory.

Japan, Criminal Code (1907), sec. 1, par. 2.—The law is also applicable to persons who have committed offences on board Japanese ships outside the Empire.

Netherlands, Penal Code (1881), Art. 3.—La loi pénale néerlandaise s'applique à quiconque, hors du royaume en Europe, à bord d'un navire néerlandaise, se rend coupable d'un fait punissable.

United States, Criminal Code (1909), sec. 272.—The crimes and offenses defined in this chapter shall be punished as herein prescribed: First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof. (35 U. S. Stat. L. 1142.)

Legislation of like effect is found in China, Penal Code (1928), Art. 3; Danzig, *Stafprozessordnung* (1927), sec. 10; Finland, Penal Code (1889), Arts. 1 and 2; Italy, Penal Code (1930), Art. 4, par. 2; Mexico, Federal Penal Code

(1931), Art. 5, I and II; Poland, Penal Code (1932), Art. 3; Rumania, Penal Code (1865), Art. 3; Rumania, Project of Penal Code (1926), Art. 3; Spain, Penal Code (1928), Art. 19; Sweden, Penal Code (1864), Arts. 1 & 2; Yugoslavia, Penal Code (1929), Art. 3. See also Resolutions of the Warsaw Conference on the Unification of the Penal Law (1927), Art. 1; Field, *Outlines of an International Code* (2d ed. 1876), Art. 642.

Other States do not assert an unrestricted competence over crimes committed on national merchant ships in foreign ports. In some codes the competence asserted is limited to crimes which do not disturb the tranquillity of the foreign port, or to crimes committed by persons who are members of the ship's personnel or passenger list, leaving jurisdiction in other cases exclusively to the littoral State. Norway may be noted, by way of example:

Norway, Penal Code (1902), sec. 12.—A moins de dispositions contraires, le Code pénal norvégien est applicable aux actes condamnables commis:

1. A l'intérieur du pays, y compris les navires norvégiens en pleine mer;
2. Sur un navire norvégien où qu'il se trouve, si l'auteur de l'acte appartient à l'équipage du navire, ou est une autre personne accompagnant le navire.

Like the Norwegian code, in restricting the jurisdiction asserted to persons identified with the vessel, see Colombia, Penal Code (1890), Art. 20, Nos. 6 and 7; Denmark, Penal Code (1930), Art. 6, pt. 1, Nos. 2 and 3; Nicaragua, Penal Code (1891), Art. 13, No. 2; Panama, Penal Code (1922), Art. 8; Venezuela, Penal Code (1926), Art. 4, Nos. 7 and 8. And asserting jurisdiction over crimes on merchant ships in foreign ports only under certain conditions, see Costa Rica, Penal Code (1924), Art. 219, No. 3; Cuba, Project of Penal Code (Ortiz, 1926), Art. 33, No. 4; Portugal, Penal Code (1886), Art. 53, No. 2.

The decisions of British and American courts assert jurisdiction without qualification over crimes committed on national ships in foreign territorial waters as well as on the high seas. Jurisdiction over crimes committed on British vessels on the high seas was affirmed in *Reg. v. Jones* (1845), 2 C. & K. 165; *Reg. v. Lopez* (1858), D. & B. 525; *Reg. v. Sattler* (1858), 7 Cox C. C. 431; *Reg. v. Lesley* (1860), 8 Cox C. C. 269; *Reg. v. Peel* (1862), 9 Cox C. C. 220; *Reg. v. Seberg* (1870), L. R. 1 C. C. 264; *Reg. v. Dudley* (1884), 15 Cox C. C. 624; *King v. Neilson* (1918), 52 N. S. (Canada), 42. See also *Reg. v. Menhan* (1856), 1 F. & F. 369; *Marshall v. Murgatroyd* (1870), 6 Q. B. 30; *King v. Heckman* (Nova Scotia, 1902), 5 Can. Cr. C. 242. Jurisdiction over crimes committed on British vessels in foreign waters was asserted in *Reg. v. Anderson* (1868), L. R. 1 C. C. 161; and *Reg. v. Ross* (1854), 1 N.S.W.S.C.R. app. (Australia) 43. See also *Reg. v. Allen* (1837), 7 Car. & P. 664; *Queen v. Sharp* (1869), 5 P. R. (Ontario), 135; *Reg. v. Armstrong* (1875), 13 Cox C. C. 184; *Reg. v. Carr and Wilson* (1882), 10 Q.B.D. 76. The

English law is summarized in Stephen, *Digest of the Law of Criminal Procedure* (1883), Art. 3, as follows:

The criminal law of England extends to all offences committed on British ships either by British subjects or by foreigners, either on the high seas or in foreign harbours or rivers below bridges where great ships go.

Courts in the United States have likewise held consistently that their jurisdiction extends to crimes committed on national ships both on the high seas and in foreign waters. Jurisdiction over crimes committed on American vessels on the high seas was asserted in *United States v. Holmes* (1820), 5 Wh. (U. S.), 412; *United States v. Arwo* (1873), 19 Wall. (U. S.), 486; *St. Clair v. United States* (1894), 154 U. S. 134; *Anderson v. United States* (1898), 170 U. S. 481; *United States v. Sharp* (1815), Fed. Cas. 16624; *United States v. Thompson* (1832), 1 Summ. 168; *United States v. Gilbert* (1834), Fed. Cas. 15204; *United States v. Holmes* (1842), Fed. Cas. 15383; *United States v. Plumer* (1859), Fed. Cas. 16056; *United States v. Gordon* (1861), Fed. Cas. 15231; *United States v. Demarchi* (1862), Fed. Cas. 14944; *United States v. Beyer* (1887), 31 Fed. 35; *Oliver v. United States* (1916), 230 Fed. 971; *Pedersen v. United States* (1921), 271 Fed. 187. See also *United States v. Townsend* (1915), 219 Fed. 761. To the effect that United States courts have such jurisdiction over crimes committed in part on an American vessel on the high seas and in part in the sea, see *Miller v. United States* (1917), 242 Fed. 907 (certiorari denied, 245 U. S. 660). Jurisdiction over crimes on American vessels in foreign waters was taken in *United States v. Rodgers* (1893), 150 U. S. 249; *United States v. Flores* (1933), 289 U. S. 137; *United States v. Keefe* (1824), Fed. Cas. 15509; *United States v. Stevens* (1825), Fed. Cas. 16394; *United States v. Roberts* (1843), Fed. Cas. 16173; *United States v. Seagrist* (1860), Fed. Cas. 16245; *United States v. Bennett* (1877), Fed. Cas. 14574. See also *In re Ross* (1891), 140 U. S. 453 (British seaman on United States vessel held within jurisdiction of United States consular court). Cf. *United States v. M'Gill* (1806), 4 Dall. 426, and *United States v. Davis* (1837), Fed. Cas. 14932 (holding that essential parts of the crimes charged were not committed on the vessel); *United States v. Wiltberger* (1820), 5 Wh. (U. S.), 76 (holding that manslaughter committed on a vessel on a Chinese river thirty-five miles from the sea was not committed on the "high seas"); *United States v. Jackson* (1843) Fed. Cas. 15457, and *Mathues v. United States ex rel. Maro* (1928), 27 F. (2d) 518 (likewise holding that the crime was not committed on the "high seas"). The three cases last noted would seem to have been clearly overruled, however, by *United States v. Flores, supra* (sustaining jurisdiction of crime committed on an American vessel anchored two hundred and fifty miles from the sea on a stream in the Belgian Congo).

Indicating that the French courts assume a similar jurisdiction of crimes committed on French vessels, see *Maréchal c. Denechaud*, Sirey (1839), II,

38; *Amad-ben-Maroufou*, Sirey (1882), I, 433. To the same effect, in Germany, see the decision of Oct. 21, 1892, 23 *Entscheidungen des Reichsgerichts* (Str.) 266; and see also decision of Jan. 15, 1917, 50 *ibid.* 218, 220. For Italy, see Manzini, *Trattato di Diritto Penale Italiano* (2d ed. 1926), I, 296 ff; and Ravizza, in *Giur. Ital.* (1914), II, 463-480; and see the case of *Tarasco* (1930), 25 *Rev. de Dr. Maritime Comparé*, 350.

In view of the consistent tendency of national legislation and jurisprudence to assert an unqualified jurisdiction with respect to crime on national ships, of the rather obvious considerations of convenience upon which the practice rests, and of the unanimity of opinion among writers, it has seemed clear that a principle which assimilates competence over ships to the State's territorial competence is well founded. A similar solution for the problem of aircraft, while of course impossible to support by an equally impressive array of practice and opinion, seems warranted by similar considerations of convenience and by such authority and opinion as has found expression during the relatively short interval in which the problem has been one of practical importance.

As regards aircraft, the most recent national legislation tends to support the principle of the present article. The following may be noted:

Germany, Project of Penal Code (1927), sec. 5, par. 2.—The penal laws of the Reich apply to acts which are committed on a German ship or aircraft, even if the ship or aircraft at the time of the act is not within the territory.

Great Britain, Air Navigation Act (1920), 10 & 11 Geo. V. c. 80, sec. 14 (1).—Any offence under this Act or under an Order in Council or regulations made thereunder, and any offence whatever committed on a British aircraft, shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.

Sec. 17 (1). An Order in Council under this Act may be made applicable to any aircraft in or over the British Islands or the territorial waters adjacent thereto, and to British aircraft wherever they may be.

Mexico, Federal Penal Code (1931), Art. 5.—There will be considered as committed on the territory of the Republic . . . IV. Those committed on board national or foreign airships which are on the territory or in national or foreign air or territorial waters, in cases analogous to those which the preceding sections prescribe for vessels.

See Great Britain, Air Navigation (Consolidation) Order, 1923, sec. 2, Stat. Rules & Orders, 1923, p. 14; McNair, *Law of the Air* (1932), p. 93. See also Italy, Penal Code (1930), Art. 4, par. 2; Poland, Penal Code (1932), Art. 3; Spain, Penal Code (1928), Art. 19; Yugoslavia, Penal Code (1930), Art. 3. And see Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 21-22, 39; Travers, *Le Droit Pénal International* (1920), I, secs. 280-284. Supporting the jurisdiction of the flag State, see P. de Damlovics and V. de Szondy, "*Les infractions à la loi pénale commise à*

bord des aéronefs," 14 *Droit Aérien* (1930), 402; Niemeyer, "*Crimes et délits commis à bord des aéronefs*," 13 *ibid.* (1925), 285; Volkman, "*Crimes et délits à bord des aéronefs en droit international*," 15 *ibid.* (1931), 26; and Resolutions of the Congrès Juridique International de l'Aviation (Geneva, 1912), Arts. 18 and 21.

The best-considered draft seems to be that of the Congrès Juridique International de l'Aviation (Budapest, 1930), incorporating the following provisions:

2. La compétence pénale de droit aérien appartient, d'une part, à l'Etat de pavillon et, d'autre part, à l'Etat survolé.

3. Les effets de la compétence pénale de droit aérien sont les mêmes que ceux de la compétence territoriale.

4. La compétence pénale de droit aérien n'exclut pas l'exercice de la répression sur d'autres bases que celles de la territorialité.

5. Quand l'aéronef n'a pas la nationalité de l'Etat survolé, celui des deux Etats compétents qui tient en son pouvoir le prévenu a la priorité de compétence.

[Later articles deal with extradition to either of these States by a third State.]

It is true that a considerable body of opinion would not support the unqualified inclusion of aircraft in the present article. While all agree, in general, that the State over which an aircraft is in flight is competent with respect to crimes in the territorial air, especially if such crimes have some effect on the subjacent territory, there is not the same approach to unanimity with respect to the State or States which should have concurrent jurisdiction. There are those who would prefer, on the basis of what are assumed to be practical considerations, to substitute for the jurisdiction of the flag State the jurisdiction of the State in which the aircraft lands after the crime is committed. See Lortsch, "*Du statut juridique du passager d'aéronef*," 13 *Droit Aérien* (1929), 7; Morpurgo, "*Quelques considérations sur les conflits internationaux de juridiction en matière pénale aéronautique*," 12 *Rev. Jur. Int. de la Locom. Aérienne* (1928), 398; Pholien, "*Des crimes et délits commis à bord d'aéronefs en vol*," 13 *Droit Aérien* (1929), 289. See also Hirschberg, "*Die Regelung der Zuständigkeit im internationalen Luftstrafrecht nach der Beschlüssen des comité juridique international de l'aviation von 3 Oktober 1930*," 2 *Archiv für Luftrecht* (1931), 159; Meyer, "*Luftfahrt und Strafrecht*," 2 *ibid.* (1932), 150. Such a substitution appears to be supported neither by analogy nor by practice. If sufficient evidence of the assumed practical considerations can be presented, it might become an appropriate subject for international legislation in the form of a general convention regulating aviation.

It is of course true that most aircraft are much less self-contained than seagoing vessels at the present time. See McNair, *Law of the Air* (1932), p. 90. It seems, however, that in their legal relations to their own State and to foreign States they have many points of resemblance and that they may

well be regarded, for present purposes, in substantially the same way. The case of an airplane which has landed on foreign territory is certainly the most extreme case to which the present article can be applied; but it seems impracticable to attempt any certain distinctions between the principles which should govern airplanes on the ground, on the one hand, and vessels tied up at dock or airships tied to a mooring mast, on the other hand. It has seemed better to state a general principle applying to all aircraft than to attempt distinctions which would be conditioned upon the size or type of aircraft or the means of contact with the ground when not in flight.

While some national legislation refers only to "crimes committed on national vessels," it is believed that the State's jurisdiction with respect to vessels and aircraft is as comprehensive as that which is stated in Article 3, preceding, with respect to territory. It includes crimes committed in whole or in part upon national ships or aircraft, participation in crime committed upon such ships or aircraft, and attempts to commit crime upon such ships or aircraft. The decision of the Permanent Court of International Justice in the case of the *S.S. Lotus* tends to support this conclusion. One of the principal grounds for that decision, with respect to which Judge Moore concurred with the majority, was that the negligence of the officer of the French vessel took effect upon the Turkish vessel which was thus sunk in consequence of collision on the high seas. Many of the writers insist that crime on shipboard should be regarded in the same way as crime on the territory; and an assimilation to territory is made expressly in some of the national codes. The following may be noted:

Spain, Penal Code (1928), Art. 19.—There shall also be considered as Spanish territory, by extension, for those purposes:

1. Spanish vessels and aircraft, on the high sea, or in the free zone of the air, or anchored in a foreign port or in a foreign aerodrome.

See also Brazil, Penal Code (1890), Art. 4; Ecuador, Penal Code (1906), Art. 10; Hungary, Law XVI (1879); Italy, Penal Code (1930), Art. 4, par. 2; Norway, Penal Code (1902), sec. 12, No. 1, quoted *supra*. A still more explicit provision is found in the new Polish Penal Code of 1932, as follows:

Art. 3, sec. 2.—L'infraction est considérée comme commise sur le territoire de l'Etat Polonais, sur un navire ou un aéronef polonais, si l'auteur y a accompli l'action ou l'omission délictueuses ou lorsque l'effet délictueux s'y est produit ou devait s'y produire suivant l'intention de l'auteur.

It is not within the province of this Convention to prescribe detailed rules for determining every possible question with respect to the water or airborne craft which are to be regarded as ships or aircraft within the meaning of the present article. In general, it is believed that the term "ships" is broad enough to include various kinds of small watercraft, as well as the larger seagoing vessels, and that it should also include the small boats and life-rafts dependent upon or coming from larger vessels. See *United States*

v. *Holmes* (1842), Fed. Cas. 15383; *Reg. v. Dudley* (1884), 15 Cox C. C. 624. Cf. *Reg. v. Waina and Swatoa* (1874), 2 N.S.W.R. (Australia), 403 (*contra*, as to a ship's longboat). On the other hand, it would not include logs, planks, or spars which had been carried on or which had formed part of a ship. Gliders might well be regarded as "aircraft", while parachutes, on the other hand, would seem to belong in the category of aircraft equipment. The present article prescribes a general principle. The rules to be deduced for borderline cases will be developed, as experience may require, by national and international agencies in conformity with the general international principle.

The present article does not make special provision for the case of collision between ships on the high seas or between aircraft in the "free" air. A few jurists have urged that special provision should be made for penal jurisdiction in such cases. Thus the Bustamante Code (1928), Art. 309 provides:

In cases of wrongful collision on the high sea or in the air, between ships or aircraft carrying different colors, the penal law of the victim shall be applied.

See also the Antwerp Conference of 1930, reported in *Comité Maritime International, Bulletin* 91, (1931); and see the literature provoked by the *Lotus* case. None of the special solutions suggested have seemed adequate; and the present article, in recognizing a competence coëxtensive with that defined in Article 3 with respect to territory, establishes a concurrent jurisdiction in the several States to which the ships or aircraft involved in collision belong. Such a concurrent jurisdiction is supported, in the case of ships, by the decision of the Permanent Court of International Justice in the case of the *S.S. Lotus*. It is believed that the principles herein defined, together with the safeguards formulated in later articles of this Convention, provide an adequate solution for the problem of collision which is in substantial conformity with national law and international practice.

It is to be noted, finally, that the jurisdiction of the State as defined in this article extends only to ships and aircraft which have its "national character." The Convention on the Regulation of Aerial Navigation, October 13, 1919, Hudson, *International Legislation* (1931), I, 359, 364, provides:

Art. 6. Aircraft possess the nationality of the State on the register of which they are entered, in accordance with the provisions of Section I (c) of Annex A.

Art. 7. No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.

No incorporated company can be registered as the owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfils all other conditions which may be prescribed by the laws of the said State.

Art. 8. An aircraft cannot be validly registered in more than one State.

See also the Convention of Habana on Commercial Aviation, February 20, 1928, Art. 7, Hudson, *op. cit.*, IV, 2354, 2358. Apart from treaty, international law does not determine the national character of ships or aircraft. The basis upon which a State may confer its national character remains indefinite. The practice indicates that it may be conferred because of the flag, the registry, or the ownership. National legislation and jurisprudence refer to the ships or aircraft of the State as "flying its flag", "registered under its laws", or "owned by the State or its nationals." If it should be found desirable to have a more precise determination of the requisites of national character, with respect either to ships or aircraft, the matter could be dealt with most appropriately in a separate international convention on that subject.

ARTICLE 5. JURISDICTION OF NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By a natural person who was a national of that State when the crime was committed or who is a national of that State when prosecuted; or

(b) By a corporation or other juristic person which had the national character of that State when the crime was committed.

COMMENT

NATURAL PERSONS

The competence of the State to prosecute and punish its nationals on the sole basis of their nationality is universally conceded. Such jurisdiction is based upon the allegiance which the person charged with crime owes to the State of which he is a national. The underlying principle is variously described as the principle of nationality, *nationalitätsprinzip*, *principe de la personnalité active*, etc. By virtue of such jurisdiction the State is enabled to prosecute its nationals while they are abroad and to execute judgments against them upon property within the State or upon them personally when they return, or the State may prosecute its nationals after they return for acts done abroad. Under existing international practice, a State is assumed to have practically unlimited legal control over its nationals. This competence is justified on the ground that a State's treatment of its nationals is not ordinarily a matter of concern to other States or to international law.

Jurists have advanced an interesting variety of reasons for the State's control over its nationals. It has been said (1) that since the State is composed of nationals, who are its members, the State's law should apply to them wherever they may be; (2) that the State is primarily interested in and affected by the conduct of its nationals; (3) that penal laws are of a personal

character, like those governing civil status, and that, while only reasons *d'ordre public* justify their application to aliens within the territory, they apply normally to nationals of the State everywhere; (4) that the protection of nationals abroad gives rise to a reciprocal duty of obedience; (5) that any offence committed by a national abroad causes a disturbance of the social and moral order in the State of his allegiance; (6) that the national knows best his own State's penal law, that he is more likely to be fairly and effectively tried under his own State's law and by his own State's courts, and that the most appropriate jurisdiction from the viewpoint of the accused should be considered rather than a jurisdiction determined by reference to the offence; (7) that without the exercise of such jurisdiction many crimes would go unpunished, especially where States refuse to extradite their nationals. For discussion of the reasons advanced, with additional references, see Aleorta, *Principios de Derecho Penal Internacional* (1931), I, pp. 115-119, 121-124; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 56-58, 63-64, 77-80; Schwarze, in Holtzendorff, *Handbuch des Deutschen Strafrechts* (1871), II, pp. 33-38; Travers (1921), *Le Droit Pénal International*, I, sec. 72.

While the exercise of such jurisdiction is perhaps the exception rather than the rule in countries deriving their jurisprudence from the English common law, the existence of such jurisdiction is fully conceded in countries belonging to this group. The following passages from judicial opinions and the writings of jurists may be noted by way of example:

The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance. (*United States v. Bowman*, 1922, 260 U. S. 94, 102.)

With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government. (*Blackmer v. United States*, 1932, 284 U. S. 421, 437.)

The authority possessed by a state community over its members being the result of the personal relation existing between it and the individuals of which it is formed; its laws travel with them wherever they go, both in places within and without the jurisdiction of other powers. A state cannot enforce its laws within the territory of another state; but its subjects remain under an obligation not to disregard them, their social relations for all purposes as within its territory are determined by them, and it preserves the power of compelling observance by punishment if a person who has broken them returns within its jurisdiction. (Hall, *International Law*, 8th ed. 1924, p. 56.)

It is not to be doubted that each state may, in the exercise of its sovereignty, punish its own nationals for such acts and in such manner as it may deem proper. For the exercise of this right, each state is

responsible to itself alone, no other state being competent to intervene. (Moore, *Report on Extraterritorial Crime and the Cutting Case*, 1887, p. 35.)

The jurisdiction, which a state chooses to exercise over its own nationals in relation to acts performed at home or abroad, can never be the concern of any other state and is therefore quite outside the sphere of international law. (Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," *British Year Book of International Law*, 1925, pp. 44, 45.)

See also Borchard, *Diplomatic Protection of Citizens Abroad* (1915), sec. 13; Hyde, *International Law* (1922), I, sec. 240; Oppenheim, *International Law* (4th ed. 1928), I, sec. 145; and the British and American legislation, cited *infra*.

The jurisdiction to prosecute and punish nationals for crimes committed anywhere has been consistently recognized in the resolutions and draft codes approved by various international bodies. The following may be noted, by way of example:

Institute of International Law, Resolutions adopted at Munich, 1883, Art. 7.—Chaque Etat conserve le droit d'étendre sa loi pénale nationale à des faits commis par ses nationaux à l'étranger.

Institute of International Law, Resolutions adopted at Cambridge, 1931, Art. 3.—Chaque Etat a le droit d'étendre sa loi pénale à toute infraction ou à tout acte de participation délictueuse commis par ses nationaux à l'étranger.

International Conference for the Unification of Penal Law, Warsaw, 1927.—Art. 2. Les lois pénales de l'Etat . . . (x) s'appliquent à tout national qui participe comme auteur, instigateur, ou auxiliaire à une infraction commise à l'étranger, si celle-ci est aussi prévue par la loi du lieu de l'infraction.

S'il y a une différence entre les deux lois, le juge tiendra compte de cette différence en faveur du prévenu dans l'application de la loi nationale.

Sauf les exceptions prévues à l'article . . . , la poursuite est subordonnée contre le national, pour les infractions par lui commises à l'étranger, à son retour ou séjour volontaires, ou à son extradition.

Sous la même réserve, aucune poursuite n'aura lieu si le national prouve qu'il a été acquitté ou condamné définitivement à l'étranger, et, en cas de condamnation, qu'il a exécuté sa peine ou a bénéficié d'une mesure d'exemption.

Art. 3. Si le condamné se soustrait à l'exécution intégrale de sa condamnation, la durée de la peine subie à l'étranger sera déduite de la peine prononcée contre lui.

Aucune poursuite ne pourra être exercée pour l'infraction commise à l'étranger qui, d'après la loi du lieu du délit, est subordonnée à une plainte, si cette plainte n'a pas été portée ou a été légalement retirée.

See also Treaty of Lima, 1878, Art. 34; Field, *Outlines of an International Code* (2d ed. 1876), Art. 641.

An examination of the legislation adopted in various countries reveals

that practically all States exercise some penal jurisdiction on the principle of nationality. The States which derive their jurisprudence from the civil law assert a competence which is substantially more comprehensive than that exercised by States influenced by the English common law, but all make some use of the principle. Differences are revealed with respect to the circumstances in which the jurisdiction will be asserted rather than with respect to recognition of the principle itself. The following provisions are sufficiently typical of the legislation found in civil law countries:

Belgium, *Code d'Instruction Criminelle* (1878).—Art. 7. Toute Belge qui, hors du territoire du royaume, se sera rendu coupable d'un crime ou d'un délit contre un Belge, pourra être poursuivi en Belgique.

Art. 8. Lorsqu'un Belge aura commis, hors du territoire du royaume, contre un étranger, soit un crime ou un délit prévu par la loi d'extradition, soit un des délits prévus par les articles 426, al. 1^{er}, 427, 428, 429 et 430 du Code Pénal, il pourra être poursuivi en Belgique, sur la plainte de l'étranger offensé ou de sa famille, ou sur un avis officiel donné à l'autorité belge par l'autorité du pays où l'infraction a été commise.

Art. 9. Tout Belge qui se sera rendu coupable d'une infraction en matière forestière, rurale, de pêche ou de chasse sur le territoire d'un Etat limitrophe, pourra, si cet Etat admet la réciprocité, être poursuivi en Belgique, sur la plainte de la partie lésée ou sur un avis officiel donné à l'autorité belge par l'autorité du pays où l'infraction a été commise.

France, *Code d'Instruction Criminelle* (1808).—Art. 5 (1910). Tout Français qui, hors du territoire de la France, s'est rendu coupable d'un crime puni par la loi française, peut être poursuivi et jugé en France.

Tout Français qui, hors du territoire de la France, s'est rendu coupable d'un fait qualifié délit par la loi française, peut être poursuivi et jugé en France, si le fait est puni par la législation du pays où il a été commis.

Il en sera de même si l'inculpé n'a acquis la nationalité française qu'après l'accomplissement du crime ou du délit.

Toutefois, qu'il s'agisse d'un crime ou d'un délit, aucune poursuite n'a lieu si l'inculpé justifie qu'il a été jugé définitivement à l'étranger, et, en cas de condamnation, qu'il a subi ou prescrit sa peine ou obtenu sa grâce.

En cas de délit commis contre un particulier français ou étranger, la poursuite ne peut être intentée qu'à la requête du ministère public; elle doit être précédée d'une plainte de la partie offensée ou d'une dénonciation officielle à l'autorité française par l'autorité du pays où le délit a été commis.

Aucune poursuite n'a lieu avant le retour de l'inculpé en France, si ce n'est pour les crimes énoncés en l'article 7 ci-après.

Italy, Penal Code (1930). Art. 9. A national who, apart from the cases specified in the two preceding Articles, commits in foreign territory a crime for which Italian law prescribes the penalty of death or penal servitude for life or for a minimum period of not less than three years, shall be punished under that law, provided he is in the territory of the State.

In the case of a crime for which a punishment restrictive of personal liberty for a lesser period is prescribed, the guilty party shall be pun-

ished on the demand of the Minister of Justice, or on the petition or denunciation of the injured party.

In the cases contemplated in the preceding provisions, when the crime has been committed to the prejudice of a foreign State or of an alien, the guilty person shall be punished on the demand of the Minister of Justice, provided that his extradition has not been granted or has not been agreed to by the Government of the State in which he committed the crime.

In order to facilitate a review of legislation which asserts jurisdiction over extraterritorial crime on the nationality principle, such legislation may be classified for convenience, according to the offences made punishable, as follows: (1) all offences; (2) all offences which are also punishable by the *lex loci delicti*; (3) all offences of a certain degree; (4) offences against nationals; and (5) certain enumerated offences only.

National legislation providing for the punishment of all or most offences committed by nationals abroad, without regard to incrimination by the *lex loci delicti*, the degree of the offence, the nationality of the person injured, or the nature of the offence committed is unusual indeed. Of the few examples available, perhaps sections from the Austrian Penal Code of 1852 are most significant:

Austria, Penal Code (1852), sec. 36.—A subject of the Austrian Empire is never to be extradited upon entering the country for crimes committed abroad, but is to be dealt with in accordance with this Penal Law, regardless of the laws of the country in which the crime has been committed. . . .

Sec. 235. A national is never to be extradited upon entering the country for misdemeanors and infringements (*Vergehen und Übertretungen*) committed abroad, but is to be dealt with in accordance with this Penal Law, regardless of the laws of the country in which they have been committed, provided that they have not been punished or condoned abroad. . . .

See also Congo, Penal Code (1896), Art. 85; Costa Rica, Penal Code (1924), Art. 219, secs. 9 & 10, and Art. 220, sec. 1; Greece, Code of Criminal Procedure (1834), Art. 3, applied by the Areopagus in Case 36 of 1897, Clunet (1898), 962, and Case 95 of 1899, Clunet (1900), 824; see also Case 125 of 1922, Clunet (1924), 1120; Yugoslavia, Penal Code (1929), Art. 6. Under the codes just noted, it appears that the exercise of jurisdiction over nationals for offences committed abroad is conditioned solely upon the presence of the offender on national territory. In the Sudan, Penal Code (1924), Art. 4, sec. 2, provision is made for general jurisdiction over all offences committed by Sudanese abroad, but it is required that the offenders be domiciled in the Sudan.

Russian penal legislation of 1926 likewise provides for a very broad jurisdiction over nationals:

R.S.F.S.R., Penal Code (1926), Art. 2. The application of the present code is extended to all citizens of the R.S.F.S.R. who have committed

socially-dangerous acts within the R.S.F.S.R. as well as outside of the U.S.S.R., provided that they are apprehended on the territory of the R.S.F.S.R.

A "socially-dangerous" act within the meaning of this article is coëxtensive with the Russian qualification of criminal offence; see the same Code, Art. 6, Trainin, *Ugolovnoie Pravo* (1929), p. 299 ff; and jurisdiction is therefore extended to all criminal offences committed by citizens of the R.S.F.S.R. outside of the Union of Socialist Soviet Republics. The only limitation concerns offences committed by citizens on the territory of other member states of the Soviet Union. Exclusive jurisdiction over such offences is given the particular Soviet state within whose territory the offence has been committed. See R.S.F.S.R., Penal Code (1926), Art. 3.

Finland, Penal Code (1889), Art. 1, provides for a fairly comprehensive jurisdiction over offences committed by nationals abroad, excepting only certain specified classes of offences.

National legislation providing for the punishment of all or most offences committed by nationals abroad, if punishable also by the *lex loci delicti* (in some instances punishing certain crimes of nationals without regard for the *lex loci delicti*), is exemplified in the following code provisions:

Germany, Project of Penal Code (1927), Art. 7.—The penal laws of the Reich apply to other acts committed abroad if the act is punishable by the laws of the place of the act and if the actor

1. was a German national at the time of the act or became a national after the act . . .

If the place of the act is not subject to the authority of any state, it is sufficient that the act is punishable by the laws of the Reich.

Netherlands, Penal Code (1881), Art. 5.—La loi pénale néerlandaise s'applique au Néerlandais qui, hors du royaume en Europe, se rend coupable: . . .

2. De tout acte considéré par la loi pénale néerlandaise comme délit, et auquel la loi de pays où il a été commis attache une peine.

La poursuite peut avoir lieu au cas où le prévenu n'est devenu Néerlandais qu'après avoir commis le fait.

See also Albania, Penal Code (1927), Art. 5; Bulgaria, Penal Code (1896), Art. 5; Czechoslovakia, Project of Penal Code (1926), Art. 6; Denmark, Penal Code (1930), Art. 7, sec. 2; Dominican Republic, Code of Criminal Procedure (as modified by Law of June 28, 1911), Art. 5; Egypt, Native Penal Code (1904), Art. 3; France, *Code d'Instruction Criminelle* (as amended 1866), Art. 5, as to *délits* (crimes are punishable regardless of *lex loci delicti*); see cases of *Bazot* (Trib. Corr. Seine, Dec. 18, 1901) *Clunet* (1902) 324, *Detrez* (Cass. Crim., March 13, 1913) *Clunet* (1913) 926, *Mion* (Cass. Crim., Sept. 5, 1914) *Clunet* (1916) 906, *Lafitte* (Cass. Crim., March 8, 1918) *Clunet* (1918) 1176, *Quemper* (Cass. Crim., April 9, 1925) *Clunet* (1926) 631, *Vander-vill et Obricks c. Mas et Moranne* (Cour d'Appel de Paris, June 4, 1905) 1 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1905), 888; the same principle is

upheld, but for various reasons the defendant was not punished, in *Madjoub Hadj* (Cour d'Appel d'Alger, Sept. 14, 1895) Clunet (1896) 1031, *Vigoureux* (Cass. Crim., May 8, 1925) Clunet (1926) 73, *Communal* (Cass. Crim., July 2, 1927) Clunet (1930) 964; France, Project of Penal Code (1932), Art. 13; Germany, Penal Code (1871), Art. 4; see cases reported in Clunet (1889), 118, and (1907), 447; Greece, Project of Penal Code (1924), Art. 3; Hungary, Penal Code (1878), Arts. 8 & 11; see decision of Hungarian Supreme Court, Feb. 1, 1931, Clunet (1931), 1257; Lebanon, Law of May 29, 1929 (as to *délits*); Luxembourg, Law of Jan. 18, 1879, Art. 5 (if the offence is not political); Mexico, Federal Penal Code (1931), Art. 4; under earlier laws, see case of *Alvarez* (1923), 20 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1925), 430; Monaco, Code of Penal Procedure (1904), Art. 6; Norway, Penal Code (1902), Art. 12, sec. 3-C; Poland, Penal Code (1932), Art. 4; Portugal, Penal Code (1886), Art. 53, sec. 5; Rumania, Penal Code (1865), Art. 4; see case of *Lazarescu* (1923), 21 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1926), 282; Rumania, Project of Penal Code (1926), Art. 4; Russia, Penal Code (1903), Art. 9 (adopted in Estonia, Penal Code, 1931, Art. 7, Latvia, Penal Code, 1918 & 1920, Art. 9, and Lithuania, Penal Code, 1930, Art. 9); Siam, Penal Code (1908), Art. 10, sec. 4; Turkey, Penal Code (1926), Art. 5; Uruguay, Penal Code (1889), Art. 6; Uruguay, Project of Penal Code (1932), Art. 10, sec. 5.

A third type of national legislation provides for the punishment of offences of a certain degree which may be committed by nationals abroad. In some codes the degree of the offence is determined by reference to a minimum penalty, while in others punishment is provided for the offences for which extradition is allowed under the extradition laws. Examples of this type of legislation are the following:

China, Penal Code (1928), Art. 7.—Le présent Code s'applique à toutes infractions, autres que celles prévues aux deux articles précédents, commise par un citoyen de la République, hors du territoire de la République, lorsque sont réunies les conditions ci-après énoncées:

1. La peine minima encourue pour ces infractions est l'emprisonnement à temps ou une peine supérieure;

2. L'acte constitue une infraction d'après la loi du lieu où il a été commis;

3. Le délinquant n'a pas été acquitté par un jugement définitif rendu à l'étranger, ou, bien qu'il ait été condamné par un jugement définitif, sa peine n'a pas été complètement subie ou n'a pas été remise.

Peru, Penal Code (1924), Art. 5 — Offences committed outside the territory of the republic will be prosecuted in the following cases: . . .

2. The offences not included in the above section, committed by a national, for which extradition is allowed according to Peruvian law; provided that they were also punishable in the state in which they were committed, and that the guilty party enters the Republic in some way.

Provisions for the punishment of crimes of a certain degree committed by nationals abroad are also found in Honduras, Law of Organization of Courts

(1906), Art. 177; Mexico, Federal Penal Code (1929), Art. 6; Paraguay, Penal Code (1914), Art. 9, sec. 2; Spain, Organic Law of the Judicial Power (1870), Art. 340; Spain, Penal Code (1928), Art. 13. The above also require incrimination by the *lex loci delicti*. Such incrimination is not required in Dominican Republic, Code of Criminal Procedure (as modified by Law of June 28, 1911), Art. 5; France, *Code d'Instruction Criminelle* (as amended by Law 26 Feb. 1910), Art. 5 (quoted *supra*, as to *crimes*, as distinguished from *délits*; this jurisdiction was the basis of convictions in the cases of *Yon* (Cass. Crim., June 22, 1882), Sirey (1884) I, 456; *Moisdon* (Cass. Crim., Oct. 17, 1889), Clunet (1893), 143; *Moiros* (Cass. Crim., Feb. 19, 1904), Clunet (1907), 721; *Soufi Abdel Kader Taleb* (Cass. Crim., Jan. 6, 1916), Clunet (1916), 1227; *Giraud-Jordan et al.* (Cass. Crim., May 24, 1917 & April 2 & 11, 1918), 15 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1919), 68; *Claude* (Cass. Crim., April 11, 1918), Clunet (1918), 1186; *Bonnet Rouge* (Conseil de Guerre de Paris, May 15, 1918), Clunet (1919), 267, same case (Cass. Crim., July 11, 1918), Clunet (1919), 270; *Bounous* (Cass. Crim., Dec. 14, 1928), Clunet (1931), 370;—the jurisdiction was affirmed, though the requirements of the law were not fully met, in the cases of *Cacatte Vachali Narayanin c. Cacatte Connatedatil Narayanin* (Cour d'Appel de Pondichery, Feb. 20, 1913), Clunet (1914), 165; and *Tripodi* (Trib. Dep. des Alpes-Maritimes, Dec. 7, 1929), 26 *Rev. de Dr. Int. Privé* (1931), 309, with doctrinal note by R. Hubert, *ibid.* 310–319; Italy, Penal Code (1930), Art. 9 (quoted *supra*); jurisdiction was taken on this principle under the earlier Italian Code in decisions of the Court of Cassation of Rome, Sept. 25, 1907, Clunet (1908), 906, July 2, 1907, Clunet (1908), 1266, July 17, 1908, Clunet (1909), 562; of the Tribunal of Venice, Dec. 22, 1908, Clunet (1909), 1202; of the Court of Cassation of Rome, Aug. 4, 1909, Clunet (1910), 1321, Dec. 30, 1909, Clunet (1911), 336, Jan. 20, 1912, Clunet (1913), 246; of the Court of Cassation, July 1, 1927, Clunet (1928), 212; the jurisdiction was recognized, though held inapplicable, in decisions of the Court of Cassation of Rome, March 10, 1905, 3 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1907), 279, June 1, 1908, Clunet (1909), 271, and Dec. 29, 1914, *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1914), 650; Lebanon, Law of May 29, 1929 (as to *crimes*); Luxembourg, Law of Jan. 18, 1879, Art. 5; Monaco, Code of Penal Procedure (1904), Art. 5; Rumania, Penal Code (1865), Art. 4; Transjordan, Code of Criminal Procedure (as amended by Act of 1924), Art. 7. Provisions for punishing extraditable crimes, when committed by nationals abroad, are found also in Belgium, *Code d'Instruction Criminelle* (1878), Art. 8 (quoted *supra*); see cases of *Gaston* (Cour Cass., July 10, 1905) Clunet (1907) 471, *Anon.* (Cour d'Appel de Liège, Nov. 25, 1910) Clunet (1912) 270, *Koerver* (Cour Cass., April 29, 1912) *Pasicrisie belge* (1912) I. 231, *Uytendhouwen* (Cour Cass., April 27, 1914) *Pasicrisie belge* (1914) I. 205, and lower court's decision in *ibid.* II, 126, *de Keuk* (Military Court of Belgium, Aug. 24, 1918) Clunet (1919), 804; Brazil, Project of Penal Code (1927), Art. 7; Guatemala, Penal

Code (1889), Art. 6, sec. 5; Switzerland, Extradition Law of 1892, and some cantonal legislation (see Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 60-62); Switzerland, Project of Penal Code (1918), Art. 6.

A fourth type of national legislation provides for the punishment of offences committed by nationals abroad against other nationals. Some of the legislation cited under this head also punishes crimes committed abroad by nationals against aliens, but on different conditions. Except where noted, incrimination by the *lex loci delicti* is not required. The following is an example of legislation of this type:

Chile, Code of Penal Procedure (1906), Art. 2.—Of the crimes and simple delicts committed outside the territory of the Republic, there are subject to Chilean jurisdiction: . . .

6. Those committed by Chileans against Chileans, if the guilty party returns to Chile without having been tried by the authorities of the country where he committed the crime.

Similar provisions are found in Albania, Penal Code (1927), Art. 5; Belgium, *Code d'Instruction Criminelle* (1878), Art. 7 (quoted *supra*); see cases of *Oppenheim* (Cour d'Appel de Bruxelles, Jan. 22, 1901) *Clunet* (1905), 699, and *De Bruyn* (Cour Cass., Feb. 27, 1922) *Pasicrisie belge* (1922), I, 182; Bolivia, Law of Nov. 29, 1902, Art. 8; Brazil, Extradition Law 2416 (1911), Art. 14 (limited to certain crimes); Colombia, Penal Code (Law of 1890), Art. 20, sec. 3; Haiti, *Code d'Instruction Criminelle* (1835), Art. 7; Honduras, Law of Organization of the Courts (1906), Art. 176; under the older Italian law, see the decision of the Court of Cassation of Torino, June 10, 1885, *Clunet* (1886), 620; Palestine, Code of Criminal Procedure (1924), Art. 7; Salvador, Penal Code (1904), Art. 20; San Marino, Penal Code (1865), Art. 3, sec. 3; Spain, Law of Organization of the Judicial Power (1870), Art. 339; see case of *Antonio Miró Bastida* (Supreme Court, Nov. 15, 1899), 63 *Jurisprudencia Criminal*, 317; Spain, Penal Code (1928), Art. 12 (incrimination by *lex loci* required); Sweden, Penal Code (1864), Art. 1; Turkey, Penal Code (1926), Art. 5; Venezuela, Penal Code (1926), Art. 4, sec. 1. See also Finland, Penal Code (1889), Art. 1.

A similar jurisdiction was at one time exercised by Virginia over its citizens in case of felonies committed abroad against other citizens. See Collection of Acts in Force in 1792, chap. 136, secs. 5 and 7, applied in *Commonwealth v. Gaines* (1819), 2 Va. Cas. (4 Va.) 172. The act was repealed in the compilation of 1819.

Finally, a great many States provide for the punishment of certain enumerated offences if committed by nationals abroad. The enumerations vary from State to State and in many States accompany other legislative provisions of the types noted above. The following is an example:

Netherlands, Penal Code (1881), Art. 5.—La loi pénale néerlandaise s'applique au Néerlandaise qui, hors du royaume en Europe, se rend coupable:

1. D'un des délits spécifiés dans les titres I et II du livre II, et dans les articles 206, 237, 388, et 389.

The crimes thus enumerated in the Netherlands Code include offences against the security of the State or the Royal Dignity, intentionally making one's self or another unfit for military service, bigamy, and taking letters of marque or engaging in privateering without authorization from the Dutch Government. A similar type of provision (the enumeration varies, of course, in different countries) is found in Afghanistan, Penal Code (1924), Arts. 40-41 (military crimes against the State); Belgium, *Code d'Instruction Criminelle* (1878), Art. 8 (quoted *supra*); Belgium, Law of July 3, 1892 (slave trade), Law of May 26, 1914 (white slave traffic), Law of June 20, 1923 (dissemination of abortionist and contraceptive propaganda); Bolivia, Penal Code (1834), Art. 7 (for certain crimes, if the law so specifies); Bulgaria, Penal Code (1896), Art. 7, note (sodomy and paederasty); Cuba, Spanish Penal Code (1879), Art. 134 ff (treason); Czechoslovakia, Project of Penal Code (1926), Art. 6 (machinations against foreign States, counterfeiting foreign money, slave trade, white slave traffic, and other crimes of like kind which the State is bound by international law to punish); Ecuador, Penal Code (1906), Art. 10 (crimes against the State and its credit, crimes against international law, piracy, treason, and other crimes which may be included); Guatemala, Penal Code (1889), Art. 6, sec. 5 (arson, murder, robbery, or extraditable crimes); Iraq, Bagdad Penal Code Amendment Law (1924), A. 1 (bearing arms against the State); Japan, Penal Code (1907), Art. 3 (long list of enumerated crimes of ordinary type); (the same plan was followed in China, Provisional Penal Code of 1912, Art. 4); Mexico, Federal Penal Code (1931), Art. 123 (treason), and Art. 236 (falsification of foreign money); Norway, Penal Code (1902), Art. 12, sec. 3 (long list of enumerated crimes); Rumania, Penal Code (1865), Art. 4; Russia, Penal Code (1903), Art. 11 (chiefly crimes against the State, including the furnishing of improper war materials, bombing conspiracies, etc.) (copied with certain omissions in Estonia, Penal Code, 1931, Art. 9; Latvia, Penal Code, 1920, Art. 11; and Lithuania, Penal Code, 1930, Art. 11); Salvador, Code of Penal Procedure (1904), Art. 18 (crimes against the State); Siam, Penal Code (1908), Art. 109 (carrying arms against the State); Spain, Penal Code (1870), Art. 136 ff (treason and military crimes against the State); Spain, Penal Code (1928), Art. 11 (crimes violating laws governing the civil status of Spaniards); Venezuela, Penal Code (1926), Art. 4 (treason, slave trade, and crimes violating laws governing civil status of Venezuelans).

The legislation found in the United States and Great Britain providing for the punishment of crimes committed by nationals abroad belongs in this category. The treason statutes of the States of the United States are made applicable to treason abroad as well as within the State. See, for example, the following:

Vermont, General Laws (1917), sec. 6786.—A person who, owing al-

legiance to this state, levies war or conspires to levy war against the same, or adheres to the enemies thereof, giving them aid and comfort, within the state or elsewhere, shall be guilty of treason against this state and shall suffer the punishment of death.

Similar legislation punishing extraterritorial treason is found in Illinois, Criminal Code (Cahill's Rev. Stat., 1927, ch. 38), par. 585; Montana, Rev. Code (1921), secs. 11714 & 10735; New Hampshire, Pub. Laws (1926), c. 393, secs. 1 & 2; New Jersey, Comp. Stat. (1910), "Crimes," secs. 1 & 3, "Criminal Procedure," sec. 157; North Dakota, Comp. Stat. (1913), sec. 10510 (see also secs. 9447-9448); Pennsylvania, Stat. (1920), sec. 8123. United States legislation providing for the punishment of treason is likewise applicable to treason committed abroad as well as within the United States.

United States, 35 U. S. Stat. L. 1088, sec. 1.—Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

For other federal legislation in the United States incorporating the same principle, see United States Criminal Code (35 U. S. Stat. L. 1088), sec. 5 (correspondence with foreign governments); secs. 308-309 (supplying liquor or opium to Pacific Island natives); secs. 303-304 (aiding hostilities against the United States); and possibly other sections (see *United States v. Bowman*, 1922, 260 U. S. 94, 98-99). The United States statutes providing punishment for those who engage in the slave trade outside the United States, if taken literally, may be applicable to aliens, but in any case they are applicable to nationals (see United States Criminal Code, secs. 246-247). See also *State v. Main* (1863), 16 Wis. 398, 421 (violation abroad of penal clause in absentee voting statute); *United States v. Craig* (1886), 28 Fed. 795, 801 (assisting immigration of alien contract laborer). See also *Blackmer v. United States* (1932), 284 U. S. 421 (punishing nationals abroad for failure to return and testify when summoned); *Jones v. United States* (1890), 137 U. S. 202 (jurisdiction over murder committed by a national on a guano island); *Cook v. Tait* (1924), 265 U. S. 47 (sustaining an income tax on foreign income of a national domiciled abroad); Marshall's speech on Livingston's Resolution, United States House of Representatives, in 5 Wh. (U. S.) app.; *Henfield's Case* (1793), Fed. Cas. 6360.

In Great Britain there is an even greater variety of statutes under which British nationals may be punished for certain crimes committed abroad. The following enumeration presents an impressive record. (1) Treason: 25 Edw. III, stat. 5, c. 2; 35 Hen. VIII, c. 2; see *Story's Case* (1571), 1 St. Tr. 1087, s.e. Dyer 298b; *Plunket's Case* (1681), 8 St. Tr. 447; *Trial of Thos. Vaughan* (1696), 13 St. Tr. 485, s.e. 2 Salk. 634; *Rex v. Cundell* (1812), 4 Newgate Cal. 62 (see also [1917], 1 K.B. 119, 128, 137); *Rex v. Lynch* [1903], 1 K.B. 444; *Rex v. Casement* [1917], 1 K.B. 98. See also *Lord Wentworth's*

Case (1550), 4 St. Tr. 314, *Sir John de Gomeney's Case*, and *Duke of Whar-ton's Case* (all three cited in [1917], 1 K.B. 116, 119). See also Treason Felony Act, 11 & 12 Vict. c. 12; and *Mulcahy v. Reg.* (1868), 3 H.L. 306. South Africa has invoked this jurisdiction in *Rex v. Bester* (1900), 21 N.L.R. 237, and in *Rex v. Du Plessis* and *Rex v. Truter* (Special Criminal Court, 1915), noted in Gardiner and Lansdowne, *South African Criminal Law and Procedure* (2d ed. 1924), I, 28-29. Queensland has a similar provision in Criminal Code Act (1899), sec. 80. (2) Murder or manslaughter: 24 & 25 Vict. c. 100, sec. 9; see *Trial of Joseph Wall* (1802), 28 St. Tr. 51; *Rex v. Sawyer* (1815), 2 C. & K. 101; *Reg. v. Azzopardi* (1843), 1 C. & K. 203 (victim an alien). See also *Chamber's Case* (1709), cited in 8 Mod. 144, 2 C. & K. 106. Cf. *Rex v. Helsham* (1830), 4 C. & P. 394. (3) Bigamy: 24 & 25 Vict. c. 100, sec. 57; see *Trial of Earl Russell* [1901], A.C. 446; and see also *In re Bigamy Sections* (Can. Sup. Ct., 1897), 1 Can. Cr. C. 172; *King v. Brinkley* (Ontario, 1907), 12 *ibid.* 454. That colonial courts lack this jurisdiction, see *McLeod v. Attorney-General for New South Wales* [1891], A.C. 455; and *Rex v. Lander* [1919], N.Z.L.R. 305. But see Statute of Westminster, 1931, 22 Geo. V, c. 5. (4) Violation of Foreign Enlistment Act: 33 & 34 Vict. c. 90; see also *Reg. v. Jameson* [1896], 2 Q.B. 425. (5) Offences against Unlawful Oaths Act: 37 Geo. III, c. 123, sec. 6; 52 Geo. III, c. 104, sec. 7. (6) Offences against Official Secrets Act: 1 & 2 Geo. V, c. 28. (7) Offences against Incitement to Mutiny Act: 37 Geo. III, c. 70. (8) Offences against Explosive Substances Act: 46 & 47 Vict., c. 3, sec. 7. (9) Offences against Dockyards Protection Act: 12 Geo. III, c. 24, sec. 2. (10) Offences against Post Office Act: 8 Edw. VII, c. 48, sec. 72. (11) Offences against Perjury Act: 1 & 2 Geo. V, c. 6. (12) Offences by nationals on British ships or on foreign ships to which they do not belong: Merchant Shipping Act (1894), 57 & 58 Vict., c. 60, sec. 686. See also Bahamas, Penal Code (1924), sec. 9. (13) White Slave Traffic: Criminal Law Amendment Act, 48 & 49 Vict., c. 69. (14) Slave Trade: 6 & 7 Vict., c. 98. (15) Kidnapping of Pacific Islanders: 35 & 36 Vict., c. 19; see *Reg. v. Vos* (Brisbane, 1895), Queensland Crim. Rep., 1860-1907, p. 288. (16) Destruction or interference with submarine cables: 48 & 49 Vict., c. 49. (17) Statutes giving special jurisdiction to Australian courts over British subjects in Pacific Islands not a part of any State, 9 Geo. IV, c. 83, sec. 4, and to Cape of Good Hope courts over British subjects in parts of Southern Africa not claimed by any State, 6 & 7 Wm. IV, c. 57. See also Foreign Jurisdiction Act (1890), 53 & 54 Vict., c. 37. And see general statements as to jurisdiction over nationals in *The Sussex Peerage Case* (1844), 11 Clark & F. 85, 146, and *The Zollverein* (1856), Swabey Adm. 96, 98.

The following States apparently confine the exercise of jurisdiction on the nationality principle to cases in which the nationals are public functionaries: Argentina, Penal Code (1921), Art. 1, sec. 2; Cuba (see the laws cited in Bustamante, *Derecho Internacional Privado* (1931), III, pp. 43-44); Cuba,

Project of Penal Code (Ortiz, 1926); Art. 36, secs. 6 and 7 (although jurisdiction over nationals is also included under the principle of universality); Panama, Penal Code (1922), Art. 8.

It will be observed that the exercise of jurisdiction to punish nationals for crimes committed abroad is commonly circumscribed by conditions or safeguards which vary from State to State. Certain more or less typical limitations have been noted in connection with the legislation just reviewed. There are many others which it is not so easy to classify. It may be stipulated, for example, that the accused must be found on the territory of the State or have been extradited to the State; that there must be a complaint by the victim of the crime or by the government of the State in whose territory it was committed; that prosecution shall only take place upon the request of some administrative officer of the State; that there shall be no prosecution for a political crime; that the action must not have been prescribed either by the law of the prosecuting State or by the law of the State on whose territory the crime was committed; and that the accused shall not have been previously prosecuted or punished in the courts of the State where the crime was committed (*cf.* comment on Art. 14, *infra*). There is much to be said, no doubt, for such limitations upon the exercise of jurisdiction based upon the nationality principle.

The widespread inclusion of such limitations in national legislation tends to confirm the opinion that jurisdiction based upon nationality is properly regarded as subsidiary to the territorial jurisdiction of the State where the crime was committed. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 66–77, 80. It is believed, however, that these are matters which each State is free to determine for itself. Both the crimes abroad for which it will punish its nationals and the circumstances under which it will exercise jurisdiction are matters which international law leaves each State free to decide according to local needs and conditions. Consequently, while such limitations find a place very properly in national legislation, or in a draft for uniform national legislation, such as the Resolutions of Warsaw, quoted *supra*, they do not seem to belong in a draft convention which, like the present, seeks to define the sphere within which each State may exercise jurisdiction to prosecute and punish for crime. While it may be hoped, and indeed expected, that all States will circumscribe the exercise of jurisdiction over their nationals with desirable conditions or safeguards, the present Convention leaves each State free to confine or expand the exercise of such jurisdiction as its own internal policy may dictate.

Under the present article, a State has jurisdiction over natural persons who were nationals at the time the crime was committed or who are nationals when prosecuted. A national becomes liable to prosecution by the State of his allegiance at the time of the wrongful act or omission, and this liability is not terminated by subsequent expatriation or naturalization abroad. See Tobar y Borgono, *Du Conflit International au Sujet des Com-*

pétences Pénales (1910), p. 154 ff; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 62; and the Draft Convention on Nationality, Art. 13, *Research in International Law* (1929), p. 44. Were the rule otherwise, a criminal might escape prosecution by change of nationality after committing the crime.

Although possibly a little difficult to justify theoretically, the jurisdiction of a State to prosecute those who have become its nationals after committing a crime seems adequately supported by the practically complete control over its nationals which international law allows the State. If the accused is a national at the time of prosecution, whatever the State may do falls within its general competence under international law; and it is immaterial that the accused may not have been a national when he committed the offence charged. There is no principle of international law which forbids the exercise of such a jurisdiction over nationals. Not only is there no forbidding principle, but it seems eminently just that one who becomes naturalized in a State after committing a crime should take his chance under the law of his adopted State. Indeed, if a contrary rule were followed, impunity might result from naturalization in a State which refuses extradition of its nationals; see the French case of *Serloute*, Clunet (1898), p. 1058, which led to the present French law.

The principle that jurisdiction may be founded either upon nationality at the time of the offence or upon nationality at the time of prosecution appears to be supported by such legislation as has dealt specifically with the question. See, for example, France, *Code d'Instruction Criminelle* (as amended by the Law of Feb. 26, 1910), Art. 5, quoted *supra*; Germany, Project of Penal Code (1927), Art. 7, quoted *supra*; Netherlands, Penal Code (1881), Art. 5, quoted *supra*. See also Brazil, Project of Penal Code (1927), Art. 4; Finland, Penal Code (1889), Art. 2; France, Project of Penal Code (1932), Art. 13; Germany, Penal Code (1871), Art. 4; see Clunet (1889), 118; Greece, Project of Penal Code (1924), Art. 3; Lebanon, Law of May 29, 1929; Poland, Penal Code (1932), Art. 4; Spain, Penal Code (1928), Art. 24. And note the following resolution of the *Conférence Internationale d'Unification du Droit Pénal*, Warsaw, 1927:

Art. 8. La loi . . . (x) s'appliquera également à l'étranger qui, au moment de la perpétration de l'acte, était ressortissant de . . . (x); elle s'appliquera également à celui qui a obtenu la nationalité . . . (x) après le perpétration de l'acte.

While nationality either at the time of the crime or at the time of prosecution provides a basis for jurisdiction under this article, nationality at some other time is clearly insufficient. Thus jurisdiction cannot be founded upon the fact that the accused was once a national if he had become an alien before committing the crime and had not recovered his original nationality at the time of prosecution. Neither is there jurisdiction if the accused was

not a national at the time of the crime, became a national after committing the crime, and ceased to be a national before the prosecution.

In case of double or multiple nationality, any State of which the accused is a national is competent under this article. It is to be recalled that a national of a State, as the term is used in this Convention, is "a natural person upon whom that State has conferred its nationality in conformity with international law." Art. 1(e) *supra*. Whether, in case of double or multiple nationality, an accused is a national of the State which is attempting to prosecute and punish is a question to be determined by reference to such principles of international law as govern nationality. If international law permits the State to regard the accused as its national, its competence is not impaired or limited by the fact that he is also a national of another State. See Travers, *Le Droit Pénal International* (1920), I, sec. 476. It is possible that the denial of certain safeguards, similar to those provided in Articles 13, 14, 15, and 16, *infra*, would be ground for an international claim on the part of another State of which the accused was also a national; but it is believed that this is a matter which should be considered elsewhere, if it is to be considered at all, rather than in a convention dealing with the jurisdiction to prosecute and punish for crime.

Domiciled or resident aliens are not assimilated to the position of nationals under the present article. A few States attempt the assimilation and assert jurisdiction to prosecute domiciled aliens for crimes committed abroad. See Denmark, Penal Code (1930), Art. 7; Liberia, Constitution (1847), Art. 1, sec. 4; and Norway, Penal Code (1902), Art. 12. Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 66-68, indicates that certain Swiss cantons do the same and points out that historically domicile rather than nationality provided the basis for the early theory of jurisdiction based on the principle of active personality. A few States assert a competence with respect to domiciled aliens which is similar to that asserted over nationals but much more limited. See Rumania, Penal Code (1865), Art. 5, and Project of Penal Code (1926), Art. 6. The latter position is taken in the Resolutions of Warsaw in which, after the two articles on nationality jurisdiction quoted *supra*, the following provision is incorporated:

Art. 4. Les dispositions des deux articles précédents sont applicables aux étrangers domiciliés en . . . (x), s'ils ne sont pas citoyens d'un pays avec lequel l'Etat . . . (x) a signé un traité d'extradition ou si leur extradition n'a pas été demandée par leur pays. Elles sont également applicables aux apolytes domiciliés en . . . (x).

A great majority of the States, however, assert no such jurisdiction; and it seems clear in principle that domicile alone does not afford an adequate basis for the unrestricted competence which this article recognizes. In view of the jurisdiction over crime committed by aliens abroad which is recognized in other articles of this Convention, it seems wholly undesirable to attempt an

assimilation of domiciled aliens to the position of nationals. The one case in which such an assimilation would be most plausible is the case of persons who are "stateless" (*apatrides*, *Staatslosen*). The Resolutions of Warsaw, quoted above, make the assimilation in this case, and the Italian Penal Code (1930), provides:

Art. 4. For the purposes of penal law . . . stateless persons residing in the territory of the state are deemed to be Italian nationals.

However, such provisions are not supported by general practice; the case is not one likely to arise often; and when the case does arise a jurisdiction on some other principle will ordinarily be found under other articles of this Convention.

Since the present article founds jurisdiction solely upon the nationality of the accused, it includes the case of nationals participating abroad in crime committed by aliens abroad and excludes the case of aliens participating abroad in crime committed by nationals abroad. In the former case, participation may be included by the State of allegiance as a "crime committed outside its territory" over which it has jurisdiction. The basis of jurisdiction is the nationality of the person whom the State is seeking to prosecute and punish, not that of the principal offender. Inasmuch as nationality is lacking in the case of alien participants abroad in crime committed by nationals abroad, the State does not have jurisdiction over such participants under this article, although of course they may be within its jurisdiction under other articles. The Belgian and French practice is otherwise, for in these two States, at least, the nationality of the principal offender determines jurisdiction over participants. Thus the Belgian *Code d'Instruction Criminelle* (1878), provides as follows:

Art. 11. L'étranger coauteur ou complice d'un crime commis hors du territoire du royaume, par un Belge, pourra être poursuivi en Belgique, conjointement avec le Belge inculpé, ou après la condamnation de celui-ci.

While a French national cannot be tried in France for participation abroad in a crime committed by an alien abroad, an alien may be tried for participation abroad in a crime committed by a French national abroad. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 84-85, 386; Travers, *Le Droit Pénal International* (1921), II, sec. 996 ff., especially 1016, 1017, 1019. But see Garraud, *Droit Pénal Français* (3rd ed. 1916), I, p. 369, denying this jurisdiction under French law. Notwithstanding Belgian and French practice, it is believed that the present Convention is correct in not subjecting aliens to the jurisdiction of the State, in case of participation in a crime committed outside the State, solely on the ground that the principal offender is a national of that State. It is believed that contemporary international practice warrants no such assertion of competence, that participation in crimes committed by nationals

abroad does not provide an adequate basis for jurisdiction over aliens, and that sufficient competence with respect to alien participants is recognized in other articles of this Convention.

The basis for the present article, therefore, is the practically unlimited control over nationals everywhere which contemporary international practice allows the State of allegiance. This control is assumed in the national legislation and jurisprudence reviewed above and is acknowledged in the unanimous testimony of jurists. Variations in contemporary national practice indicate that some States prefer to confine more closely than others the exercise of an admitted competence. The competence seems clearly established in conformity with the broad general principle formulated in paragraph (a) of the present article.

JURISTIC PERSONS

Paragraph (b) of the present article deals with juristic persons having the national character of the State. In general, it assimilates competence with respect to such juristic persons to the State's jurisdiction over its nationals. While it must be admitted that such an assimilation goes beyond anything which is clearly established in the practice of States, it is indisputable that States do exercise a criminal jurisdiction over their juristic persons and that they consider their juristic persons as having a national character for important purposes. It is indisputable, also, that nothing in international law precludes a State from prosecuting and punishing one of its juristic persons for a crime committed outside its territory. Paragraph (b) of the present article affirms the competence of the State with respect to any crime committed outside its territory "by a corporation or other juristic person which had the national character of that State when the crime was committed."

In the British Empire and the United States it is well established that corporations can commit crimes and be punished for crimes. For authorities, see Thompson, *Corporations* (3d ed. 1927), VII, secs. 5606-5646. See also Bishop, *Criminal Law* (9th ed. 1923), I, secs. 417-424; and Wharton, *Criminal Law* (12th ed. 1932), I, secs. 116-123. Examples may be found in the following cases: *Queen v. Great North of England Ry. Co.* (1846), 2 Cox C. C. 70 (damage to highway); *Union Colliery Co. v. Queen* (Canada, 1900), 31 S.Ct. 81 (breach of statutory duty to avoid danger to human life); *Pearks, Gunston & Tee, Ltd. v. Ward* [1902], 2 K.B. 1 (sale of adulterated butter in violation of statute); *United States v. Union Supply Co.* (1909), 215 U.S. 50 (corporation a "person" punishable for violation of statute regulating sale of oleomargarine); *United States v. John Kelso Co.* (1898), 86 Fed. 304 (violation of act limiting working day on public works to eight hours); *United States v. Sin Wan Pao Co.* (United States Court for China, 1920), 1 Lobingier, *Extraterritorial Cases* 983 (newspaper company convicted for publishing advertisement of lewd books); *Commonwealth v. Proprietors of New Bedford Bridge* (1854), 2 Gray (Mass.), 339 (nuisance by building bridge

so as to obstruct navigation); *State v. Lehigh Valley Ry. Co.* (1920), 90 N.J.L. 372 (negligent manslaughter; decision based, not on a statutory liability, but on common law as modified by *State v. Morris & Essex Ry. Co.* (1852), 23 N.J.L. 360) (see 19 *Mich. L. Rev.* 205); *People v. N.Y.C. & H.R.R. Co.* (1878), 29 N.Y. 302 (failure to maintain proper railroad crossing); *People v. J. H. Woodbury Dermatological Institute* (1908), 192 N.Y. 454 (corporation convicted for practicing medicine when not a registered physician); *State v. Salisbury Ice Co.* (1914), 166 N.C. 366 (obtaining under false pretenses by knowingly selling false weight of coal). See also Gardner and Lansdown, *South African Criminal Law and Procedure* (2d ed. 1924), I, pp. 59-61, showing that South Africa also recognizes that corporations may be punished for crime.

While of course a juristic person cannot be jailed, in case of conviction, it may be fined or its charter may be suspended or terminated. See, for example, the provisions of the New York statute governing punishment of corporations convicted of felony:

In all cases where a corporation is convicted of an offense for the commission of which a natural person would be punishable with imprisonment, as for a felony, such corporation is punishable by a fine of not more than five thousand dollars. (Cahill's Cons. Laws, 1930, sec. 1932.)

Among the States of the United States whose laws provide a particular procedure to be used in prosecutions against corporations, see California, Penal Code (1872, as amended to 1931), sees. 1390-1397; Illinois, Cahill's Stat. (1929), ch. 38, Criminal Code, sec. 690; Ohio, Throckmorton's Ann. Code (1930), sec. 13437; Virginia, Code (as amended to 1930), sec. 4892; Washington, Rem. Comp. Stat. (1922), sec. 2011.

The assimilation of competence over corporations to the State's jurisdiction over its nationals finds support in the tendency of legislation in some States to include juristic persons in the term "person" when used in penal legislation. See the following:

Great Britain, Interpretation Act (1889), 52 & 53 Vict., c. 63, sec. 2.—(1) In the construction of every enactment relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression "person" shall, unless the contrary intention appears, include a body corporate.

Michigan, Penal Code, sec. 10, par. 3 (Mich. Pub. Acts, 1931, no. 328).—The words "person", "accused", and similar words include, unless a contrary intention appears, public and private corporations, copartnerships, and unincorporated or voluntary associations.

Of similar effect, see California, Penal Code (1872, as amended to 1931), sec. 7; Ohio, Throckmorton's Ann. Code (1930), sec. 12371; Washington, Rem. Comp. Stat. (1922), sec. 2303 (14); India, Penal Code (1860), sec. 11;

New South Wales, Act 40 of 1900, sec. 4; New Zealand, Cons. Stat. (1908), 1, No. 32, "Crimes", sec. 2; Sudan, Penal Code (1899), Art. 9. Under such legislation, laws asserting jurisdiction over nationals for crimes committed abroad should also be applicable to juristic persons having the State's national character. The decision in *American Banana Co. v. United Fruit Co.* (1909), 213 U.S. 347 is not inconsistent with such a principle, since that decision was based upon the conclusion that the statute in question was not intended to have extraterritorial effect. In delivering the opinion of the court, Mr. Justice Holmes indicated that United States penal laws might be made applicable to United States corporations for acts or omissions to act committed abroad. He said:

It is true that domestic corporations remain always within the power of the domestic law, but in the present case, at least, there is no ground for distinguishing between corporations and men. (213 U. S. 347, 357.)

The conviction of a Delaware corporation in *United States v. Sin Wan Pao Co.* (1920), 1 Lobingier, *Extraterritorial Cases*, 983, in the United States Court for China, would seem to indicate that United States corporations may be assimilated to United States nationals for the purposes of criminal jurisdiction under the "extraterritorial régime" in China.

Prosecution and punishment of juristic persons for crime is also provided in India, Penal Code (1860), sec. 11; Liberia, Criminal Code (1914), sec. 28; Palestine, Companies Ordinance (1921), Art. 84; Sudan, Penal Code (1899), Art. 9; while the provisions of Mexico, Federal Penal Code (1931), Art. 11, come to very much the same thing. Such provisions appear also in Cuba, Project of Penal Code (Ortiz, 1926), Art. 15; and France, Project of Penal Code (1932), Art. 115, par. 2. See also Spain, Penal Code (1928), Art. 44. See Lilienthal, "*Die Strafbarkeit juristischer Personen*," *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1908), Allg. Teil, V, 87-101. The penal responsibility of juristic persons was one of the topics considered at the second *Congrès Internationale de Droit Pénal* at Bucharest in 1929. Reports on the subject are published in the proceedings of the Congress, pp. 23-183 (also in 6 *Rev. Int. de Dr. Pénal*, 219 ff.). See also Calon, *Derecho Penal* (1928), pp. 203-209, and Vidal, *Cours de Droit Criminel* (7th ed. 1928), sec. 65 ff., indicating the extent to which penal responsibility of juristic persons is recognized at present, especially in France. Saleilles, *De la Personnalité Juridique* (1910), p. 638 ff., Mestre, *Les Personnes Morales et le Problème de leur Responsabilité Pénale* (1899), and Mestre, "*Responsabilité Pénale des Personnes Morales*," *Revue Pénitentiaire* (1920), 239, urge that with respect to penal responsibility juristic persons should be treated substantially as natural persons are treated.

On the general subject of the penal responsibility and punishment of juristic persons, see also Canfield, "Corporate Responsibility for Crime," 14 *Columbia L. Rev.* (1914), 469; Collier, "Impolicy of Making Corporations

Indictable," 71 *Central L. Jour.* (1910), 421; Edgerton, "Corporate Criminal Responsibility," 36 *Yale L. Jour.* (1927), 827; Francis, "Criminal Responsibility of the Corporation," 18 *Ill. L. Rev.* (1924), 305; Hacker, "The Penal Ability and Responsibility of the Corporate Bodies," 14 *Jour. Crim. L. and Criminology* (1923), 91, (also discussing European practice and ideas on the subject); Hitchler, "The Criminal Responsibility of Corporations," 27 *Dickinson L. Rev.* (1923), 89, 119; Trainin, *Ugolovnoi Pravo* (1929), pp. 244-248.

The phrase "corporation or other juristic person" is used in the present article, in preference to formulae commonly used in certain national legal systems, because of the various kinds of juristic persons which are recognized under different systems of national law. The "corporation" is probably the type of juristic person best known in common law countries. The present article must be formulated in terms sufficiently broad, however, to include any entity which is recognized as a juristic person under the laws of the State whose "national character" it possesses. For discussion of different kinds of juristic persons, see Gray, *Nature and Sources of the Law* (2d ed. 1921), pp. 27-61; Salmond, *Jurisprudence* (7th ed. 1924), sec. 113; Brissaud, *History of French Private Law* (Howell's transl. 1912), secs. 588-590; Planiol et Ripert, *Traité Pratique de Droit Civil Français* (1925), I, pp. 69-100; Staudinger, *Kommentar zum Buergerlichen Gesetzbuch*, (9th ed. 1925), I, pp. 154-335.

The phrase "national character" is used herein to describe a relationship to the State which is substantially similar to that described by the term "national" in paragraph (a) preceding. There is a difference of opinion as to whether a corporation should be regarded as having the nationality of the State under whose laws it is organized, apparently the Anglo-American view for most purposes, or of the State where its seat or chief office (*siège social*) is located, the view generally accepted elsewhere, or even of some other State, such as that where the chief activity is to take place. It would seem that this question is one to be resolved as part of another subject and not in a convention on jurisdiction with respect to crime. See the report of the League of Nations Committee of Experts for the Progressive Codification of International Law, Nationality of Corporations and Their Diplomatic Protection, *Publications of the League of Nations*, V. Legal. 1927, V. 12; also in 22 *Am. Jour. Int. L.* (1928), Supp. 171-214; Bustamante Code (1928), Arts. 16-20; Cuq, *La Nationalité des Sociétés* (1921); Leven, *De la Nationalité des Sociétés* (1899); Pepy, *La Nationalité des Sociétés* (1920); Schwandt, "Die Staatsangehörigkeit der Handelsgesellschaften," 6 *Zeitschrift für ausländisches und internationales Privatrecht*, bes. Heft 197 (1932); Streit, "La nationalité des sociétés commerciales," 55 *Rev. de Dr. Int. et de Lég. Comp.* (1928), 494-521; Travers, "La Nationalité des Sociétés Commerciales," in *Académie de Dr. Int., Recueil des Cours* (1930), III, 1-114; Yofre, *Nacionalidad de las personas juridicas* (1927). See also Hyde, *International Law*

(1922), I, 486; Central Executive Council of the Inter-American High Commission, *The Juridical Status of Foreign Corporations in the American Republics* (1927), especially pp. 94-102.

Of course a State cannot have unlimited competence to ascribe its national character to corporations and then to prosecute and punish them under the present article for crimes committed abroad. The opinion may perhaps be ventured that either the *siège social* must be in the State or the corporation must have been formed under its laws. Such questions, however, as well as questions of multiple national character, fall within a different field of international law from that with which the present Convention deals. It seems clear, as a general principle of penal jurisdiction, that the State should have the same kind of competence with respect to crimes committed abroad by its juristic persons as is attributed to it in paragraph (a), preceding, with respect to crimes committed abroad by its nationals.

ARTICLE 6. PERSONS ASSIMILATED TO NATIONALS

A State has jurisdiction with respect to any crime committed outside its territory,

(a) By an alien in connection with the discharge of a public function which he was engaged to perform for that State; or

(b) By an alien while employed as one of the personnel of a ship or aircraft having the national character of that State.

COMMENT

Under paragraph (a) of this article, a State may prosecute and punish its public official (*fonctionnaire*, *Beamter*) of alien nationality, or of no nationality, for crimes committed abroad in connection with the discharge of his functions. In case of a functionary who is a national, of course, the State would have jurisdiction under Article 5, *supra*. Paragraph (a) of the present article provides that an alien functionary may be treated like a national with respect to crimes connected with the office. It has nothing to do with crimes which he may commit in his individual or private capacity. The term "functionary" may include diplomatic and consular officers, officers of military and naval forces, customs officials, public health officers, officials of government-operated transportation systems, etc. While such positions are usually held by nationals, aliens may be engaged; and it is to such aliens that the present article applies.

The jurisdiction defined in this article is based upon the relationship existing between the functionary and the State which he serves. The alien official is part of the State's governmental organization even though he may be serving outside its territorial limits. The State served is obviously the State chiefly concerned in the faithful discharge of the functionary's duties. While the State where the functionary's offences are committed is competent to prosecute and punish such offences as committed within its territory, it

will not ordinarily have the same interest in prosecution and punishment that it would have if its own governmental interests were affected. Such offences may be directed chiefly or solely against the State served. If the latter were without jurisdiction, many such offences would be likely to go unpunished. The situation presented is in some respects like that for which provision is made in Article 7, *infra*, dealing with the competence of the State to prosecute and punish crimes committed abroad against its security or integrity. Here, as there, the State must be competent to protect its own peculiar interests since the protection afforded by the State where the offence is committed has been shown by experience to be insufficient.

The relationship between the State and its functionaries is for each State to determine. If the functionary commits an act or omission in relation to his public functions, the consequences should be settled between him and the State served. In this respect the present article may be said to rest upon the principle that each State has an unrestricted capacity to organize and control its own governmental agencies.

Jurisdiction over the crimes committed by functionaries abroad in relation to their public functions is asserted in the penal legislation of many States. The following selections are sufficiently typical:

Argentina, Penal Code (1921), Art. 1.—This code shall be applied:
 . . . 2. In case of crime committed abroad by agents or employees of Argentine authorities in the performance of their duties.

Chile, Code of Criminal Procedure (1906), Art. 2.—Of the crimes and simple delicts committed outside the territory of the Republic, there are subject to the Chilean jurisdiction:

1. Those committed by a diplomatic or consular officer of the Republic, in the exercise of his functions.

2. Maladministration of public funds, frauds and illegal exactions, unfaithfulness in keeping documents, violation of secrets, and bribery, committed by Chilean public functionaries or by aliens in the service of the Republic.

China, Penal Code (1928), Art. 6.—Le présent Code s'applique à toutes infractions ci-après énoncées, commises par un fonctionnaire public de la République, hors du territoire de la République:

1. Infractions de corruption dans les fonctions publiques, art. 128, 131, 135, 139, et 140;

2. Infractions d'évasion de prisonniers, art. 172;

3. Infractions de fabrication de faux documents, art. 230.

Italy, Penal Code (1930), Art. 7.—A national or foreigner who commits any one of the following offences in foreign territory shall be punished under Italian laws: . . . (4) Crimes committed by public officials in the service of the State, with abuse of their powers or in violation of the duties inherent in their functions.

Provisions of similar effect are found in Albania, Penal Code (1927), Art. 4; for Belgium, see case of *Masui et al.* (Trib. Corr. Bruxelles, April 6, 1920), Clunet (1920), 714; Brazil, Project of Penal Code (1927), Art. 4; Bulgaria,

Penal Code (1896), Art. 4; Chile, Project of Penal Code (1929), Art. 3, Nos. 1 & 2; Colombia, Penal Code (1890), Art. 20, sec. 4; Cuba, Project of Penal Code (Ortiz, 1926), Art. 36, sec. 6; Danzig, *Strafprozessordnung* (1927), sec. 11; Finland, Penal Code (1889), Art. 3; Germany, Penal Code (1871), Art. 4; Germany, Project of Penal Code (1927), sec. 6; Greece, Project of Penal Code (1924), Art. 4; Honduras, Law of Organization of the Courts (1906), Art. 173; India, Penal Code (1860), sec. 4; Japan, Penal Code (1907), Art. 4 (as to specified offences); Mexico, Penal Code (1929), Art. 7; Netherlands, Penal Code (1881), Art. 6; Panama, Penal Code (1922), Art. 8; Peru, Penal Code (1924), Art. 5, sec. 4; Poland, Penal Code (1932), Art. 7; Russia, Penal Code (1903), Art. 11 (adopted in Estonia, Penal Code, 1931, Art. 9, Latvia, Penal Code, 1918 and 1920, and Lithuania, Penal Code, 1930, Art. 11); Spain, Law of Organization of Judicial Power (1870), Art. 336; Spain, Penal Code (1928), Art. 11, sec. 3; Turkey, Penal Code (1926), Art. 4, par. 4; Uruguay, Project of Penal Code (1932), Art. 10, sec. 4. See Venezuela, Penal Code (1926), Art. 4, Nos. 6, 7, 13. See also, though perhaps confined to functionaries who are nationals, such legislation as is found in Bolivia, Penal Code (1834), Art. 169 (entering foreign territory under arms), and Military Penal Code, Art. 5; Costa Rica, Penal Code (1924), Art. 219, sec. 8; Cuba, in Bustamante, *Derecho Internacional Privado* (1931), III, 43-44 (jurisdiction over crimes by diplomats, consuls, and military forces abroad); Ecuador, Penal Code (1906), Art. 10; Great Britain, 11 & 12 Wm. III, c. 12, and 42 Geo. III, c. 85 (as to certain offences) (see *Rex v. Stevens* and *Agnew* (1804), 5 East 244; *King v. Jones* (1806), 8 East 30; *Case of Picton* (1804-12), 30 How. St. Tr. 225; *Sirdar Gurdial Singh v. The Rajah of Faridkote*, L.R. [1894], A. C. 670).

The present article applies only to a crime committed "in connection with the discharge of a public function." If a State asserts jurisdiction over its alien functionary for other crimes, its competence must be based upon some other article of this Convention. Crimes in relation to public functions cannot be enumerated or defined in this Convention. They depend primarily upon the nature of the office filled by the functionary. Examples of such crimes are misappropriation of funds or property, disclosure of official secrets, bribery, various types of falsification, and failure to perform the duties of the office as required by the State served.

While the present article provides for jurisdiction with respect only to such crimes, it does provide for jurisdiction with respect to them whether the alien is still a functionary, or has left the service of the State after committing the crime but before he is prosecuted and punished, or has left the service of the State before committing the crime. For illustration, if a national of State X serving as an official of State Y should, after the termination of his service, illegally disclose military secrets which came into his possession as an official of State Y, the latter State would have jurisdiction under this article wherever the illegal disclosure might be made. The basis

of the jurisdiction would be the service as an official of State Y. The jurisdiction extends only to crimes in relation to that service; but it extends to such crimes whether or not the accused is still an official.

Under paragraph (b) of the present article, a State may prosecute and punish an alien employed as one of the personnel of a ship or aircraft having its national character for any offence committed outside its territory while so employed. The assimilation to the position of nationals is thus more comprehensive than that accomplished with respect to functionaries under paragraph (a). As to offences committed in whole or in part upon a ship or aircraft having its national character, the State has jurisdiction by virtue of the place of the offence. See Article 4, *supra*. As to offences committed elsewhere by the alien seaman of a national vessel, the State has jurisdiction by virtue of the assimilation which paragraph (b) of the present article effects. The assimilation is not common in national legislation or international practice, though there have been a few instances.

Referring to the position of alien seamen on American vessels where a question of extraterritorial jurisdiction was concerned, Secretary Blaine stated the position of the United States as follows:

When a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation, in the exercise of an unquestioned authority, governs its vessels and seamen. (Secretary Blaine to Sir Edward Thornton, June 3, 1881, Moore, *Digest of International Law*, 1906, II, 607.)

See also *in re Ross* (1891), 140 U. S. 453.

The British Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, sec. 687, provides:

All offences in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England; and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

No record has been found of prosecutions under this section for offences committed by alien seamen elsewhere than on British vessels. On the effect of the section and of similar legislation of earlier date, see Gibb, *The International Law of Jurisdiction* (1926), p. 269; Lewis, *Foreign Jurisdiction and the Extradition of Criminals* (1859), p. 24.

ARTICLE 7. PROTECTION—SECURITY OF THE STATE

A State has jurisdiction with respect to any crime committed outside its territory, by an alien, against the security, territorial integrity or political independence of that State, provided that the act or omission which constitutes the crime was not committed in exercise of a right guaranteed to the alien by the law of the place where it was committed.

COMMENT

With but few exceptions, national penal codes contain provisions which are based upon the conception that States are competent to legislate for the protection of their security and credit against injurious acts even though such acts are committed by aliens upon foreign territory. The basis of such jurisdiction is the nature of the interest injured rather than the place of the act or the nationality of the offender. With the exception of the jurisdiction universally recognized over nationals abroad and over pirates (see Arts. 5 and 9), legislation enacted in reliance upon the protective principle constitutes the most common extension of penal jurisdiction to offences committed abroad.

Protective legislation applicable to aliens for acts committed in foreign territory appears at an early date. In fact, such legislation antedates the establishment of modern national States and the formulation of the modern territorial theory of penal competence. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 86, and *Introduction à l'Etude du Droit Pénal International* (1922), p. 175, citing statutes of various Italian cities of the 15th and 16th centuries. In view of the early appearance of such protective legislation and of its widespread adoption by States at the present time, it would seem clear that the underlying protective principle must find a place in a Convention on penal competence. See Beckett, "The Exercise of Criminal Jurisdiction over Foreigners," *British Yearbook of International Law* (1925), pp. 50-52, 56-57; Bourquin, "*Crimes et Délits contre la Sécurité des Etats Etrangers*," *Académie de Dr. Int., Recueil des Cours* (1927), I, pp. 174-176; Brierly, "Criminal Competence of States in Respect of Offences Committed outside their Territory," Committee of Experts for the Progressive Codification of International Law, *Publications of the League of Nations*, C. 50, M. 27. 1926. V. 7, p. 2.

States may be divided roughly into two groups according to the extent to which they exercise a competence to punish crimes committed abroad against their security, integrity or independence. The first group includes those States which generally confine the application of their protective laws to nationals, while occasionally asserting a claim to jurisdiction over aliens for specific offences against their security or against the functioning of their political institutions or agencies. The second group includes those States which apply their protective laws, with certain exceptions, to aliens as well as to nationals.

Great Britain and the United States belong to the first group, basing their penal competence almost exclusively upon the territorial and personal principles. See Hintrager, "*Die Behandlung der im Auslande begangenen Delikte nach dem Rechte Grossbritanniens unter Berücksichtigung des Rechts der Vereinigten Staaten von Amerika*," 9 *Zeitschrift für Int. Recht* (1899), 88 ff. Legislation for the protection of the security of the State, such as the treason laws, is applicable only to nationals abroad, aliens being exempted from its operation (*cf.* Art. 5, and comment).

There are provisions in the law of the United States, however, which it is difficult to reconcile with an exclusively territorial or personal theory of penal competence and which appear to be based in some measure upon the principle that the United States is competent to prosecute offences which interfere with the functioning of its public agencies and instrumentalities, irrespective of the place of the offence or the nationality of the offender. See, for example, the Act of Congress of August 18, 1856, c. 27, sec. 24 (11 U.S. Stat. L. 61), which makes punishable acts of perjury before an American diplomatic or consular officer without limitation to United States territory or to nationals of the United States. See also provisions punishing perjury or fraud in applications for immigration, Immigration Act of 1924, sec. 22 (43 U.S. Stat. L. 153, 165). In *United States ex rel. Majka v. Palmer* (1933), 67 F. (2d), 147, deportation was ordered because of perjury before an American consul abroad, the perjury being regarded as a crime by United States law. *Cf.* decision of Supreme Court of Vienna, March 29, 1929, *Chunet* (1931), 190 (presenting a falsified passport to an Austrian frontier official on Czech territory held punishable in Austria); and French case of *Min. Pub. c. Glass* (Trib. Corr. de Boulogne sur Mer, Feb. 25, 1858), D.P. 1858. 3. 39 (taking jurisdiction over an alien who used a false name before a French consul abroad to gain admittance to France). See also the British Foreign Marriages Act, 55 & 56 Viet., c. 23, sec. 15, later repealed by the Perjury Act. The language used by Chief Justice Taft, in delivering the opinion of the Supreme Court in the case of *United States v. Bowman* (1922), 260 U.S. 94, *Annual Digest*, 1919-1922, Case No. 109, seems to imply that certain statutory provisions for the protection of United States agencies might be applied to aliens for acts committed abroad. In this case the court overruled a demurrer, filed in behalf of an American citizen, to an indictment under sec. 35 of the Criminal Code, as amended October 23, 1918, c. 194 (40 U.S. Stat. L. 1015), for conspiracy to defraud the United States Shipping Board Emergency Fleet Corporation. After referring to the principle that statutes punishing crimes which affect the good order and peace of the community are to be interpreted as applicable only within the territorial limits of the United States, in the absence of express evidence of a contrary intent on the part of Congress, Chief Justice Taft said:

But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality

for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated. . . . Some such offences can only be committed within the territorial jurisdiction of the Government because of the local acts required to constitute them. Others are such that to limit their *locus* to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute. . . . In such cases, Congress has not thought it necessary to make specific provision in the law that the *locus* shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offence. (260 U.S. 94, 98.)

The court left open the question as to whether the statute was applicable to aliens as well as to nationals for acts committed abroad. Chief Justice Taft said:

The three defendants who were found in New York were citizens of the United States and were certainly subject to such laws as it might pass to protect itself and its property. . . . The other defendant is a subject of Great Britain. He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial. (260 U.S. 94, 102.)

The Texas Penal Code contains an interesting provision, in its chapter punishing the forgery of titles to land, which appears to be based upon the principle of protection:

Texas, Penal Code (1925), Art. 1009.—Persons out of the State may commit and be liable to indictment and conviction for committing any of the offences enumerated in this chapter which do not in their commission necessarily require a personal presence in this State, the object of this chapter being to arrest and punish all persons offending against its provisions, whether within or without the State.

This statute (then Penal Code, Art. 454) was upheld in *Hanks v. The State* (1882), 13 Tex. App. 289, the Texas Court of Appeals affirming the conviction of the defendant for forging Texas land titles in Louisiana. Delivering the opinion of the court, Judge White said:

We can see no valid reason why the Legislature of the State of Texas could not assert, as it has done in Article 454 *supra*, her jurisdiction over wrongs and crimes with regard to the land titles of the State, no matter whether the perpetrator of the crime was at the time of its consummation, within or without her territorial limits. Such acts are offenses against the State of Texas and her citizens only, and can properly be tried only in her courts. It may in fact be no crime against the State in which it is perpetrated; and if it is, under such circumstances as we are considering, that other State would have no interest in punishing it, and would rarely, if ever, do so. When this forgery was committed in Louisiana, *eo instanti* a crime was committed against, and injury done to, the State of Texas, because it affected title to lands within her sovereignty. (13 Tex. App. 289, 308-309.)

It is possible that certain legislation against making war on the State, like that of Maryland, may apply to persons other than citizens. At least

the wording of such provisions is not clearly confined to persons owing allegiance to the State and suggests that the protective principle is not wholly unknown to American legislation. See Maryland, Ann. Code (1924), Art. 24, secs. 516, 517, 520, of which the following may be quoted:

Sec. 516. If any person shall levy war against this State, or shall adhere to the enemies thereof, whether foreign or domestic, giving them aid or comfort, within this State or elsewhere, and shall be thereof convicted, on confession in open court or on the testimony of two witnesses, both to the same overt act, he shall suffer death, or be sentenced to confinement in the penitentiary for not less than six nor more than twenty years, at the discretion of the court.

And see the legislation noted in the comment on Article 3, *supra*, by way of illustration of the more extreme applications of the territorial principle.

The fact that the United States and Great Britain have not chosen to extend their legislation generally to punish offences against their security and integrity committed by aliens abroad is not conclusive evidence that they deem the exercise of such a penal competence contrary to international law. It is not always possible to "infer from the practice adopted by a State the theory upon which it bases its assumption of jurisdiction, since we cannot safely argue from the fact that it assumes jurisdiction only in certain cases that it regards those cases as the only ones in which the assumption of jurisdiction would be legitimate." Briefly, "Criminal Competence of States in Respect of Offences Committed outside their Territory," Committee of Experts for the Progressive Codification of International Law, *Publications of the League of Nations*, C. 50. M. 27. 1926. V. 7, p. 2.

The States assuming penal competence upon the protective principle include practically all States other than the United States and Great Britain. Nearly all of these States apply laws for the protection of their security, integrity or independence to offences committed abroad either by nationals or aliens. A number make certain distinctions between nationals and aliens as to the application, for example, of the rule of *non bis in idem*, or as to the particular offences which are made punishable. It is unnecessary, however, to take account of these distinctions and differences at this point.

The provisions of national codes providing for the punishment of crimes against security or integrity vary somewhat in the formula which they employ to describe the acts incriminated. Thus the French *Code d'Instruction Criminelle*, Art. 7, speaks of

un crime attentatoire à la sûreté de l'Etat, ou de contrefaçon du sceau de l'Etat, de monnaies nationales ayant cours, de papiers nationaux, de billets de banque autorisés par la loi.

The Polish Penal Code (1932), Art. 8, is made applicable to persons who have committed abroad

a) infractions contre la sûreté intérieure ou extérieure de l'Etat Polonais; b) infractions contre les offices publics ou les fonctionnaires de l'Etat Polonais; c) fausse déposition faite devant un office public de l'Etat Polonais.

The Guatemalan Penal Code (1890), Art. 4 denounces:

Crime against the independence of the Republic, the integrity of its territory, its form of government, its tranquillity, its internal or external security, or against the Chief of State, as well as falsification of the signature of the President of the Republic or of Ministers of State, or public seals, of current Guatemalan money, of bonds, titles, and other documents of public credit of the nation, or of notes of a bank existing by law in the Republic and which has been authorized to issue them, and also the introduction into the Republic or the spending of them when falsified.

The German Penal Code (1871), Art. 4 applies to

Acts of high treason (*Hochverräterische Handlung*) against the Reich or a Federal State, or a coinage crime (*Münzverbrechen*).

The following articles from national penal codes will suffice to illustrate the principal types of penal provision based upon the principle of protection and applying both to nationals and aliens for crimes abroad:

Colombia, Penal Code (1890), Art. 20.—There shall be punished according to this Code, and ignorance of what it prescribes shall not exculpate them: . . .

(2) Nationals and aliens who outside of the national territory commit acts or are guilty of omissions punished by law, provided that the said acts or omissions compromise the peace and external or internal security of the Republic, or affect its Constitution, or lead to the falsification of seals of public offices, or of documents of public credit, or of banknotes that circulate in the country, or of sealed paper or stamps of whatever sort, or of documents which are to have their effects in the country. There shall also be punished the acts and omissions which have in view the introduction of the said falsified things, or to cause any other damage to the interests of the country; but in no case shall they be tried in the Republic who have already been tried in the place where they did wrong, for the same acts or omissions.

Germany, Project of Penal Code (1927), sec. 6.—The penal laws of the Reich apply to the following acts committed abroad, irrespective of the law of the place of the act:

1. high treason or treason against the Reich or one of the German States (*Länder*), and offences (*Vergehen*) against the defence force or the national force (*die Wehrmacht oder die Volkskraft*);
2. punishable acts which anyone commits as holder of a German office, or which anyone commits against the holder of a German office, during the exercise of his office or in relation to his office;
3. perjury in a proceeding pending before a German authority;
4. crimes of counterfeiting;
5. crimes of traffic in women and children.

Italy, Penal Code (1930).—Art. 7. A national or foreigner who commits any one of the following offences in foreign territory shall be punished under Italian law:

- (1) Crimes against the personality of the State.
- (2) The crimes of counterfeiting the seal of the State and of using such counterfeited seal.
- (3) The crimes of counterfeiting coins which have legal currency in the territory of the State, or revenue stamps or Italian public credit securities.
- (4) Crimes committed by public officials in the service of the State with abuse of their powers or in violation of the duties inherent in their functions.
- (5) Any other offence in respect of which special provisions of law or international conventions prescribe the applicability of Italian penal law.

Art. 8. A national or foreigner who commits in foreign territory a political crime other than those specified in (1) of the preceding Article shall be punished under Italian law, on the demand of the Minister of Justice.

If the crime is one which is punishable on the denunciation of the injured party, such denunciation is required in addition to the above demand.

For the purposes of penal law, any crime which injures a political interest of the State, or a political right of a national, is a political crime. An ordinary crime, determined wholly or in part by political motives, is likewise considered to be a political crime.

Rumania, Project of Penal Code (1926), Art. 7.—Quiconque commettra, hors du territoire roumain, soit comme auteur, soit comme complice, un crime contre la sûreté de l'Etat, un délit de contrefaçon des monnaies ayant cours légal en Roumanie, du sceau de l'Etat, de ceux des autorités roumaines, ou bien falsifiera des effets public: timbres nationaux, timbres-poste, billets de banque autorisés par loi en Roumanie, passeports roumains, papiers de crédit, ou encore se rendre coupable d'infractions quelconque d'autre nature envers un citoyen roumain, pourra être poursuivi en Roumanie, jugé et condamné même par défaut.

Si le coupable a été appréhendé sur le territoire roumain, et si son extradition peut être obtenue, il devra purger la peine prononcée par les tribunaux roumains, même si pour les faits énumérés dans l'alinéa précédent, il avait été jugé à l'étranger, d'une sentence irrévocable.

En case d'une condamnation prononcée à l'étranger pour la même infraction, la peine déjà subie sera déduite de celle prononcée par les tribunaux roumains.

Venezuela, Penal Code (1926), Art. 4.—There are subject to prosecution in Venezuela and shall be punished according to the Venezuela penal law: . . .

- (2) The foreign subjects or citizens who in a foreign country commit any crime against the security of the Republic or against any of its nationals.

In the preceding two cases it is requisite that the accused has come to the territory of the Republic and that action has been brought by the injured party, or by the Public Minister in cases of treason or crime against the security of Venezuela.

It is also necessary that the accused has not been tried by foreign

courts, unless he has been tried and has avoided the sentence decreed.

(11) The Venezuelans, or aliens who have come to the territory of the Republic, who in another country falsify, or take part in the falsification of, money legally current in Venezuela, or seals of public office, stamps, or documents of credit of the nation, banknotes to the bearer or shares of capital and income whose issue has been authorized by national law.

(12) The Venezuelans or aliens who in any way have favored the introduction into the Republic of the [falsified] valuables specified in the preceding paragraph.

As may be seen from the examples above quoted, the general articles in national codes providing for jurisdiction over offenses against the security and credit of the State vary as to the formulas which they employ to describe the types of offenses made punishable. In order to ascertain what particular offenses are included under the broad terms of the general articles, it is necessary to refer to special parts of the codes. There appears to be a high degree of uniformity in the particular crimes made punishable in reliance upon the protective principle. For offenses designated in the French *Code d'Instruction Criminelle*, Art. 7, as crimes "*attentatoire à la sûreté de l'Etat*", see the Penal Code (1810), Bk. III, ch. I, "*Crimes et délits contre la sûreté de l'Etat*," Sec. I. "*Des crimes et délits contre la sûreté extérieure de l'Etat*," Sec. II. "*Des crimes contre la sûreté intérieure de l'Etat*," Sec. III. "*De la révélation et de la non-révélation des crimes qui compromettent la sûreté intérieure ou extérieure de l'Etat*." And see the following cases in which protective jurisdiction has been asserted successfully: *Oës* (Conseil de révision de Lyon, Feb. 5, 1917), *Clunet* (1917), 1027; *Wechsler* (Conseil de Guerre de Paris, July 20, 1917), *Clunet* (1917), 1745, 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1917), 551; *Sedano y Leguizano* (Cass. Crim., Aug. 23, 1917), *Clunet* (1917), 1748; *Rachkoff* (Cass. Crim., May 10, 1919), 123 *Bull. Crim.* (1918), 189; *Urios* (Cass. Crim., Jan. 15, 1920), *Clunet* (1920) 195, *Annual Digest*, 1919-1922, Case No. 70; *Bayot* (Cass. Crim., Feb. 22, 1923), D.P. 1924. 1. 136, 128 *Bull. Crim.* 140, *Annual Digest*, 1923-1924, Case No. 54. For Germany, see Preuss, "International Law and German Legislation on Political Crime," in *Transactions of Grotius Society* (1934); see also Project of Penal Code (1927), *Begründung*, p. 8, note 1, citing other laws providing for protective jurisdiction over offenses committed by aliens abroad; and see decision of June 30, 1911, in *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1911), 402. For the particular crimes punishable under the protective principle in Italy, see Penal Code (1930), Bk. II, chs. 1-5, Arts. 241-313.

In addition to the provisions above quoted, the following codes, laws, and projects provide for protective legislation with extraterritorial application to aliens: Albania, Penal Code (1927), Arts. 4 and 6; Belgium, Code of Criminal Instruction (1878), Art. 6 (Law of Aug. 4, 1914), and Art. 10;

Bolivia, Law of Nov. 29, 1902, Arts. 6 and 7; Brazil, Law of June 28, 1914, Art. 13, and Project of Penal Code (1927), Art. 3; Bulgaria, Penal Code (1896), Art. 4; China, Penal Code (1928), Art. 5; Costa Rica, Penal Code (1924), Art. 219, Nos. 5 and 6; Cuba, Project of Penal Code (1926), Art. 36; Czechoslovakia, Law for the Protection of the Republic, Mar. 11, 1923, secs. 1-7, 17, 38, and Project of Penal Code (1926), sec. 5; Denmark, Penal Code (1930), sec. 8; Dominican Republic, Law of June 28, 1911, Art. 7; Ecuador, Penal Code (1906), Art. 10; Finland, Penal Code (1889), secs. 1 and 3; Finland, Project of Penal Code (Serlachius, 1920), ch. 1, Art. 4 (according to Pella, *Académie de Dr. Int., Recueil des Cours*, 1930, III, 671, 774); France, Project of Penal Code (1932), Art. 14; Germany, Law for the Protection of the Republic, Mar. 25, 1930, secs. 1-5, 7; Greece, Code of Criminal Procedure (1834), Art. 2, applied in Decision 541 of the Areopagus, Clunet (1929), 1183, and Project of Penal Code (1924), Art. 4; Guatemala, Penal Code (1889), Art. 6; Haiti, Code of Criminal Procedure (1835), Art. 5, and Extradition Law (1912), Art. 4; Honduras, Law of Organization of the Courts (1906), Art. 173; Hungary, Penal Code (1878), Art. 7; Japan, Penal Code (1907), Art. 2; Lithuania, Penal Code (1930), Art. 9; Luxembourg, Code of Criminal Procedure (1808, replaced in Law of Jan. 18, 1879), Arts. 5 and 7; Monaco, Code of Criminal Procedure (1904), Art. 7; Netherlands, Penal Code (1881), Art. 4; Nicaragua, Penal Code (1891), Art. 13; Norway, Penal Code (1902), sec. 13, par. 3; Palestine, Code of Criminal Procedure (1924), Arts. 5 and 6; Panama, Penal Code (1922), Art. 6, and Project of Penal Code (1930), Art. 7; Paraguay, Penal Code (1914), Art. 9; Peru, Penal Code (1924), Art. 5; Poland, Penal Code (1932), Art. 8; Portugal, Penal Code (1886), Arts. 3 and 4; Rumania, Penal Code (1865), Art. 5 and Project of Penal Code (1926), Art. 5; Rumania, Project of Penal Code (revised, 1928), Arts. 9 and 19 (see Pella, *Académie de Dr. Int., Recueil des Cours*, 1930, III, 671, 774, 779); Salvador, Code of Criminal Procedure (1904), Art. 18; Siam, Penal Code (1908), Art. 10; Spain, Law of Organization of the Judicial Power (1870), Art. 336 and Penal Code (1928), Art. 11; Sudan, Penal Code (1924), Art. 4; Sweden, Penal Code (1864), Arts. 1 and 2, and Project of Penal Code (1923), ch. 1, sec. 5; Switzerland, Federal Penal Law (1853), Art. 1, and Project of Penal Code (1918), Art. 4; also the following Swiss Cantonal Codes, Aargau, Penal Code (1857), sec. 2c; Appenzell A. Rh., Penal Code (1878), Art. 1b; Basellandschaft, Penal Code (1873), sec. 2, No. 2; Bern, Law of July 5, 1914, Art. 3; Fribourg, Penal Code (1924), Art. 3; Geneva, Code of Crim. Proc. (1891), Art. 9; Glarus, Penal Code (1867), Art. 2b; Gräubünden, Penal Code (1851), sec. 3; Luzern, Crim. Code (1861), Art. 2c; Neuchâtel, Penal Code (1891), Art. 6, No. 1; Obwalden, Crim. Code (1864), Art. 2b; St. Gall, Penal Code (1857, rev. 1886), Art. 4b; Schaffhausen, Penal Code (1859), sec. 3c; Schwyz, Crim. Code (1881), sec. 3; Solothurn, Penal Code (1874), sec. 4b; Thurgau, Penal Code (1841, modified 1868), sec. 2c; Ticino, Penal Code (1873, modified 1885), Art. 3, sec. 1;

Valais, Penal Code (1859), sec. 10; Vaud, Penal Code (1931), arts. 5(c) and 246-293; Zug, Penal Code (1882), sec. 2d; Zurich, Crim. Code (1897), sec. 3c; Uruguay, Penal Code (1889), Art. 5, and Project (1932), Art. 10; Yugoslavia, Penal Code (1929), Art. 4.

In addition to the evidence of almost universal approval of the protective principle revealed in the national code provisions above cited, this principle has also been supported by various resolutions of international organizations, by conferences on penal law, and to a limited extent in treaties. The following may be noted:

Institute of International Law, Resolutions of 1883, Art. 8.—*Tout Etat a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'Etat en cause et compromettent sa sécurité, et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu.*

Institute of International Law, Resolutions of 1931, Art. 4.—*Tout Etat a le droit de punir des actes commis en dehors de son territoire, même par des étrangers, lorsque ces actes constituent:*

- a) *Un attentat contre sa sécurité;*
- b) *Une falsification de sa monnaie, de ses timbres, sceaux ou marques officiels.*

Cette règle est applicable lors même que les faits considérés ne sont pas prévus par la loi pénale du pays sur le territoire duquel ils ont été commis.

International Prison Congress, August 10, 1900.—Art. 1. *Chaque Etat peut punir, conformément à ses lois, les crimes et les délits commis hors de son territoire, par des nationaux ou par des étrangers, soit comme auteurs, soit comme complices, contre la sûreté, la fortune ou le crédit publics de cet Etat.*

La poursuite n'est pas subordonnée à la présence de l'inculpé sur le territoire de l'Etat lésé.

International Conference for the Unification of Penal Law, Warsaw, 1927.—Art. 5. *Sera punissable, même par défaut, quiconque aura participé à l'étranger à un crime ou délit: 1^e contre la sûreté de l'Etat; 2^e de contrefaçon ou falsification de sceau, poinçons, cachets ou timbres de l'Etat.*

Bustamante Code (Convention on Private International Law, signed at the Sixth International Conference of American States, February 20, 1928).—Art. 305. *Those committing an offense against the internal or external security of a contracting State or against its public credit, whatever the nationality or domicile of the delinquent person, are subject in a foreign country to the penal laws of each contracting State.*

International Congress of Comparative Law, The Hague, 1932.—Art. 3. *Tout Etat a le droit de punir les actes commis en dehors de son territoire, même par des étrangers lorsque les actes constituent*

- a) *Un attentat contre sa sécurité;*
- b) *Un délit de contrefaçon du sceau de cet Etat ou d'usage du sceau contrefait;*

- c) Un délit de falsification de monnaie ou de valeur du timbre ou d'effet de crédit public de cet Etat.

Cette règle est applicable, lors même que les faits considérés ne sont pas prévus par la loi pénale du pays sur le territoire duquel ils ont été commis.

There is justification for the enactment of penal legislation based upon the protective principle in the inadequacy of most national legislation punishing offences committed within the territory against the security, integrity and independence of foreign States. So long as the State within whose territory such offences are committed fails to take adequate measures, competence must be conceded to the State whose fundamental interests are threatened. At the present time the international obligation to protect foreign States against such offences is ill-defined and national legislation to that end is varied. Some States, such as Great Britain and the United States, while recognizing an obligation to afford a minimum of protection, tend to adhere to the principle of "political neutrality" and to make a relatively fragmentary and incomplete provision for protecting the interests of foreign States. Other States, such as France, Penal Code (1810), Arts. 84 and 85, and States which have based their legislation upon the French model, provide for the punishment of anyone who, by unauthorized hostile acts, exposes the State to a declaration of war or its citizens to reprisals. Such legislation is enacted primarily for the security of the legislating State and affords only an incidental protection to foreign States. Another group of States, including Austria, Germany, and Switzerland, grant a more extended protection, assimilating crimes against the security, integrity, and independence of foreign States to treason against the legislating State. See Bourquin, "*Crimes et Délits contre la Sécurité des Etats Etrangers*," *Académie de Dr. Int., Recueil des Cours* (1927), I, 121, *passim*; Hegler, "*Actes d'hostilité envers des états amis*," *Actes du Congrès Pénal et Pénitentiaire de Prague* (1930), II, pp. 207-213; Gerland, "*Feindliche Handlungen gegen befreundete Staaten*," *Vergleichende Darstellung des deutschen und ausländischen Strafrechts* (1906), Bes. Teil. I Bd., *passim*.

Various factors have contributed to make the legislation enacted an insufficient assurance of protection for foreign States. The traditional political liberalism of certain States has made them reluctant to lend any support to the protection or maintenance of régimes based upon principles different from their own. Other States have guaranteed a more extended protection only to secure reciprocal treatment, or because their international position has rendered it essential to their own security that they repress all acts upon their territory which might be of a nature to compromise their relations with foreign States. See Lauterpacht, "Revolutionary Activities by Private Persons against Foreign States," 22 *Am. Jour. Int. Law* (1928), 108; Preuss, "*La répression des crimes contre la sécurité des états étrangers*," 40 *Rev. Gén. de Dr. Int. Pub.* (1933), 606. Not only is the existing national legislation inadequate, but it is, in addition, indifferently enforced. In short, it appears

that such legislation cannot be relied upon by States which are the object of political offences emanating from abroad. In the present condition of the international community, it is doubtful whether substantial advance in this field through conventional agreement is to be anticipated. Protective penal legislation applicable to offences committed outside the territory by aliens must remain, therefore, the principal defense of the security, independence and integrity of States. Legislation enacted for this purpose assumes that the legislation of the State where the crime is committed will be inadequate. This is demonstrated by the fact that protective provisions in no case provide that the act must be incriminated by the *lex loci delicti* as well as by the law of the injured State, although the requirement of double incrimination is common in the case of ordinary offences committed abroad by aliens. See Getz, *Actes du Congrès Pénal International de Bruxelles* (1900), II, p. 204; *Annuaire Inst. de Dr. Int.*, Session de Munich (1883), pt. 2, p. 204; *ibid.*, Session de Bruxelles (1879), pt. 1, pp. 279–281; Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 110–137.

At the present time, it appears that the tendency in national legislation is toward an extension of the exercise of competence to punish crimes by aliens against the security and integrity of the State. Modern means of communication have increased the opportunities for such crimes and States have naturally reacted to the growing danger to their security in extending the application of their penal laws. New penal legislation has been introduced and older provisions have been made applicable in times of peace as well as in war. The overthrow of liberal régimes in many countries and the establishment of dictatorships of party or class have led to an increase in the subversive activities of dissenting groups which are frequently conducted from the shelter of foreign territory. In postwar penal legislation there has been a marked departure from the general attitude of relative indifference with which political crimes were regarded during the nineteenth century. See Plassard, *Evolution de la nature juridique des attentats à la sûreté extérieure de l'Etat* (1924), p. 38 ff.; Pella, "La répression des crimes contre la personnalité de l'état," *Académie de Dr. Int., Recueil des Cours* (1930), III, p. 699 ff.; Bourquin, "Crimes et Délits contre la Sûreté des Etats Etrangers," *ibid.*, (1927), I, pp. 128–134. The extension of the application of penal law to certain political crimes committed abroad has become all but universal, the severity of penalties has been increased, and the emphasis upon the right of the State to protect its security and integrity has led in numerous instances to legislation containing serious derogations from those safeguards which have been deemed essential in the past to prevent injustice to individuals. These features of recent legislation are mentioned here only to suggest that much of the present controversy with respect to the propriety of protective legislation is due, not to a disposition to question the principle upon which it is based, but to a fear that its practical application may lead to inadmissible results. See Brierly, "Criminal Competence of States in Respect of Offences

Committed outside their Territory," Committee of Experts for the Progressive Codification of International Law, *Publications of the League of Nations*, C. 50. M. 27. 1926. V. 7, pp. 255-256.

The Marseilles assassinations of 1934 have focused attention upon the inadequacy of existing national legislation for the suppression of political offences against foreign States and have indicated a need for more effective international coöperation. The recent resolution of the Council of the League of Nations recalls

That it is the duty of every State neither to encourage nor tolerate on its territory any terrorist activity with a political purpose;

That every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to governments which request it.

After referring more particularly to the duties of League members, and to the controversy which had arisen with respect to alleged subversive activities on Hungarian territory, the resolution continues:

Considering that rules of international law concerning the repression of terrorist activities are not at present sufficiently precise to guarantee efficiently international coöperation in this matter,

Decides to set up a committee of experts to study this question with a view to drawing up a preliminary draft of an international convention to assure the repression of conspiracies or crimes committed with political and terrorist purpose. (*New York Times*, Dec. 11, 1934, p. 1.)

The international validity of penal legislation based upon the protective principle has been defended upon various grounds. In countries which have enacted such legislation, doctrine tends naturally to affirm the existence of international competence. See Drost, "*Völkerrechtliche Grenzen für den Geltungsbereich staatlicher Strafrechtsnormen*," 43 *Zeitschrift für Int. Recht* (1930-31), 111 ff. While apparently conceding that the competence to prosecute and punish for crime is not absolutely unlimited, a number of writers attempt to derive this particular competence from the theory of sovereignty. Thus Binding says:

The scope of its penal law is determined by every sovereign state as sovereign. Under no conditions would the existence of its pretensions with respect to punishment be conditioned upon the consent of a foreign sovereign. (*Handbueh des Strafrechts* (1885), I Bd., p. 374.)

Traub states:

"The proper field of the penal competence of the state, and also the proper domain of its rules and penal statutes, results from the scope of its legal interests, which it alone is entitled to determine." (*Strafrechtliche Abhandlungen* (1913), Heft 167, p. 23.)

See also Mendelssohn Bartholdy, "*Das Räumliche Herrschaftsgebiet des Strafgesetzes*," *Vergleichende Darstellung des deutschen und ausländischen*

Strafrechts, (1908) Allg. Teil, VI Bd., p. 106; Travers, *Le Droit Pénal International* (1920), I, p. 11; and the views of other writers analyzed in Van Praag, *Jurisdiction et Droit International Public* (1915), pp. 134-138. Such an analysis, without more, advances but little the justification of the protective principle and hardly provides an acceptable theory for a draft convention which seeks to define competence.

Other writers, while stressing sovereignty, go on to emphasize the considerations of convenience or necessity which have actually led to the widespread adoption of protective legislation. Thus Mercier has said *arguendo*:

Le principe fondamental qui domine toute la matière est celui de la souveraineté des Etats. Cette souveraineté comporte le droit de légiférer, chaque Etat appréciant lui-même les éléments, conditions et modalités de son ordre social, dont il a la responsabilité, et édictant librement les dispositions législatives, d'ordre civil, administratif, pénal ou autre, qu'il estime nécessaires à la protection de ses intérêts et de son ordre public au sens le plus large du mot . . . Mais le droit de libre législation des Etats peut subir des restrictions en raison des conventions internationales, générales ou spéciales, telles que celles qui fixent des règles destinées soit à éviter les conflits, positifs ou négatifs, pouvant résulter de lois divergentes des Etats, soit à établir les facteurs de solution de ces conflits. On pourrait aussi admettre, exceptionnellement, qu'une restriction soit apportée au droit de libre législation des Etats par une coutume générale et constante, dûment attestée par une pratique continue, bien établie et universelle. Ou encore pourrait-on invoquer comme règle coutumière entre certains Etats des normes identiques ou similaires que consacrerait leurs législations respectives ou qui seraient suivies de façon générale et constante par la jurisprudence de leurs tribunaux. (*Publications P.C.I.J.*, Series C, No. 13, II, pp. 400-401.)

Referring specifically to legislation for the protection of the security of the State against offences committed abroad, Mercier says:

En principe, tout Etat souverain, qui a la responsabilité de son bon ordre social, doit avoir le droit de réprimer les actes de nature à troubler celui-ci, quel que soit leur lieu de commission et quelle que soit la nationalité de leur auteur. Aucun Etat ne saurait d'avance renoncer à l'action répressive qui peut être nécessaire au maintien de son ordre public, à la protection des intérêts dont il a la garde. Assurément, dans chaque cas particulier, l'Etat peut voir si et dans quelle mesure il doit exercer son droit d'action, si et dans quelle mesure il peut y renoncer, en s'inspirant aussi des considérations de justice et d'équité, qui sont des éléments de l'ordre social. Mais aucun Etat ne peut dire d'une façon générale que, quelle que soient les circonstances, il n'exercera jamais d'action répressive en raison d'un acte commis à l'étranger par un étranger et dirigé contre ses droits ou intérêts. Le principe, au contraire, doit être que tout acte qui lèse les droits ou intérêts d'un Etat crée un lien juridique entre l'auteur de cet acte et cet Etat. Et ce lien juridique est manifesté par un droit d'action de cet Etat contre l'auteur de cet acte. (58 *Rev. de Dr. Int. et de Lég. Comparée*, 1931, 464.)

The *exposé des motifs* of the project for a new Czechoslovakian penal code (1926), states:

Il est certain que l'Etat doit défendre ses intérêts, même si c'est en dehors des frontières de son territoire qu'on y a porté atteinte. Ce sont spécialement ses propres ressortissants qui ont comme devoir de respecter partout et toujours ses intérêts. Mais l'Etat doit aussi se défendre contre les étrangers qui menacent ses intérêts à l'étranger, car la protection qui est fournie par l'Etat étranger est le plus souvent très insuffisante. (p. 13.)

In the *Bayot* case, February 22, 1923, the French Court of Cassation stated:

Attendu que, si le droit de punir, qui émane du droit de souveraineté, ne s'étend pas, en principe, au delà des limites du territoire, il en est autrement au cas prévu par l'art. 7, C. instru. crim., dont la disposition, fondée sur le droit de légitime défense, attribue compétence à la juridiction française pour connaître des crimes attentatoires à la sûreté de l'Etat commis hors du territoire de la France par un étranger dont l'arrestation a eu lieu en France. (Sirey, 1923, I, 330.)

The divergence of opinion among those who doubt or deny the international validity of particular legislation based on the protective principle, on the one hand, and those who hold on the other that such legislation is within the competence of States, seems to be based less upon a conflict as to competence than upon differences with respect to its exercise. In view of the fact that an overwhelming majority of States have enacted such legislation, it is hardly possible to conclude that such legislation is necessarily in excess of competence as recognized by contemporary international law. The contention advanced by certain Anglo-American writers that jurisdiction over aliens is restricted to those within the territory and to pirates appears to be the result of a tendency to equate the exercise of jurisdiction undertaken in a particular State with competence as determined by international law. In commenting upon this tendency, Professor Fedozzi has said *arguendo*:

Il n'est pas facile à comprendre que, nonobstant le manque évident d'une coutume internationale dans le sens susindiqué, les Etats qui s'abstiennent d'exercer leur juridiction pénale pour les délits commis par des étrangers à l'étranger puissent soutenir que les dispositions contraires contenues en plusieurs législations sont en contradiction avec le droit des gens. Il y a là surtout un phénomène de psychologie bien connu de qui a considéré attentivement la pratique des controverses internationales. Chaque Etat est naturellement porté à considérer les règles édictées par son propre droit public extérieur non seulement comme conformes aux principes de droit international, mais aussi comme les seules conformes à ces principes. Cette opinion se transforme avec facilité en la prétention que les Etats qui adoptent des règles différentes soient obligés à les changer pour se conformer aux prétendus principes du droit international. (*Publications P.C.I.J.*, Series C, No. 13, II, p. 372.)

It is believed that most of the objections to the protective principle may be overcome by agreement on certain limitations with respect to the acts of aliens which may be denounced as criminal and by the general acceptance of certain safeguards.

The present article accepts the principle upon which penal competence for the protection of the security and integrity of the State is founded. As drafted, however, it contains an important limitation upon this competence. While the limitation proposed has some basis in national legislation, it is incorporated in the present draft, not as a restatement of existing practice, but as a means of attaining a reasonable compromise between those States which now claim the most extensive competence on the protective principle and States which have tended to adhere more closely to a territorial theory. The differences between these two groups of States are by no means so great as has been sometimes assumed. As regards jurisdiction over crime committed by aliens abroad against the security of the State, the gap between the two groups is partially bridged at least by the so-called objective application of the territorial principle. See Bourquin, "*Crimes et délits contre la sûreté des états étrangers*," *Académie de Dr. Int., Recueil des Cours* (1930), III, pp. 756-758. It would appear feasible to bridge the gap entirely if reasonable safeguards are established for the protection of nationals of the latter group of States against possible abuse of the competence. In drafting the present article, a limitation has accordingly been incorporated which leaves an ample competence to enact protective legislation, while rejecting such extreme claims as are likely to be unjust in their effect upon the nationals of other States or inconsistent with generally approved principles of law.

The limitation incorporated in the present Article excludes from prosecution or punishment on the protective principle every act or omission which is "committed in exercise of a right guaranteed to the alien by the law of the place where it was committed." This limitation affords a reasonable compromise between those States which have perhaps been oversensitive about their prestige or security, on the one hand, and other States which have probably been lax in providing the necessary minimum of protection for the interests of foreign States, on the other hand. To require that the act or omission be denounced as an offence by the *lex loci* would obviously defeat the legitimate purpose of protective jurisdiction. To permit the act or omission to be prosecuted and punished, notwithstanding the guarantee of the *lex loci*, would victimize the individual for something for which the State where the act was done should be responsible if responsibility is to be imposed. Thus, under the present article, it will be no defense to an assertion of protective jurisdiction that the act was not denounced by the *lex loci*. On the other hand, it will be a complete defense that the *lex loci*, in an organic law, legislation in force, or authoritative judicial opinion, has guaranteed the right to do or refrain from doing such acts or omissions as that with respect to which jurisdiction is asserted. Conspicuous among the acts thus safeguarded in many States against an assumption of protective jurisdiction by other States are acts done in the exercise of rights of free speech, freedom of the press, or free assembly.

By way of illustration of the operation of this limitation, it may be noted

that it would restrict or even prohibit the application to certain acts committed in Great Britain or the United States, where a maximum of liberty is guaranteed the individual, of such legislation as the Polish Penal Code (1932), Art. 104, or the Italian Penal Code (1930), Art. 265. The Italian Code, Art. 265, provides:

Whoever, in time of war, spreads or communicates false, exaggerated, or misleading reports or news, which may arouse public alarm or depress the public spirit, or otherwise lessen the resistance of the nation to the enemy, or in any way acts so as to cause injury to the national interests, shall be punished with penal servitude for not less than 5 years.

It would likewise require a more closely guarded application of the French Penal Code (1810), Art. 78 than has been made by the French courts in recent cases. This article provides for the punishment of anyone guilty of correspondence with the subjects of an enemy State if such correspondence has the effect of furnishing the enemy with information harmful to the political or military situation of France or her allies. The very extreme applications which French tribunals made of this article during and after the World War are illustrated in the following cases. In the case of Captain Urios, a Spanish national and captain in the Spanish merchant marine, the Court of Cassation affirmed (Jan. 15, 1920), *Clunet* (1920), 195, *Annual Digest*, 1919-1922, Case No. 70, a decision of the Permanent Council of War of the Military Division of Oran (Nov. 7, 1919), condemning Captain Urios to twenty years imprisonment for correspondence in Spain with the subjects of an enemy Power. The prosecution was instituted under *Code d'Instruction Criminelle*, Art. 7, and the Penal Code (1810), Art. 78. Of Article 78 the court said:

par la généralité même de ses termes, cet article exclut distinction; qu'il est applicable aux étrangers comme aux Français, les faits eussent-ils été commis hors du territoire de la France. (*Sirey*, 1923, I, 238.)

See 16 *Rev. de Dr. Int. Privé* (1920); Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 95. In the case of *B.*, a Belgian national arrested in France on a charge of correspondence with the enemy in Belgium, in the form of aid in obtaining various military supplies, the Court of Cassation held (Feb. 22, 1923), *Sirey* (1923), I, 331, that the French courts had jurisdiction. The aid given, it was concluded, exceeded the normal operations of commerce. See also the case of *Rachkoff* (May 10, 1919), 123 *Bull. Crim.* (1918), 189. It is believed that such assertions of competence are inadmissible in principle and in excess of anything which international law permits. The fundamental objection is well stated by Garçon, the French commentator, as follows:

Le droit des gens est obligatoire pour les tribunaux criminels français. C'est ainsi, par exemple, que le droit pénal français a toujours reconnu l'immunité diplomatique. Or, lorsqu'il s'agit précisément de crimes

commis par un étranger en temps de guerre, contre l'Etat français, il paraît impossible de ne pas tenir compte des règles et des coutumes du droit des gens. Si on accepte ce principe, on pourra en déduire que le sujet d'une puissance en guerre avec la France ne commet aucun crime contre la sûreté de l'Etat français en servant son pays, pourvu qu'il se conforme aux coutumes du droit des gens; qu'un neutre ne se rend non plus coupable d'aucun crime en usant des droits qui lui appartiennent comme sujet de son propre pays, s'il respecte, dans ses relations avec les belligérants, les règles du droit international public. (*Code pénal annoté*, Art. 76, No. 3.)

Other limitations serving to confine the scope of protective jurisdiction, as well as other types of jurisdiction, are incorporated in later articles (Art. 13 to 17 inclusive) dealing with the general subject of safeguards. Notable among these other limitations is the provision of Article 13, *infra*, forbidding the prosecution of an alien who has not been "taken into custody by its authorities as permitted by international law or international convention." There are provisions to the contrary in a number of national codes in which prosecution and conviction for acts committed abroad against the security, integrity or independence of the State is permitted in the absence of the accused (*par défaut, par contumace*). See, for example, Albania, Penal Code (1927), Art. 4; Belgium, *Code d'Instruction Criminelle* (1878), Art. 12; Italy, Penal Code (1930), Arts. 7 and 10; Paraguay, Penal Code (1914), Art. 9; Poland, Penal Code (1932), Art. 10; Uruguay, Penal Code (1889), Art. 5. While it is recognized that the limitation herein imposed would restrict the scope of such legislation, it is believed that it incorporates a reasonable compromise which would tend strongly to remove the objections entertained in some quarters to all legislation based upon the protective principle. There are more States which restrict prosecution in the absence of the accused to nationals and which require, in the case of aliens, that the accused shall be apprehended within the territory. See, for example, Bolivia, Law of Nov. 29, 1902, Art. 6; Brazil, Law of June 28, 1911, Art. 13; Finland, Penal Code (1889), secs. 1 and 3; France, *Code d'Instruction Criminelle*, Arts. 5 and 6, and Project of Penal Code (1932), Art. 14; Spain, Law of Organization of the Judicial Power (1870), Art. 336, and Penal Code (1928), Art. 11. Abandonment of the claim to prosecute absent aliens would certainly remove one of the principal objections to protective legislation commonly advanced in Great Britain and the United States. Since the difficulties in securing witnesses and adequate evidence, more or less acute in all prosecutions for offences committed abroad, are especially serious in prosecutions for offences in this category, it is believed that the concession asked of those States which now prosecute in the accused's absence is not one which will work any substantial impairment of the protective principle. On the other hand, it will safeguard nationals of other States against a type of prosecution which is too likely to be arbitrary and unfair.

Notable also among the limitations imposed upon protective jurisdiction

by later articles devoted to safeguards is the principle of *non bis in idem*, incorporated in Article 14, *infra*, forbidding the prosecution and punishment of an alien who has been previously prosecuted in another State for substantially the same offence. Here again the limitation imposed establishes a competence somewhat more restricted than is now asserted by a few States. The Italian Penal Code (1930), Art. 11, for example, provides that in all cases of crime abroad punishable under Italian law the accused shall be tried again in Italy upon demand of the Minister of Justice. No effect is given the action previously taken by foreign courts or authorities. Of similar effect, see Albania, Penal Code (1927), Art. 4; Yugoslavia, Penal Code (1929), Art. 8. A larger number of national codes, while not incorporating the principle of *non bis in idem*, provide that the penalty undergone abroad shall either be deducted from the penalty imposed locally or shall at least be taken into account. Thus the German Penal Code (1871), Art. 7 provides:

Any punishment already undergone in a foreign country is to be taken into account in assessing the punishment to be inflicted if a sentence in respect of the same offence is again imposed within the territory of the German Reich.

See also Austria, Penal Code (1852), secs. 36 and 38; Bulgaria, Penal Code (1896), Art. 4; Brazil, Law of June 28, 1911, Art. 14; China, Penal Code (1928), Art. 8; Cuba, Project of Penal Code (1926), Art. 43; Czechoslovakia, Project of Penal Code (1926), sec. 66; Hungary, Penal Code (1878), Art. 7; Japan, Penal Code (1907), Art. 7; Paraguay, Penal Code (1914), Art. 10; Poland, Penal Code (1932), Art. 11. In a third group of States, the principle of *non bis in idem* is applied in prosecutions for offences committed abroad against the security, integrity or independence of the State, thus barring prosecution and punishment in case of acquittal, pardon, or prescription in a foreign State, or where the penalty has been undergone in full. If the penalty has been only partially undergone, as much as has been incurred is imputed in determining the local sentence or is at least taken into account. The Belgian *Code d'Instruction Criminelle* (1878), Art. 13 provides:

Les dispositions précédentes ne seront pas applicable lorsque l'inculpé jugé en pays étranger du chef de la même infraction, aura été acquitté.

Il en sera de même lorsque, après y avoir été condamné, il aura subi ou prescrit sa peine, ou qu'il aura été gracié.

Toute détention subie à l'étranger, par suite de l'infraction qui donne lieu à la condamnation en Belgique, sera imputée sur la durée des peines emportant privation de la liberté.

See also Costa Rica, Penal Code (1924), Art. 220; Netherlands, Penal Code (1881), Art. 68; Panama, Penal Code (1922), Art. 7. It is believed that recognition of the principle of *non bis in idem* will work no real hardship upon those States which have asserted the most extreme competence under the protective principle, that it is essential if States are to be encouraged to develop an adequate protection for the interests of foreign States in their

penal laws of territorial application, that it is an essential safeguard of individual rights, and that it will contribute much to make the protective principle acceptable among those who have hitherto regarded it with disfavor.

Of similar effect are the other safeguards with which Article 13, *infra*, circumscribes the prosecution and punishment of aliens under this Convention. Thus the establishment of special tribunals with special procedure for trying offences against the security of the State has provoked vigorous criticism. *Cf.* the Italian Decree No. 2062 of Dec. 12, 1926 (*Leggi e Decreti*, 1926, IV, p. 4701). Certain of the tribunals and procedures established would seem to provide but meager assurance of a fair and impartial trial. Article 13, *infra*, requires further that no State shall "prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise than by fair trial before an impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination."

The present article embodies a principle which finds emphatic expression in the national legislation and jurisprudence of most States. It embodies a principle which appears to be indispensable unless and until States recognize much more clearly than they do now their obligation to provide a well-defined minimum of protection for the interests of foreign States and take appropriate measures to translate such a recognition of obligation into effective action. At the same time, the present article and other articles in this Convention circumscribe the principle with such limitations as appear necessary to satisfy well-founded criticism and to safeguard against abuse. It is believed that the gap between the most expansive and the most restricted assertions of competence based upon the protective principle may thus be bridged without sacrificing any essential interest. The advantages which would accrue to all States from a common understanding require no emphasis.

ARTICLE 8. PROTECTION—COUNTERFEITING

A State has jurisdiction with respect to any crime committed outside its territory, by an alien, which consists of a falsification or counterfeiting, or an uttering of falsified copies or counterfeits, of the seals, currency, instruments of credit, stamps, passports, or public documents, issued by that State or under its authority.

COMMENT

Most States punish the falsification or counterfeiting of their seals, currency, instruments of credit, stamps, passports, or public documents, and also the use or uttering of such falsified copies or counterfeits, by whomsoever or wheresoever committed. Provisions to this end are commonly included

in legislation for the protection of the security, integrity, independence and credit of the State of the type reviewed in the comment on Article 7, *supra*. The competence of the State to punish such offences has been recognized consistently in the resolutions and draft conventions prepared by various international organizations and conferences. See the resolutions of the Institute of International Law, the Conference of Warsaw for the Unification of Penal Law, and the International Congress of Comparative Law at The Hague, quoted *supra*. The present article makes a separate and more specific provision for this competence. A separate provision appears to be required by the very special nature of the problem presented.

In the first place, while the competence defined in this article rests fundamentally upon the same protective principle as Article 7, *supra*, and while it is impossible to distinguish sharply between many of the offences which fall within the scope of Article 7, *supra*, and at least some of the offences which may fall within the scope of the present article, it remains true nevertheless that most offences falling within the scope of the present article are regarded everywhere as highly reprehensible and are not classed among political offences. This is conspicuously true of offences of falsifying or counterfeiting the seals, currency, instruments of credit, stamps or passports of a State for a private purpose. Such offences are generally classed among the common crimes.

In addition to the national legislation and international resolutions or draft conventions already noted, there have been two significant developments which tend to confirm an almost universal approval of the application of the protective principle which is made in this article. On the one hand, national penal legislation of territorial effect, even in States which have been traditionally most reluctant to punish political offences against foreign States, has made a notable progress in providing for the punishment of the counterfeiting of the seals, currency, instruments of credit, stamps or passports of foreign States. See *Emperor of Austria v. Day and Kossuth* (1861), 2 Giff. 628; *United States v. Arjona* (1887), 120 U. S. 479; United States, Criminal Code (1909), secs. 156-163, 165, 167, 170-173, 218, 220 (35 U. S. Stat. L. 1088, 1117, 1118, 1131, 1132); 18 U. S. Code Ann., secs. 270-277, 279, 281, 284-288, 347, 349. The R. S. F. S. R., ordinarily somewhat indifferent to offences against nonproletarian States, forbids the counterfeiting of foreign currencies, prescribing death as the maximum penalty. See Criminal Code (1926), Art. 59, sec. 8. In short, it is generally considered to the advantage of each State that crimes of falsification or counterfeiting of the seals, currencies, etc. of any State should be everywhere suppressed.

On the other hand, an even more significant development is the denunciation of counterfeiting in recent multipartite international instruments of legislative effect. See the Convention on the Suppression of Counterfeiting Currency, Geneva, April 20, 1929, League of Nations Document, C.153. M.59.1929.II., Hudson, *International Legislation* (1931), IV, 2692, which provides:

Art. 9. Foreigners who have committed abroad any offence referred to in Article 3, and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country.

The obligation to take proceedings is subject to the condition that extradition has been requested and that the country to which application is made cannot hand over the person accused for some reason which has no connection with the offence.

See also Dupriez, "*Répression internationale du faux monnayage*," 10 *Rev. de Dr. Int. et de Lég. Comp.* (1929), 387; Pella, "*La coopération des Etats dans la lutte contre le faux monnayage*," 34 *Rev. Gén. de Dr. Int. Pub.* (1927), 673; 24 *Am. Jour. Int. L.* (1930), 135.

In the second place, it is clear that the limitation with which Article 7, *supra*, circumscribes the competence to prosecute and punish an alien under the protective principle for offences against the security, independence or integrity of the State has no proper application to crimes of falsification or counterfeiting. In view of the widespread practice of suppressing such offences through appropriate penal legislation of territorial effect, and in view of the progress made in the coöperative effort to suppress such offences through multipartite international instruments of legislative effect, it is hardly conceivable that the acts involved could be guaranteed by the law of any State. Crimes of counterfeiting now belong clearly to the category of offences which are coming more and more to be regarded as of the nature of *delicta juris gentium*. See the comment on Article 2, *supra*.

For the reasons thus briefly indicated, the present article states a general principle of jurisdiction in conformity with contemporary national legislation and international practice and without the special safeguard which appeared essential in the article preceding. The jurisdiction is of course circumscribed by the general safeguards with respect to the prosecution and punishment of aliens prescribed in later articles of this Convention. See Articles 13-17, *infra*. Here, as elsewhere, the alien accused must have been taken into custody, must have a fair and impartial trial, may not suffer twice for the same offence, may not be prosecuted for something which was required by the law of the place where it was done, may not be prosecuted while voluntarily present to testify or assist in the administration of justice, and may not be prosecuted if brought within the State in violation of international convention or international law.

ARTICLE 9 UNIVERSALITY—PIRACY

A State has jurisdiction with respect to any crime committed outside its territory, by an alien; which constitutes piracy by international law.

COMMENT

The jurisdiction of the State to prosecute and punish for piracy *juris gentium* though committed outside the territory is everywhere recognized.

Most of the principal maritime States have enacted legislation making piracy a special ground of jurisdiction, while in other States it is included in a more comprehensive competence which the State asserts over various offences committed by aliens abroad. The principle is one of universality. The piratical act need not have been committed within the territorial jurisdiction of the State. The pirate need not be a national or one assimilated thereto. If the crime is one "which constitutes piracy by international law" the competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offence. Jurists who have written on the jurisdiction of crime are practically unanimous in affirming the competence. The whole subject has been carefully studied in the preparation of the Draft Convention on Piracy, *Research in International Law* (1932), pp. 739-885; and most of the relevant legislation has been collected in the accompanying Collection of Piracy Laws (*ibid.*, pp. 887-1013).

The jurisdiction to prosecute and punish for piracy, even when committed abroad by aliens, appears to be expressly recognized in the legislation of the following States: Argentina, Code of Penal Procedure (1888), Art. 23, No. 1; Brazil, Penal Code (1890), Art. 5; Canada, Criminal Code, 1 Can. Rev. Stat., 1927, c. 36, sec. 137; Chile, Code of Criminal Procedure (1906), Art. 2, and Project of Penal Code (1929), Art. 3, No. 6; China, Penal Code (1928), Art. 5; Colombia, Penal Code (1890), Art. 20, No. 5; Costa Rica, Penal Code (1924), Art. 219, No. 11; Cuba, Spanish Penal Code (1879), Arts. 153-154; see Bustamante, *Derecho Internacional Privado* (1931), III, p. 63; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, No. 1; Ecuador, Code of Criminal Procedure (1906), Art. 2, No. 6; France, Law of April 10, 1825; France, Project of Penal Code (1932), Art. 15; Great Britain, see *Dawson's Trial* (1696), 13 How. St. Tr. 451, 455, *Quelch's Trial* (1704), 14 *ibid.* 1067, *The Magellan Pirates* (1853), 1 Spinks Ecc. & Adm. 81, *Attorney-General for Hong Kong v. Kwok-a-Sing* (1873), 5 P.C. 179, *In re Piracy Jure Gentium* [1934], A.C. 586; see also *The Serhassan* (1845), 2 W. Rob. 354, and see Stephen, *Digest of the Law of Criminal Procedure* (1883), Art. 4, Hawkins, *Pleas of the Crown* (1716), I, ch. 37; Greece, Piracy Law (March 30, 1845); Greece, Maritime Penal Code (1923), Art. 13; Mexico, Federal Penal Code (1931), Art. 146 (see also Federal Penal Code (1929), Art. 409); Netherlands, Penal Code (1881), Art. 4, sec. 4; Netherlands Indies, Penal Code (1915), Art. 4, sec. 4; Panama, Penal Code (1922), Art. 8; Peru, Penal Code (1924), Art. 5, No. 1; Poland, Penal Code (1932), Art. 9; Siam, Penal Code (1908), Art. 10, No. 3; Spain, Penal Code (1928), Arts. 245-246; United States, Criminal Code (1909), sec. 290 (35 U.S. Stat. L. 1088, 1145); on the earlier legislation, see *U.S. For. Rel.* (1887), 757, 794; 38 *Harv. L. Rev.* 334, 342; and see *United States v. Klintoek* (1820), 5 Wh. (U.S.) 144, *United States v. Smith* (1820), 5 Wh. (U.S.) 153, *United States v. Pirates* (1820), 5 Wh. (U.S.) 184; *People v. Lol-lo and Saraw* (1922), 43 P.I. 19, *Annual Digest*, 1919-1922, Case No. 112; Uruguay, Penal Code (1889), Art. 142; Venezuela, Penal Code

(1926), Art. 4, sec. 9. See also Norway, Penal Code (1902), Art. 12, No. 4, and Arts. 267–269; Portugal, Penal Code (1886), Art. 162.

Likewise most of the resolutions and treaties proposed or adopted on the subject of penal competence provide for jurisdiction over piracy whatever the nationality of the offender. See the Treaty of Lima (1878), Art. 34, No. 3; Treaty of Montevideo on International Penal Law (1889), Art. 13; Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Bustamante Code (1928), Art. 308; Resolutions of the Institute of International Law (1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

Among jurists who affirm the competence are Bluntschli, *Le Droit International Codifié* (Lardy's transl. 1895), Art. 346; Fauchille, *Traité de Droit International Public* (1922), sec. 483; Field, *Outlines of an International Code* (2d ed., 1876), Art. 650; Fiore, *International Law Codified* (Borchard's transl. 1918), Art. 299; Hall, *International Law* (8th ed., 1924), sec. 81; Halleck, *International Law* (1861), I, ch. 7, sec. 24; Hyde, *International Law* (1922), I, sec. 231; Lewis, *Foreign Jurisdiction and the Extradition of Criminals* (1859), pp. 12–14; Oppenheim, *International Law* (4th ed. 1928), I, secs. 272–280; Ortolan, *Diplomatie de la Mer* (4th ed. 1864), I, p. 207; Pradier-Fodéré, *Traité de Droit International Public* (1891), sec. 2490 ff; Tobar y Borgono, *Du Conflit International au Sujet des Compétences Pénales* (1910), p. 95; and Travers, *Le Droit Pénal International* (1920), I, p. 78. The opinions of a great number of jurists are collected in the comment on the Draft Convention on Piracy, Research in International Law (1932), pp. 739, 751–754, 757–765, 852 ff.

The Draft Convention on Piracy, Art. 14, Research in International Law (1932), pp. 739, 852, states the rule as follows:

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.

2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.

3. The law of the state must, however, assure protection to accused aliens as follows:

- (a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.

- (b) The accused person must be given humane treatment during his confinement pending trial.

- (c) No cruel and unusual punishment may be inflicted.

- (d) No discrimination may be made against the nationals of any state.

4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.

It is to be noted that the safeguards prescribed in paragraph 3 of the above, for the protection of accused aliens, are incorporated in Article 13, *infra*, of the present Convention.

Originating in a period when piratical depredations were a very real menace to all water-borne commerce and traffic, the competence to prosecute and punish for piracy was commonly explained by saying that the pirate who preyed upon all alike was the enemy of all alike. As expressed by Coke, C. J., in *King v. Marsh* (1615), 3 Bulstr. 27, 81 E.R. 23, "*pirata est hostis humani generis*." The competence is perhaps better justified at the present time upon the ground that the punishable acts are committed upon the seas where all have an interest in the safety of commerce and where no State has territorial jurisdiction. Notwithstanding the more effective policing of the seas in modern times, the common interest and mutual convenience which gave rise to the principle have conserved its vitality as a means of preventing the recurrence of maritime depredations of a piratical character.

The present article defines the competence as including "any crime committed outside its territory, by an alien, which constitutes piracy by international law." If the offence is committed within the territory, there is jurisdiction under Article 3, *supra*; if by a national, there is jurisdiction under Article 5, *supra*. But if the offence is committed outside the territory, by an alien, it is necessary to define a special extraterritorial competence. Such a competence is recognized if the offence is one "which constitutes piracy by international law." It is essential that the competence should be so stated as to include only offences which constitute "piracy by international law," since many States denounce various offences as piracy by national law. Such national legislation is applicable, of course, only within the territory, upon national ships or aircraft, or in the prosecution of nationals.

The definition of piracy is not within the scope of the present Convention. The Draft Convention on Piracy, Art. 3, Research in International Law (1932), pp. 739, 768, defines it as follows:

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

The phrase "pirate ship," as used in the article quoted above, is defined in the Draft Convention on Piracy, Art. 4, Research in International Law (1932), pp. 739, 822, as follows:

1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs.

2.. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a state by descent from the high sea, as long as it continues under the same control.

Among other definitions of piracy *juris gentium*, the following may be noted:

By piracy we understand any violent act committed on the high sea for the purpose of robbery or depredation, by a ship not provided with a license or letters of marque emanating from a recognized government, and when the offence is directed indiscriminately against the ships of any country. (Fiore, *International Law Codified*, 1918, Borchard's transl., sec. 300.)

La piraterie est le fait de commettre, dans un esprit de luere et pour son propre compte, des actes de violence contre les personnes et de depredation contre les biens, dans les lieux ne relevant de la souveraineté d'aucun Etat déterminé et que compromet ainsi en ces lieux la sécurité de la circulation. (Pella, "*La Répression de la Piraterie*," *Académie de Dr. Int., Recueil des Cours*, 1926, V, pp. 145, 170.)

Les pirates sont des hommes qui, sans commission ni papiers d'aucun Etat souverain, courent les mers avec des bâtiments armés, attaquent et pillent les navires qu'ils rencontrent, à quelque nation qu'ils appartiennent. (André Senly, *Le Piraterie*, 1902, p. 53.)

Piracy occurs only on the high seas and consists in the commission for private ends of depredations upon property or acts of violence against persons.

It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy. (Matsuda, *Draft Provisions for Suppression of Piracy*, Art. 1, *League of Nations Document*, C. 196. M. 70. 1927. V., p. 119.)

For a thorough discussion of the offences which constitute piracy by international law, see the Draft Convention on Piracy, Art. 3, Comment, Research in International Law (1932), pp. 739, 769-822. See also Moore, *Digest* (1906), II, pp. 951-979.

In exercising jurisdiction under the present article, a State is subject to the general safeguards stipulated in Articles 13-17, *infra*. Of particular importance among these safeguards is the provision requiring apprehension by authorities of the State assuming jurisdiction in a way consistent with international law. See Article 13, *infra*. The Draft Convention on Piracy, Art. 14, quoted *supra*, permits prosecution by a State which has "lawful

custody." On the other hand, the same Draft Convention, Art. 9, Research in International Law (1932), pp. 739, 834, provides that

If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

Cf. Article 17, *infra*. See also Pella, "*La Répression de la Piraterie*," *Académie de Dr. Int., Recueil des Cours* (1926), V, pp. 145, 247. It is settled that international law permits apprehension outside the territorial jurisdiction of another State. Thus apprehension is permissible in the territory or territorial waters or air of the apprehending State, on the high seas or in the "free air," or on land which does not belong to any State. The Draft Convention on Piracy, Art. 6, Research in International Law (1932), pp. 739, 832, provides:

In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

It is not so clearly established that international law permits apprehension, even in exceptional circumstances, within the territorial jurisdiction of another State. The Draft Convention on Piracy, Art. 7, Research in International Law (1932), pp. 739, 832, provides:

1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state.

2. If a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of this article, the state making the seizure shall give prompt notice to the other state, and shall tender possession of the ship and other things seized and the custody of persons seized.

3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high sea.

And see the comment on the above article, *loc. cit.* The question concerns the international law of piracy and is outside the scope of the present Convention.

If the Draft Convention on Piracy, Art. 7, quoted above, formulates correctly the governing principle of international law, the penal competence of the State is clear under the present article. If the Draft Convention on Piracy should be ratified, the penal competence as between States parties to that convention would likewise be clear under the present article. And there would also be penal competence between States parties to other con-

ventions which might be concluded to provide specially for the apprehension of pirates within their territorial waters. Thus if State X and State Y should conclude a convention permitting State X to seize pirates in the territorial waters of State Y, it would be permissible for State X to apprehend in the territorial waters of State Y pirates of any nationality. The nature of the offence would clearly exclude objection on the part of the State of the pirate's nationality; and the competence would be established as between State X and State Y by the provisions of such a special convention.

It is to be noted, finally, that the present article recognizes the penal competence of States with respect to an offence committed by an alien outside the territory only in case the offence is one "which constitutes piracy by international law." This excludes other offences which modern international conventions of legislative effect have tended to assimilate to piracy. Certain publicists and the resolutions of certain learned bodies have urged that jurisdiction over these various so-called *delicta juris gentium* should be assimilated to that over piracy. There are national codes and projects of codes which assert a competence to prosecute and punish such offences substantially as piracy is prosecuted and punished. By way of example, the following may be noted:

Germany, Project of Penal Code (1927), sec. 6.—The penal laws of the Reich apply to the following acts committed abroad, irrespective of the law of the place of the act: . . .

4. Crimes of counterfeiting.
5. Crimes of traffic in women and children.

Poland, Penal Code (1932), Art. 9.—Indépendamment des dispositions en vigueur au lieu de l'accomplissement de l'infraction, la loi pénale polonaise est applicable aux citoyens polonais et aux étrangers dont l'extradition n'a pas été accordée, lorsqu'ils ont commis à l'étranger les infractions suivantes:

- a) piraterie;
- b) contrefaçon des monnaies, des papiers publics de valeurs ou des billets de banque;
- c) traite des esclaves;
- d) traite des femmes et des enfants;
- e) emploi d'un moyen propre à provoquer un danger général, dans l'intention de le provoquer;
- f) trafic de stupéfiants;
- g) trafic de publications obscènes;
- h) toute autre infraction prévue dans les traités internationaux conclus par l'Etat Polonais.

However, there seems to be little or no basis for common agreement as to which offences should fall within the class of *delicta juris gentium* which are to be prosecuted and punished on the same basis as piracy. For example, see the provisions of the following national codes, laws, or projects with respect to the slave trade: Costa Rica, Penal Code (1924), Art. 219; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 1; Czechoslovakia, Project of Penal

Code (1926), Art. 7; France, Project of Penal Code (1932), Art. 15; Germany, Law of July 18, 1895; Greece, Project of Penal Code (1924), Art. 4; Panama, Penal Code (1916), Art. 1, sec. 6 (but not found in Penal Code of 1922); Poland, Penal Code (1932), Art. 9c; see also Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Bustamante Code (1928), Art. 308; Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4; and on the analogous coolie trade, see Tobar y Borgono, *Du Conflit International au Sujet des Compétences Pénales* (1910), p. 108 ff.

With respect to the counterfeiting of foreign moneys or securities, see Belgium, Law of July 12, 1932, Art. 2; Czechoslovakia, Project of Penal Code (1926), Art. 7; France, Project of Penal Code (1932), Art. 15; Germany, Project of Penal Code (1927), secs. 6, 215-224; Mexico, Federal Penal Code (1931), Art. 236; Poland, Penal Code (1932), Art. 9b; Siam, Penal Code (1908), Art. 10, sec. 2; Switzerland, Project of Federal Penal Code (1918), Art. 206; see also Norway, Penal Code (1902), Art. 12, sec. 4A; Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

With respect to traffic in women and children for immoral purposes, see Chile, Project of Penal Code (1929), Art. 3, No. 6; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 1; Czechoslovakia, Project of Penal Code (1926), Art. 7; France, Project of Penal Code (1932), Art. 15; Germany, Project of Penal Code (1927), secs. 6, 308; Greece, Project of Penal Code (1924), Art. 4; Poland, Penal Code (1932), Art. 9d; Spain, Penal Code (1928), Art. 11, sec. 3; Switzerland, Project of Penal Code (1918), Art. 177; see also Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Bustamante Code (1928), Art. 308; Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

With respect to the use of explosives or poisons to cause a common danger, see Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 2; Poland, Penal Code (1932), Art. 9c; Switzerland, Project of Penal Code (1918), Art. 190; see also Germany, Law of June 9, 1884; Norway, Penal Code (1902), Art. 12, sec. 4A; Switzerland, *Sprengstoffsgesetz* (Apr. 12, 1894), Art. 6; Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6.

With respect to injury to submarine cables, see Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 1; see also Bustamante Code (1928), Art. 308; Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

With respect to traffic in narcotics, see France, Project of Penal Code

(1932), Art. 15; Poland, Penal Code (1932), Art. 9f; see also Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

With respect to the traffic in obscene publications, see France, Project of Penal Code (1932), Art. 15; Poland, Penal Code (1932), Art. 9g; see also Resolutions of the Conference for the Unification of Penal Law (Warsaw, 1927), Art. 6; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4.

The inclusion of other offenses has been urged and among them the following: brigandage in neighboring States (Greece, Code of Crim. Proc., as modified by Law of Dec. 22, 1887, Art. 2; see decision of Areopagus, No. 6 of 1904, Clunet (1908), 245, and No. 13 of 1906, *ibid.*, 1262); crimes against the public health of the world by spread of contagious disease (see Resolutions of the Institute of International Law (Cambridge, 1931), Art. 5; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4; propaganda in favor of war or leading to a war of aggression (formerly in the Polish Project of a Penal Code, but deleted in the draft adopted; this has provoked an extensive literature); use of false radio signals, especially false signals of distress; crimes against the international protection of deep sea fisheries; abuse of the Red Cross; injury to international means of communication (notably interoceanic canals); crimes against internationally protected industrial or literary property; etc. A discussion will be found in the reports presented to the Third International Congress of Penal Law (Palermo, 1933); and on the question as to what crimes should be subject to universal jurisdiction see the same reports in *Rev. Int. de Dr. Pénal* (1931-2), Vols. 8 and 9. See also Saldaña, "*La Justice Pénale Internationale*," *Académie de Dr. Int., Recueil des Cours* (1925), V, pp. 223, 285 ff. Because of the difficulties of enumeration, some States assert the jurisdiction with respect to so-called "crimes against humanity"; see Costa Rica, Penal Code (1924), Art. 219, sec. 11; Venezuela, Penal Code (1926), Art. 4, sec. 9; or with respect to so-called "crimes against international law"; see Cuba, Project of Penal Code (Ortiz, 1926), Art. 37, sec. 1; Panama, Penal Code (1916), Art. 1, sec. 1.

Finally, there are those who would assert a jurisdiction, comparable to that over piracy, with respect to all crimes which States have agreed by treaty to repress. See Article 2, comment, *supra*. In short, proponents of this view would adopt international coöperation for the repression of certain crimes as the test for determining whether there is to be a universal jurisdiction with respect to such crimes on the same basis as in case of piracy. If a list of such crimes is to be undertaken, this is perhaps the soundest basis for selection; but it can hardly be said that any such principle of international law has yet matured. Indeed, because of its implications and its inherent vagueness, it is probable that the inclusion of such a test in an international

convention on penal competence would tend to discourage further coöperation in the suppression of offences of general international concern. If States wish to agree upon a universal competence for the suppression of such crimes in conventions providing for coöperation, they are free to do so under Article 2, *supra*, of the present Convention.

In any case, competence such as is asserted in national legislation of the type noted above is excluded from the scope of the present article. There will be many cases in which jurisdiction over such "international crimes" may be successfully asserted on the ground that the offence was committed in part within the territory. And jurisdiction over aliens who commit such offences abroad, as well as those who commit other offences, may of course be taken under Article 10, *infra* (or Article 11, *infra*, depending upon the place of the crime), incorporating the general principle of universality, but only when the conditions imposed by those articles are satisfied. There appears to be no good reason why the conditions imposed by those articles should not be required in case of so-called *delicta juris gentium*. Subject to those conditions, the articles incorporating the principle of universality provide an adequate competence. See Donnedieu de Vabres, "*Pour quels délits convient-il d'admettre la compétence universelle*," 9 *Rev. Int. de Dr. Pénal* (1932), 315, who says of the difficulty involved in setting up a classification of certain offences as *delicta juris gentium*:

Parmi les délits de droit commun, il n'en est aucun, à notre connaissance, qui soit toujours, et nécessairement, un délit international; il n'en est aucun, en revanche, à qui doive être déniée la possibilité de le devenir. (*Op. cit.*, p. 318.)

Donnedieu de Vabres concludes that the proper course is as follows:

En appliquant aux infractions de toute nature le compétence du *forum deprehensionis*, mais en lui assurant la place qui est normalement la sienne dans la hiérarchie des compétences, c'est-à-dire exactement la dernière. (*Op. cit.*, p. 329.)

Even the Third International Congress of Penal Law (Palermo, 1933), which adopted a resolution favorable in general to the idea of *delicta juris gentium* (see 10 *Rev. Int. de Dr. Pénal*, 144 ff), resolved that until further unification of national legislation with respect to such offences, and until the establishment of better coöperation in the matter of proceedings in a place other than where the offence was committed, extradition should be regarded as preferable to jurisdiction on the universality principle (*ibid.*, p. 157). There appears to be no sufficient reason for singling out any of the above-mentioned offences for the special treatment which is accorded piracy, since jurisdiction under appropriate safeguards is permitted under Articles 10 and 11, *infra*. While international law undoubtedly requires such treatment in the case of piracy, it does not at the present time do so with respect to other so-called *delicta juris gentium*.

ARTICLE 10. UNIVERSALITY—OTHER CRIMES

A State has jurisdiction with respect to any crime committed outside its territory, by an alien, other than the crimes mentioned in Articles 6, 7, 8, and 9, by reason of the presence of the alien within its territory, as follows:

(a) When committed in a place not subject to its authority but subject to the authority of another State, the act or omission which constitutes the crime must also be an offence by the law of the place where it was committed, surrender of the alien for prosecution must first have been offered to such other State or States and the offer must remain unaccepted, and prosecution must not be barred by lapse of time in the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed by the law of the place where the crime was committed.

(b) When committed in a place not subject to the authority of any State, the act or omission which constitutes the crime must also be an offence by the law of a State of which the alien is a national, surrender of the alien for prosecution must first have been offered to the State or States of which he is a national and the offer must remain unaccepted, and prosecution must not be barred by lapse of time under the law of any State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of any State of which the alien is a national.

(c) When committed in a place not subject to the authority of any State and the alien is not a national of any State.

COMMENT

The present article provides for jurisdiction of crimes committed by aliens outside the territory on the principle of universality, that is to say, on the sole basis of "the presence of the alien" within the territory of the State assuming jurisdiction (*principe de l'universalité, Weltrechtsprinzip*). It so circumscribes and limits the competence, however, as to make it distinctly subsidiary and one which will be rarely invoked. Thus, on the one hand, the article states a principle which is not limited in its application to any particular offence or class of offences, as in Article 9, *supra*, applying the principle of universality to crimes of piracy; and, on the other hand, since it recognizes the applicability of the universality principle to "any crime committed outside its territory, by an alien," a situation much more common than the above and a competence much more debatable, it so limits both the occasions when the jurisdiction may be invoked and the manner of its exercise as to remove all grounds for objection on the part of other States. It is a subsidiary jurisdiction; but there will be occasions when either it must be invoked or the offender permitted to go unpunished. In view of the extent to which the principle is recognized in contemporary legislation and of its utility in occasional cases as a subsidiary principle, it seems clear that it should have a place in the present Convention.

CRIMES COMMITTED IN A PLACE SUBJECT TO THE AUTHORITY OF ANOTHER
STATE

Paragraph (a) of the present article recognizes the jurisdiction of the State, on certain conditions, in cases in which the crime committed outside its territory, by an alien, is committed "in a place not subject to its authority but subject to the authority of another State." Paragraph (a) recognizes throughout the superior authority of the territorial principle and envisages surrender to the State where the crime was committed as the ordinary procedure whenever such surrender is possible. Consequently the application of the principle of universality is restricted to cases where such surrender has not been accepted. In such cases, universality is essential to prevent impunity. The competence of the State having custody is concisely justified by Donnedieu de Vabres as follows:

Il intervient, à défaut de toute autre Etat, pour éviter, dans un intérêt humain, une impunité scandaleuse. (*Les Principes Modernes du Droit Pénal International*, 1928, p. 135.)

The principle of universality has a long history extending back at least to its recognition in the *Corpus Juris Civilis* (C.3.15.1.). Applied in mediaeval times to certain crimes and recognized by various of the Glossators, d'Argentré, Voet, and other jurists of the Middle Ages and the Renaissance, it found expression in French practice and German legislation of the 16th to 18th centuries and has been more recently embodied in modern codes of the 19th and 20th centuries. For the history of the principle, see Donnedieu de Vabres, *Introduction à l'Etude du Droit Pénal International* (1922), pp. 106, 128 ff, 174 ff, 222, 290 ff, 312, 324 ff, 331, 337 ff, 345 ff, 359 ff, 459, and *passim*; Alcorta, *Principios de Derecho Penal Internacional* (1931), I, 136 ff; and sources cited in the above. The classical writers on international law approved the principle. Grotius treated it as an alternative to extradition and urged that it was not only a right but a duty of the State *aut dedere aut punire*; Grotius, *De Jure Belli ac Pacis* (1625), II, c. 21, sec. 4, Nos. 1, 3, 8. See also Vattel, *Droit des Gens* (1758), I, c. 19, par. 233.

The incorporation of the principle of universality in modern codes and projects of codes is exemplified in the following:

Austria, Penal Code (1852), sec. 39.—Again, if a foreigner has committed abroad an offence other than those indicated in the preceding paragraph, he shall always be arrested upon entering the country; arrangement shall be made forthwith for his extradition to the state where the offence was committed.

Sec. 40. Should the foreign state refuse to receive him, the foreign offender will generally be prosecuted in accordance with the provisions of the present penal code. If, however, more lenient treatment is prescribed by the criminal law of the place where he committed the act, he shall be treated according to this more lenient law. Expulsion shall also be included in the penal sentence in addition to the infliction of the usual penalty.

Germany, Project of Penal Code (1927), sec. 7.—The penal laws of the Reich apply to other acts committed abroad, if the act is incriminated by the law of the place of the act and if the actor . . .

2. At the time of the act was an alien, has been arrested upon the territory, and has not been extradited, although extradition would be permissible according to the nature of the act.

Hungary, Penal Code (1878), Art. 9.—Sera aussi puni d'après les dispositions du présent Code l'étranger qui commet à l'étranger un crime ou un délit non mentionné au paragraphe 2 de l'article 7, dans le cas où son extradition n'est pas autorisée par les traités ou l'usage en vigueur, et si le Ministre de la Justice donne l'ordre de poursuivre.

Italy, Penal Code (1930), Art. 10.—A foreigner who, apart from the crimes specified in Articles 7 and 8, commits in foreign territory to the prejudice of the State or of a national a crime . . .

If the crime is committed to the prejudice of a foreign State or of an alien, the guilty party shall be punished under Italian law, at the demand of the Minister of Justice, always provided—

(1) That he is in the territory of the State.

(2) That the crime is one for which the penalty of death, penal servitude for life, or penal servitude for a minimum period of not less than 3 years is prescribed.

(3) That his extradition has not been granted or agreed to by the Government of the State in which he committed the crime, or by that of the State to whom he belongs.

Poland, Penal Code (1932), Art. 10, sec. 1.—La loi pénale polonaise est applicable à un étranger qui a commis à l'étranger une infraction non énoncée aux articles 5, 8, et 9, si l'auteur de l'infraction se trouve sur le territoire de l'Etat Polonais et si son extradition n'a pas été accordée, les conditions des Articles 6 ou 7 étant remplies.

Sec. 2. La poursuite est exercée sur l'ordre du Ministre du Justice.

Rumania, Project of Penal Code (1928), Art. 8.—Tous autres crimes ou délits, en dehors de ceux prévus dans l'art. 7, commis par un étranger à l'étranger seront poursuivis et punis conformément aux dispositions de ce code, si l'étranger délinquant se trouve dans le pays, s'il n'a pas été puni, si son extradition n'a pas été demandée et si le Ministère de la Justice demande la poursuite. La poursuite ne pourra se faire qu'à la demande du Ministère de la Justice, en exceptant les infractions suivantes:

- 1) falsification de la monnaie étrangère métallique ou papier-monnaie;
- 2) le trafic international d'enfants et de femmes;
- 3) l'emploi intentionnel de n'importe quels moyens de produire un péril public;
- 4) le trafic des substances stupéfiantes;
- 5) le trafic de publications obscènes;
- 6) la piraterie . . . (Quoted by Buzea, "*Règle de Droit Pénal et ses Applications Extraterritoriales*," 8 *Rev. Int. de Dr. Pénal*, 1931, 125, 136-137).

Similar provisions are found in Albania, Penal Code (1927), Art. 6; Argentina, Extradition Law (April 25, 1885), Art. 5; Austria, Project of Penal Code (1909), Art. 87; Bulgaria, Penal Code (1896), Art. 6; Cuba, Project of Penal

Code (Ortiz, 1926), Art. 37; Czechoslovakia, Penal Code (Austrian Code of 1852), Arts. 39, 40, Project of Penal Code (1926), sec. 7; Italy, Penal Code (1889, superseded by Code of 1930, quoted *supra*), Art. 6, Project of Penal Code (Ferri, 1921, not adopted, Code of 1930 adopted); Sweden, Project of Penal Code (1923), ch. 1, sec. 9; Turkey, Penal Code (1926), Art. 6; Yugoslavia, Penal Code (1929), Art. 7. See also the variation of the principle, excluding the offer of surrender and made applicable to a long list of crimes, including most of the common crimes of any gravity, in the following:

Norway, Penal Code (1902), sec. 12.—A moins de dispositions contraires, le Code pénal norvégien est applicable aux actes condamnables commis . . .

(4) A l'étranger, par des étrangers, quand l'acte, ou bien

(A) tombe sous le coup des articles 83, 88, 89, 90 (dernier alinéa), 93, 98 à 104, 110 à 132, 148, 152 (1, 2, 3 alinéas), 153, 154 (1 alinéa), 159, 160, 161, 169, 174 à 178, 182 à 185, 187, 189, 190, 191 à 195, 202, 217, 220, 221, 223 à 225, 231 à 235, 243, 244, 264, 267 à 269, 277, 292, 327, 328, 331, et 423 de la présente loi, ou bien . . .

Sec. 13. Dans les cas de l'article 12 (no. 4), les poursuites pénales ne peuvent être commencées que sur l'ordre du roi.

While the incorporation of the principle in modern legislation dates back at least to the Austrian Penal Code of 1803, its continued vitality is attested by the approval of those engaged throughout the world in the preparation of official projects. Donnedieu de Vabres says:

Parmi les codes pénaux en voie d'élaboration, il n'en est à peu près aucun, à notre connaissance, qui n'admette, à quelque mesure, la compétence du *judex deprehensionis*." (*Les Principes Modernes du Droit Pénal International*, 1928, p. 156.)

The general principle of universality has also been affirmed with few qualifications in the resolutions or drafts of various international conferences or organizations. The Institute of International Law at its Munich Session of 1883 resolved as follows:

Art. 10. Chaque Etat chrétien (ou reconnaissant les principes du droit des pays chrétiens), ayant sous sa main le coupable, pourra juger et punir ce dernier, lorsque, nonobstant des preuves certaines de prime abord d'un crime grave et de la culpabilité, le lieu de l'activité ne peut être constaté ou que l'extradition du coupable, même à sa justice nationale, n'est pas admise ou est réputée dangereuse.

Dans ces cas, le tribunal jugera d'après la loi la plus favorable à l'accusé en égard à la probabilité du lieu du crime, à la nationalité du coupable et à la loi pénale du tribunal même.

At its Cambridge session of 1931, the Institute reaffirmed the same principle, but only for offences against general interests protected by international law, so-called *delicta juris gentium*, in the following terms:

Tout Etat a le droit de punir des actes commis à l'étranger par un étranger découvert sur son territoire lorsque ces actes constituent une

infraction contre des intérêts généraux protégés par le droit international (tels que la piraterie, la traite des noirs, la traite des blanches, la propagation de maladies contagieuses, l'atteinte à des moyens de communication internationaux, canaux, câbles sous-marins, la falsification des monnaies, instruments de crédit, etc.), à condition que l'extradition de l'inculpé ne soit pas demandée ou que l'offre en soit refusée par l'Etat sur le territoire duquel le délit a été commis ou dont l'inculpé est ressortissant.

The International Conference held at Warsaw in 1927 on the Unification of Penal Law, on the other hand, composed chiefly of members of various official codification commissions, resolved unanimously in favor of the universality principle for all offences:

Art. 7. Tout autre crime ou délit commis à l'étranger par un étranger, pourra être puni dans le pays . . . (x) dans les conditions prévues aux articles précédents, si l'agent se trouve sur le territoire de l'Etat . . . (x) et si l'extradition n'a pas été demandée ou n'a pu être accordée et si le Ministre de la Justice requiert la poursuite.

See the Draft Code of International Law adopted by the Japanese Branch of the International Law Association, and Kokusaiho Gakkwai, "Rules Concerning the Jurisdiction of Offences Committed Abroad and Concerning Extradition," Art. 2, *International Law Association, Report of the 34th Conference*, 1926, pp. 378, 383-384; Resolutions of the International Congress of Comparative Law (The Hague, 1932), Art. 4; and the Third International Congress of Penal Law (Palermo, 1933), which, after a discussion of so-called *delicta juris gentium*, resolved as follows:

Que l'attribution de la compétence aux tribunaux du pays où le délinquant est arrêté est hautement désirable, même lorsqu'il s'agit d'infractions de droit commun et lorsque l'extradition du coupable n'a été demandée ni par l'Etat, sur le territoire duquel l'infraction a été commise, ou dont elle lèse directement les intérêts, ni par l'Etat dont le délinquant relève par sa nationalité. (10 *Rev. Int. de Dr. Pénal*, 1933, 144, 157.)

In addition to the national legislation and the resolutions noted above, it should be recalled that there is legislation in a number of States which asserts jurisdiction on the principle of universality over enumerated offences, in some States under limitations similar to those incorporated in this article, in others without such limitations. The legislation of this type is cited and discussed briefly under Article 9, comment, *supra*. And *cf.* Article 2, comment, *supra*. It will be apparent at once that par. (a) of the present article is both broader in scope and more restricted in effect than such legislation. It so states the principle of universality as to make it applicable to all offences which are also made crimes by the *lex loci delicti*, but so narrows the exercise of such jurisdiction as to leave it effective in only a limited class of cases. Following the more common practice, it avoids the difficulties inherent in any attempt to

prescribe a competence for specific offences by generalizing the competence and circumscribing its exercise so as to remove all valid objections.

The principle of universality as stated in the present article finds some support likewise in the legislation and practice of those States which assert jurisdiction over offences committed against their nationals abroad by whomsoever committed (passive personality, *personalité passive*, *Schutzprinzip*). An important group of States assert such jurisdiction; others would contest it. Many writers favor it, while others oppose it. The following is sufficiently typical of legislation in force in those States which assert the jurisdiction:

Japan, Penal Code (1907), Art. 3.—[after enumerating a long list of offences for which nationals will be punished if they commit them abroad] . . . This law also applies to foreigners who have committed offences mentioned in the preceding paragraph against Japanese subjects outside the Empire.

Uruguay, Penal Code (1889), Art. 7.—Aside from the cases provided for in article 5, offences committed in foreign territory by an alien, to the injury of a citizen or to the injury of the state, and punishable both by the laws of the latter and by those of the state where they were committed, shall be tried and punished by the courts of the state, when the criminals enter the territory in any way, applying to them the milder law and taking into account what is provided in the second paragraph of the preceding article [requiring complaint of the injured party in case of the less serious offences].

See also Albania, Penal Code (1927), Art. 6; Brazil, Extradition Law No. 2416 (1911), Art. 3; Project of Penal Code (1927), Art. 6; China, Penal Code (1928), Art. 7; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37; Czechoslovakia, Project of Penal Code (1926), Art. 5; Estonia, Penal Code (1929), Art. 7; Finland, Penal Code (1889), Art. 2; Greece, Code of Crim. Proc. (1834), Art. 2; see Clunet (1898), 962, for judgment of the Arcopagus applying this article; Greece, Project of Penal Code (1924), Art. 3; Guatemala, Penal Code (1889), Art. 6, No. 6; Italy, Penal Code (1930), Art. 10; Latvia, Penal Code (Russian Code of 1903), Art. 9, sec. 2; Lithuania, Penal Code (1930), Art. 9, sec. 2; Mexico, Federal Penal Code (1929), Art. 6, Federal Penal Code (1931), Art. 4; Monaco, Code of Crim. Proc. (1904), Art. 8; Peru, Penal Code (1924), Art. 5, No. 3; Poland, Penal Code (1932), Art. 5; Rumania, Project of Penal Code (1926), Art. 7; Russia, Penal Code (1903), Art. 9, par. 2; San Marino, Penal Code (1865), Art. 3; Sweden, Penal Code (1864), Art. 2; and Project of Penal Code (1923), ch. 1, sec. 5; Switzerland, Project of Penal Code (1918), Art. 5; Turkey, Penal Code (1926), Art. 6; Uruguay, Project of Penal Code (1932), Art. 10, No. 6; Venezuela, Penal Code (1926), Art. 4, No. 2; Yugoslavia, Penal Code (1929), Art. 5.

A few of the States which assert competence on the principle of passive personality qualify the asserted competence with restrictions comparable to those incorporated in the present article; but in most national legislation

based on this principle no such restrictions are incorporated. As an example of the more exceptional type of national code provision, see

Peru, Penal Code (1924), Art. 5.—Offences committed outside the territory of the Republic shall be punished in the following cases: . . .

3. Offences not included in the first paragraph, committed by an alien against a national, for which extradition is allowed under Peruvian law, provided that they are also punishable in the state in which they are committed, and that the criminal enters the Republic in some way, and is not surrendered abroad.

Jurisdiction asserted upon the principle of passive personality without qualifications has been more strongly contested than any other type of competence. It has been vigorously opposed in Anglo-American countries. See the British objections to the proposed French Law of 1852, mentioned briefly in Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 107, 369, and the Cutting Incident between Mexico and the United States, *U. S. Foreign Relations* (1887), 751–867. Cf. Mendelssohn-Bartholdy, *Das räumliche Herrschaftsgebiet des Strafgesetzes* (1908), pp. 135–143. See also the *S. S. Lotus*, *Publications P.C.I.J.*, Series A, Judgment No. 9. It has had distinguished opponents among Continental writers. See Donnedieu de Vabres, *op. cit.*, pp. 129–131, 362–364; Travers, *Le Droit Pénal International* (1920), I, sec. 71. Of all principles of jurisdiction having some substantial support in contemporary national legislation, it is the most difficult to justify in theory. Unless circumscribed by important safeguards and limitations, it is unlikely that it can be made acceptable to an important group of States. Since the essential safeguards and limitations are precisely those by which the principle of universality is circumscribed in the present article, and since universality thus circumscribed serves every legitimate purpose for which passive personality might be invoked in such circumstances, it seems clear that the recognition of the latter principle in the present Convention would only invite controversy without serving any useful objective. In consequence, except in Article 11, *infra*, recognizing passive personality in case of crimes committed in a place not subject to the authority of any State, the principle finds no place in the present Convention.

Failure to include the principle of passive personality in the present Convention, except in Article 11, *infra*, makes it all the more essential that such desirable ends as it may serve in the States which assert it should be attainable under some one or more of the principles herein incorporated. It would appear that every desirable end may be attained under the principle of universality as formulated in the present article. Under the present article, indeed, no less than three groups of States will find practical realization of an asserted competence: first, States asserting a universal jurisdiction over so-called *delicta juris gentium* other than piracy; second, States asserting jurisdiction on the principle of passive personality; and third, States which assert jurisdiction on the principle of universality substantially as it is herein

delimited. The list of States asserting competence on one or another of the above principles would include: Albania, Argentina, Austria, Brazil, Bulgaria, China, Costa Rica, Cuba (project), Czechoslovakia, Estonia, Finland, France (project), Germany, Greece, Guatemala, Hungary, Italy, Japan, Latvia, Lithuania, Mexico, Monaco, Norway, Panama, Peru, Poland, Rumania (project), San Marino, Siam, Sweden, Switzerland (including various cantonal codes), Turkey, Uruguay, Venezuela, and Yugoslavia. No record has been found of official objection on international principles to the type of jurisdiction which the present article delimits.

The reasons advanced in the literature for a much broader application of the principle of universality apply *a fortiori* in support of the subsidiary principle stated in paragraph (a) of the present article. If disturbance of the legal order within a State's territory is considered the most persuasive reason for penal jurisdiction, such disturbance may be found in the presence unpunished of an offender who has committed crime elsewhere. As Fusinato says:

La présence du délinquant qui peut, après son crime, jouir avec impunité du profit qu'il en a tiré, constituerait la plus scandaleuse et intolérable offense à l'honnêteté publique, à la morale et au droit. C'est le spectacle des avantages que l'on peut tirer d'un délit, plus encore que le spectacle du délit lui-même, qui constitue le mauvais exemple le plus dangereux. ("Des Délits Commis à l'Etranger," Clunet, 1892, 56, 59-60.)

See also Baty, *International Law* (1909), p. 231; Carrara, *Opuscoli di Diritto Criminale* (2d ed., 1870), II, 396; Schauberg, "Das intercantonale Strafrecht der Schweiz," 16 *Z. f. Schw. R.* (1869), 107. The same idea seems to have inspired Chief Justice Taney's dictum that states of the United States

may, if they think proper, in order to deter offenders in other countries from coming among them, make crimes committed elsewhere punishable in their courts, if the guilty party shall be found within their jurisdiction. (*Holmes v. Jennison*, 1840, 14 Pet. (U. S.) 540, 568.)

If the legal order is generalized idealistically, and crime is regarded as menacing a universal interest, then the only criticism of the present article will be that it is not sufficiently comprehensive. It will be agreed, with de Boeck, that the principle of universality "est justifié par la solidarité des Etats dans la lutte contre la délinquant." *Annuaire de l'Inst. de Dr. Int.* (1931), I, 157, 159. See Germany, *Entwurf eines allgemeinen deutschen Stofgesetzbuchs, Begründung* (1927), pp. 9-10; Bernard, "Etudes sur le nouvelle code pénal Sarde," 20 *Rev. Crit. de Lég. et de Jurisp.* (1862), 364, 368; Lévy, "Jurisdiction over Crimes," 16 *Jour. Crim. L. and Criminology*, 316, 496, 505; Pinheiro-Ferreira, *Droit des Gens*, II, Art. 3, sec. 12, and *Cours de Droit Public* (1850), II, 31; Saldaña, *La Défense Sociale Universelle* (1925), p. 21. The list of jurists who have supported a more comprehensive application of universality than is here approved is a long one and includes many

distinguished names. If to this list are added the names of those who would approve the more restricted competence delimited in the present article, the roster becomes impressive indeed.

Without further attention to the literature at this point, we may conclude with Mercier:

Le principe lui-même . . . n'est plus guère contesté; sa consécration progressive par le droit positif et par les projets de codes pénaux atteste qu'il répond à une exigence de la justice pénale, bien que l'accord sur les motifs ne soit pas établi en doctrine.

Entre la conception purement idéaliste d'un impératif de la justice et la conception purement réaliste d'un intérêt territorial à ne pas tolérer la présence d'un criminel impuni, il y a encore la conception, à la fois idéaliste et réaliste, d'une solidarité internationale pour la protection d'un patrimoine, matériel et moral, de l'humanité civilisée.

Mais, malgré ces divergences doctrinales, les législations font une place de plus en plus importante au principe de la répression universelle. Et si l'étendue de son application, limitée parfois à quelques infractions, varie encore d'un pays à l'autre, par contre les conditions d'application se retrouvent à peu près les mêmes partout. (*Rapport, Annuaire de l'Inst. de Dr. Int.*, 1931, I, 87, 136.)

In the words of Donnedieu de Vabres,

Il est dès lors inutile de pénétrer dans le détail des spéculations philosophiques par lesquelles on a voulu l'étayer. Il suffit de constater qu'étant *utile*—internationalement, universellement utile—et *juste*, cette compétence répond aux *desiderata* dont s'inspire, pour organiser la répression, la doctrine neo-classique, fondement de presque toutes les législations positives. (*Les Principes Modernes du Droit Pénal International*, 1928, p. 169.)

L'attribution d'une compétence très subsidiaire au juge du lieu d'arrestation donne satisfaction à un besoin de sécurité, à un sentiment élémentaire de justice. (*Ibid.*, p. 445.)

See, in addition to Bernard, Carrara, de Boeck, Donnedieu de Vabres, Fusinato, Grotius, Lévit, Mercier, Pinheiro-Ferreira, Saldaña, and Schauberg, cited above, Alcorta, *Principios de Derecho Penal Internacional* (1931), I, 135-146; Bar, in *Annuaire de l'Inst. de Dr. Int.* (1883-85), 127, 141; Getz, in *Actes du Congrès Pénitentiaire International* (Brussels, 1900), II, 199; Girardon, *De la Répression des Infractions à la Loi Pénale* (1876), p. 160 ff; Harburger, in 20 *Z. f. gesammte Strafrechtswissenschaft* (1882), 588; Heffter, *Das Europäische Völkerrecht* (8th ed., 1888), sec. 104; Manfredini, "*Estraterritorialità del Diritto Penale*," 10 *Archivio Giuridico* (1872), 153; von Martens, *Précis du Droit des Gens de l'Europe* (1788), sec. 100 (Cobbett's transl., 1795), Bk. III, ch. 3, sec. 22 ff); von Mohl, *Staatsrecht, Völkerrecht und Politik* (1860), I, pp. 711 ff, 750 ff; Poittevin, in *Actes du Congrès Pénitentiaire International* (Brussels, 1900), II, 403; Travers, *Le Droit Pénal International* (1920), I, sec. 73; Travers, "*Compétence criminelle*," in de Lapradelle et Niboyet, *Répertoire de Dr. Int.* (1930), IV, 377-381; Woulfert, in *Actes du*

Congrès Pénitentiaire International (Brussels, 1900). See also Ferri, *Principii di Diritto Criminale* (1928), p. 156 ff; and Ortolan, *Eléments de Droit Pénal* (4th ed., 1875), I, 382, 389.

Without extending further the comment upon the general principle of the present article, attention may be directed more particularly to the limitations and safeguards which paragraph (a) incorporates. The principle of the article may be invoked only if the alien is present in a place subject to the authority of the State assuming jurisdiction and if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed. The presence of the accused provides the basis for jurisdiction. The requirement of incrimination by the *lex loci delicti* is included to safeguard against the possibility, however remote, that an alien might be prosecuted in reliance upon the principle of universality for an act or omission which was not a crime where committed. This requirement will tend to limit prosecutions in reliance upon the principle of universality to the more serious offences and to offences generally made punishable throughout the world. It is believed that this would be a desirable tendency under present conditions. Not all States include the requirement in their penal codes. See Travers, *Le Droit Pénal International* (1920), I, sec. 73. Considerations of fairness and justice would seem to support its inclusion. See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), pp. 161 ff; Mercier, 58 *Rev. de Dr. Int.* (1931), 439, 477-478. It is included in the legislation of Bulgaria, Czechoslovakia, Cuba, Germany, Hungary, and Poland, and in the Resolutions of the Conference on the Unification of the Penal Law (Warsaw, 1927). A similar requirement is included in the legislation of many States providing for the prosecution of nationals for crimes committed abroad. *A fortiori* it should be included here.

Following the requirement of incrimination by the *lex loci delicti*, the Article stipulates that a "surrender of the alien for prosecution must first have been offered to such other State or States and the offer must remain unaccepted." In other words, jurisdiction in reliance upon the principle of universality may be invoked under par. (a) only as an alternative to extradition, other conditions being satisfied. Hitherto opposition to the principle of universality has come chiefly from British and American writers and from Continental writers opposed to universality without an offer of extradition. See Fiore, *Droit Pénal International* (Antoine's transl., 1880), secs. 42-60, 83; Deloume, *Principes Généraux du Droit International en Matière Criminelle* (1882), pp. 98-99; Gybichowski, "La compétence des tribunaux à raison d'infractions commises hors du territoire," *Académie de Dr. Int., Recueil des Cours* (1926), II, 247, 283 ff, 377. Yet even Hall, a conspicuous opponent of jurisdiction over crimes committed abroad, concedes an important distinction between universality in its more comprehensive form and universality as limited in the present article. He says:

As the refusal of an offer to surrender is the equivalent of consent to the trial of a prisoner by the state making the offer, the jurisdiction afterwards exercised does not take the form of a jurisdiction exercised as of right. (*International Law*, 8th ed., 1924, p. 262.)

And in colonial New England we find a quaint instance of universality asserted as an alternative to surrender for trial elsewhere:

It is enacted by the Court that whosoever haveing comitted uncleanes in another Collonie and shall come hither and have not satisfyed the law where the faet was comitted they shalbe sent baeke or heer punished according to the nature of the erime as if the acte had bine heer done. (*Charter and Laws of New Plymouth*, by William Brigham, printed 1836, p. 162.)

Recourse to the principle of universality is an alternative to extradition in all the modern codes and the projects of codes noted *supra*, excepting only the Penal Code of Norway. The texts vary but the essential idea is the same. Since the offence may have been committed in part in one State and in part in another, the text here adopted requires that an offer of surrender be made to "such other State or States," thus assuring precedence in all cases to the territorial jurisdiction. If the crime was committed in two or more States, the question whether offers should be made simultaneously or in a determined sequence is for the law governing extradition to decide. The text here adopted requires an actual offer of surrender; mere notice is not enough. It does not require that the offer be formally declined; it is enough if the State or States to which the offer is communicated either decline, fail to proceed for whatever reason, or do not reply.

It is to be noted that Italy, and under Italian influence, Albania and Turkey, as well as the Third International Congress of Penal Law (Palermo, 1933), require also an offer of surrender to the State of which the alleged offender is a national. While there is nothing in the present article to prevent such an offer, it is felt that it should not be required as a necessary condition to the exercise of jurisdiction on the principle of universality. Were the requirement incorporated, there would be imposed upon the competence of States an added restriction which appears to be unwarranted by anything in international law and unsupported by the existing practice of States. Of the many States providing for some jurisdiction on the universality principle, only the three noted require an offer of surrender to the State of allegiance.

The next condition requires that "prosecution must not be barred by lapse of time in the place where the crime was committed." Since recourse to the principle of universality is permissible under par. (a) only as an alternative to surrender for prosecution at the place where the offence was committed, it seems correct to affirm the superior authority of the territorial law with respect to limitation or prescription. If prosecution is barred at the place where the offence was committed, it is only just that it

should be barred everywhere. A similar requirement is found in the legislation of Bulgaria, Hungary, and perhaps Yugoslavia. Many States incorporate the requirement in legislation providing for the prosecution of nationals for crimes committed abroad. *A fortiori*, it would seem, the requirement should be incorporated here. See also Foelix, *Droit International Privé* (3d ed., 1856), II, sec. 602.

Finally, it is stipulated that "the penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed." Again the superior authority of the territorial law is affirmed and a safeguard is established against consequences which might appear unjust from the point of view of the State or States where the offence was committed. Similar provisions are found in the codes of Austria, Bulgaria, Hungary, and Poland, and in the Resolutions of the Conference on the Unification of the Penal Law (Warsaw, 1927), as well as in the legislation of some States providing punishment for crimes committed by nationals abroad. In view of the widely varying punishments provided in different States for the same type of offence, the stipulation seems essential if the offender is to be assured, in the State which invokes the principle of universality, substantially the same treatment as he would have received if he had been surrendered to a State in which he committed the offence.

In addition to the above conditions, national legislation frequently requires approval of the prosecution by a designated administrative or executive official or, in some classes of cases, a complaint on the part of the injured party. Since the present Convention is concerned only with the international competence of States, and since this type of requirement would appear to be matter of internal procedure rather than international competence, it has not seemed appropriate to include anything of the kind in the present article. There is probably much to be said for such requirements, particularly for certain classes of cases, but they are matters with respect to which each State remains free to make its own decision.

It thus appears that the principle herein defined and limited is in no respect the sort of jurisdictional cosmopolitanism which some have espoused and others have condemned. In no case does it recognize an original or primary competence based solely upon the presence of the accused. It is by no means a principle under which any State may prosecute and punish anyone for anything done anywhere. Rather it is a conservative statement of a subsidiary competence, available in case there can be no surrender to the State or States where the offence was committed, carefully circumscribed by limitations suggested by the best contemporary practice, and fully secured against possible abuse by the safeguards of Articles 13 to 17, *infra*. It will seldom be invoked in actual practice; but it has been emphatically affirmed, as has been noted, in the national legislation of a great number of States, it may serve a useful purpose on exceptional occasions, and it is clearly entitled to a place in

a convention which purports to embody a complete statement of international penal competence.

CRIMES COMMITTED IN A PLACE NOT SUBJECT TO THE AUTHORITY OF ANY STATE

Paragraph (b) of the present article formulates an application of the principle of universality with respect to crimes committed by an alien in a place which is not subject to the authority of any State. The principle thus formulated applies to offences which are neither committed within the territory of any State nor upon the ships or aircraft of any State. It may be assumed that there will be few occasions for the exercise of such jurisdiction; but the likelihood of cases arising seems sufficiently clear to require the formulation of a principle in a convention which aims to incorporate a comprehensive statement of State competence to prosecute and punish for crime.

It is not possible to exhaust, within the scope of this comment, the meaning of "a place not subject to the authority of any State." One hundred years ago considerable land areas would have fallen within this category; today States have asserted a territorial authority over most of the land areas of the world. Nevertheless certain areas may remain so imperfectly organized for the administration of criminal justice as to be virtually "not subject to the authority of any State"; and other areas now sufficiently organized may return, with changing circumstances, to such a condition. Parts of the Antarctic continent now claimed by certain States may conceivably be regarded by other States as *terra nullius* or *terra communis*; and much of the Antarctic area is admittedly *terra nullius* at the present time. See Hall, *International Law* (8th ed.), p. 125, note; Reeves, in 28 *Am. Jour. Int. L.* (1934), 117. Numerous expeditions have visited and explored the Antarctic area; its marine resources have attracted whaling, sealing and fishing; and at some future date its mineral resources may attract exploitation. See Greely, *Polar Regions in the Twentieth Century* (1928), pp. 229 ff, 250 ff. Spitzbergen was treated as *terra nullius* until 1920, although it had been known, visited and inhabited for various industrial and commercial purposes since the seventeenth century. Franz Josef Land, now claimed by Russia, was often visited before it was claimed as the territory of any State. As recently as 1931, Norway contended with some plausibility that East Greenland was *terra nullius*, though the Permanent Court of International Justice has recently held otherwise. *Publications P.C.I.J.*, Series A/B, No. 53. In the Pacific, perhaps even in the Caribbean, there may still be small islands, atolls, reefs and rocks which are part of no State's territory. It is possible that parts of Arabia, especially in the southeast, such as the "Empty Quarter" (apparently not included in the Arabian Saudian Kingdom, Yemen, Muscat, or parts under an effective British protectorate), may be regarded as "not subject to the authority of any State."

In addition to land areas of doubtful or unknown status, there are large ice areas, some attached to the land and others floating free. It is extremely

doubtful whether these ice-fields or ice-floes can be regarded as territory or subject to territorial authority, even on the so-called Arctic-Sector principle. Nevertheless people can live on them for long periods of time, as is evidenced by the Norwegian sealers and Icelandic fishermen who work regularly on drifting icepacks, the Eskimo, Russian and Siberian hunters who travel long distances on the ice, the polar expeditions which have remained for long periods on the ice, and the possibility, demonstrated by Wilkins, of using ice-fields as emergency landing-fields on the shortest air-routes between Europe and much of America or eastern Asia. Not only is it possible that crimes may be committed wherever men may go, but there are already on record such instances as a gambling house on the ice more than three miles from the Alaskan coast, 11 *Rev. Gén. de Dr. Int. Pub.* (1904), 340; Green's killing of an Eskimo on the Arctic ice during the MacMillan Expedition of 1914 (Greely, *Polar Regions in the Twentieth Century*, 1928, p. 91); the murder by Eskimos of a leader of the Peary expedition in 1909 (Greely, *op. cit.*, p. 205); and the crimes committed, rude trials held and sentences executed by hunters and traders on the ice north of Siberia (more or less reliably reported in Welzl, *Thirty Years in the Golden North*, 1932, p. 305 ff).

By no means beyond possibility, in addition to the above, are offences committed on the high seas on ships or floating objects having no national character. It has been questioned whether pirate ships retain a national character; likewise as to various types of small boats or rafts. See comment on Article 4, *supra*, and *Reg. v. Waina and Swatoa* (1874), 2 N.S.W.L.R. 403, holding that a British ship's long-boat was not a British ship for jurisdictional purposes. There is also the possibility of crimes committed on floating logs, spars, or timbers, *e.g.*, the classical example of one survivor of a shipwreck pushing another off a spar. Crimes committed on a floating iceberg, or by a person swimming or supported by a surfboard or similar object, would certainly be "in a place not subject to the authority of any State" if outside territorial waters.

The aggregate of possibilities and more or less remote probabilities seems clearly sufficient to require a statement of governing principle if the present Convention is to be complete. In the absence of anything of the nature of territorial authority, the problem presented is *sui generis*. After a careful study of the problem, Travers concludes:

Il faut, selon nous, lorsque le crime ou le délit a eu lieu dans un Etat barbare ou sur un territoire sans maître, non seulement donner droit de juridiction aux Etats lésés par la nature même de l'infraction . . . mais aussi reconnaître le quadruple compétence 1. des lois de l'Etat dont le coupable est ressortissant ou protégé . . . 2. de celles du pays dont la victime est ressortissant ou protégé . . . 3. de celles de l'Etat de refuge . . . 4. de celles des pays dont la région non civilisée ou sans maître est limitrophe. (*Le Droit Pénal International*, 1920, I, sec. 369.)

See also Kauffmann, *Delikte auf staatslosem Gebiet* (1913). The State of which the accused is a national has jurisdiction under Article 5, *supra*, and

the State of which the victim is a national under Article 11, *infra*. The notion of jurisdiction based upon contiguity alone appears to have slight support in theory or practice. The other basis of jurisdiction suggested by Travers is covered adequately by par. (b) of the present article.

Application of the principle of universality to offences committed "in a place not subject to the authority of any State", thus permitting any State where the offender may be found to prosecute and punish, has the support of considerable opinion in addition to that of Travers. Pella says:

Pour en revenir à la question de la compétence universelle à raison du lieu où l'infraction a été commise, nous remarquerons qu'en dehors de la haute mer il y a encore les territoires sans maître . . .

Aussi longtemps qu'un Etat ne sera pas parvenu à imposer sa souveraineté exclusive sur ces territoires, tous les Etats y garderont, en vertu des principes ci-dessus indiqués, un droit virtuel de juridiction répressive. (*Académie de Dr. Int., Recueil des Cours*, 1926, V, 145, 223.)

Cybichowski, discussing "la compétence des tribunaux à raison d'infractions commises hors du territoire," says:

Quant aux délits commis sur une terre nullius ou dans un Etat barbare on leur applique le principe de la juridiction pénal originaire, car il n'existe pas de juridiction criminel que l'on puisse remplacer par celle d'un autre Etat. (*Académie de Dr. Int., Recueil des Cours*, 1926, II, 251, 291.)

To the same effect, see Nachbaur, "*Droit Pénal International*," in de Lapradelle et Niboyet, *Répertoire de Dr. Int.* (1930), VII, 441, 474; Rolin, *International Prison Congress* (1900), II, 399; and Schoenborn, in *Académie de Dr. Int., Recueil des Cours* (1929), V, 81, 164 (as to floating ice, in particular).

From the United States, we find a New Jersey opinion suggesting that

Where an act *malum in se* is done in solitudes, upon land where there has not yet been formally extended any supreme power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water. (*State v. Carter*, 1859, 3 Dutcher, N. J. L., 499, 502.)

See also Hepner, *Extraterritorial Criminal Jurisdiction and its Effects on American Citizens* (1890), p. 17. And see the official reply of the Rumanian Government to the questionnaire of the League of Nations' Committee of Experts for the Progressive Codification of International Law:

Besides the high seas, there are also unowned territories, . . . and until some State acquires exclusive sovereignty over them, every State, in virtue of the principles described above, will naturally have a theoretical right of punitive jurisdiction over them. . . .

The fact of the apprehension of the criminal transforms the theoretical right into an actual right. . . .

Supposing, for example, that a band of brigands in some unowned territory attacks and plunders a convoy or caravan and escapes capture by its victims, what is the difference from the legal point of view between piracy on the high seas and pillage in unowned territory?

Although certain publicists maintain that in such cases the right of suppression may only be exercised by the State to which the villain belongs, or by States bordering on the unowned territory, this theory is undeniably quite arbitrary and is not founded on any of the principles now underlying the application of criminal law.

If the act was committed in unowned territory, it is universally punishable in virtue of the same principles as those which make piracy on the high seas universally punishable. (*League of Nations Document C. 196, M. 70. 1927. V. 1., pp. 190, 204.*)

While but few States have dealt in their penal legislation with crimes committed in a place not subject to the authority of any State, unless to extend their laws to their own nationals in such places, the following may be noted:

Germany, Project of Penal Code (1927), sec. 7. The penal laws of the Reich apply to other acts committed abroad, if the act is incriminated by the law of the place of the act and if the actor . . .

2. At the time of the act was an alien, has been arrested upon the territory, and has not been extradited, although extradition would be permissible in view of the nature of the act.

If the place of the act is not subject to the authority of any state, it is sufficient that the act is punishable by the laws of the Reich.

The Polish penal code, in conjunction with Art. 10 providing for jurisdiction over aliens who commit crimes abroad, if extradition is not granted, stipulates as follows:

Poland, Penal Code (1932), Art. 6, sec. 1. L'acte commis à l'étranger n'entraîne la responsabilité pénale que sous la condition que le dit acte soit qualifié infraction par la loi en vigueur au lieu de son accomplissement.

Art. 7. Les dispositions de l'article 6 ne sont pas applicables: . . .

b) aux personnes qui ont commis une infraction dans un lieu qui n'est soumis à l'autorité d'aucun Etat.

The Criminal Code of the Swiss canton of Vaud (1931), provides in Art. 5:

Les dispositions du present code sont applicables: . . .

(f) aux délits commis hors du canton, dans un lieu qui n'est soumis à aucune souveraineté, lorsque l'inculpé peut être appréhendé dans le canton. . . . Dans les cas prévus sous litt . . . (f) ci-dessus, la poursuite pénale est subordonnée à l'autorisation du Conseil d'Etat.

See also the Bustamante Code (1928), Art. 308, providing as follows:

Piracy, trade in negroes and slave traffic, white slavery, the destruction or injury of submarine cables, and all other offences of a similar nature against international law committed on the high seas, in the open air, and on territory not yet organized into a State, shall be punished by the captor in accordance with the penal laws of the latter.

It would appear, in short, that the problem is of sufficient importance to require a solution in the present Convention and that the principle of universality incorporated in this article may provide an acceptable solution.

Paragraph (b) requires that "the act or omission which constitutes the crime must also be an offense by the law of a State of which the alien is a national." It prescribes, subject also to the safeguards formulated in Articles 13 to 17, *infra*, a set of conditions which are intended to establish definitely the superior authority of the law of the State of which the alien is a national. Thus it is required that an offer of surrender for prosecution be made to the State or States of which the alien is a national, that prosecution shall not be barred by lapse of time under the law of any such State, and that the penalty be no more severe than is provided for the same crime by the law of such a State. It is assumed that the State of the alien's allegiance has an interest in the prosecution which is superior to that of the State whose concern arises only from custody of the accused, in short, that jurisdiction on the universality principle is auxiliary and inferior to jurisdiction based upon the principle of nationality. Possible cases of double or multiple nationality have made necessary the phrasing "a State of which the alien is a national," "the State or States of which he is a national," and "any State of which the alien is a national." In such cases, par. (b) of the present article requires that at least one State of allegiance make the act or omission a crime, that surrender be offered to every State of allegiance and be accepted by none, that prosecution be barred by the law of no such State, and that the penalty be no more severe than that provided by the law of any such State. With the interest of the State or States of which the alien is a national thus safeguarded, it is difficult to conceive of any possible objection on the part of other States to an exercise of jurisdiction by the State which has lawful custody of the accused.

Paragraph (e) of the present article refers to the very unusual case of crime committed in a place not subject to the authority of any State by an alien who is not a national of any State. Such an alien, of no nationality, may be prosecuted and punished wherever found. There is neither an applicable territorial law, nor a national law, and the injured party may be an alien. Unless such offenders are to go completely unpunished, they must be subject to prosecution wherever apprehended. The case is unlikely to occur; but if it does occur, there appears to be no possible objection to jurisdiction on the universality principle. The safeguards incorporated in Articles 13 to 17, *infra*, are entirely adequate.

ARTICLE 11. PASSIVE PERSONALITY

A State has jurisdiction with respect to any crime committed in a place not subject to the authority of any State, by an alien, if the crime was committed to the injury of that State, or of one of its nationals, or of a corporation or juristic person having its national character.

COMMENT

In relation to Article 10, paragraph (b), preceding, the present article provides for the only case of an offence committed in a place not subject to the authority of any State, by an alien, with respect to which the State having lawful custody of the accused may properly claim an interest superior to that of the State of which the accused is a national, namely, the case of an offence to the injury of the State having custody, of one or more of its nationals, or of one or more corporations or juristic persons having its national character. Elsewhere the present Convention excludes the theory of passive personality (jurisdiction based upon the nationality of the injured party). Here, however, in the absence of any territorial authority, it would seem clear that the State which is injured directly or through its nationals has at least as vital an interest as the State of which the accused is a national, and that the former State, if it has lawful custody of the accused, should be competent to prosecute and punish.

Approval of the principle of passive personality in case of offences committed in a place not subject to the authority of any State is supported, of course, by the law and practice of those States, by no means inconsiderable in number and importance, which now affirm the principle generally. See Article 10, comment, *supra*. Perhaps even more significant is the support of legislation and opinion rejecting the principle elsewhere. Thus Travers, in general a vigorous opponent of the theory of passive personality, makes an exception in favor of the theory for offences committed where there is no territorial jurisdiction.

Le troisième cas, dans lequel nous croyons que la loi pénale de la victime est applicable à ce seul titre est celui où il n'existe pas de loi répressive du lieu de l'infraction. . . .

En pareille occurrence, le devoir de protection de l'Etat dont la partie lésée est ressortissante, redevient absolu.

Les intérêts généraux d'un Etat exigent que tout ressortissant, atteint par un fait assez grave pour revenir tous les éléments d'une infraction à la loi pénale, trouve une loi et des tribunaux pour le protéger. (Travers, *Le Droit Pénal International*, 1920, I, sec. 71.)

To the same effect, see Travers, "*Compétence Criminelle*", in de Lapradelle et Niboyet, *Répertoire de Dr. Int.* (1930), IV, 360, 369. And see Klüber, *Droit des Gens Moderne de l'Europe* (1819), sec. 61.

Of similar import is the statement of the American, Francis Wharton:

If an American citizen is murdered or plundered abroad, it is the duty of his country to exact redress and retribution. . . . If the crime is committed in a barbarous or semi-barbarous land, where a demand for extradition is not recognized, and where justice is not inflicted in accordance with civilized jurisprudence, then we have the right to execute justice ourselves, by seizing the offenders and trying them according to our laws, in all cases in which these laws embody crimes against men, irrespective of local limitations. Ignorance of law would, indeed, avail

as a defense as to offences not *mala in se*. But as to offences *mala in se*, wherever the rights of a citizen are assailed, then it is the prerogative of his state to require redress. (Wharton, "Extraterritorial Crime", 4 *Southern Law Rev.*, N.S., 1879, 676, 701.)

For American action on this principle in Samoa, see Ryden, *Foreign Policy of the United States in Relation to Samoa* (1933), pp. 20-23.

Great Britain is among the States most strongly opposed to the principle of passive personality, yet in at least one instance, where the circumstances were such as to come within the present article, British authorities took jurisdiction:

A British subject having been murdered in 1877 by natives in the island of Tanna, H.M.S. "Beagle" proceeded thither; the murderer was tried by two naval officers, was found guilty, and executed by hanging at the foremast of the "Beagle", the commander being aware that Sir George Innes, Attorney-General for New South Wales, had already given an opinion, based on previous decisions, that there was no jurisdiction in the colonial courts to try such islanders, they not being British subjects, and the crime not being committed within British territory. The Admiralty deemed that the commander had adopted the most humane course, and approved thereof, . . . that the only real justification for so unusual a mode of punishment lay in the circumstance that the crime committed was not justiciable by any civilized tribunal, and was of such a nature as not to admit of any more merciful course being adopted. . . . The Attorney-General in the House of Commons supported the action of the naval officers. (Halleck, *International Law*, Baker's 4th ed., 1908, I, 220.)

Similarly the Danish Penal Code (1930), which does not admit a general jurisdiction based on the nationality of the party injured, provides in Art. 8:

There fall within Danish jurisdiction, regardless of the perpetrator's nationality, acts committed abroad: . . .

3. If committed outside of what is recognized by international law as the territory of any state, if the act is committed to the injury of a Danish national or a person resident in Denmark, and is an act of such a sort as to be punishable by a penalty more severe than arrest (*Haefte*).

The Danish provision may be particularly significant in view of the large number of Danish nationals engaged in enterprises which take them into places not subject to the authority of any State.

And in France, another State rejecting the principle of passive personality in general, the Cour de Cassation has upheld the jurisdiction of a colonial court in a case involving the killing of a French national by natives in a part of Africa not then subject to any State. The Court observed:

Pour la protection de ses nationaux, la France conserve toujours les droits qu'elle tient de la légitime défense . . . qu'elle peut se saisir des coupables et les livrer à la justice de ses tribunaux. (Case of *Suleman*, May 17, 1839, Dalloz, *Répertoire*, "Compétence eriminelle," No. 111, pp. 336-337.)

Foelix, *Traité du Droit International Privé* (Demangeat 3d ed. 1856), II, 294, accepts this as a general rule for crimes against nationals in places not subject to the authority of any State. It has been held, however, that France has no jurisdiction on this principle over a crime by an alien against a native subject of a protected chief. Case of *Roland and Brown* (Cour d'assises du Sénégal), Clunet (1882), 281. For these and other French cases, see Travers, *Le Droit Pénal International* (1920), I, sec. 361 ff.

ARTICLE 12. IMMUNITIES

In exercising jurisdiction under this Convention, a State shall respect such immunities as are accorded by international law or international convention to other States or to institutions created by international convention.

COMMENT

This article requires that States, in exercising jurisdiction under this Convention, shall respect such immunities from jurisdiction or the exercise of jurisdiction as international law or international agreement have accorded to other States, or to Institutions created by international convention, or to such States or Institutions for their officers, diplomatic representatives, consuls, armed forces, public or private ships, aircraft, or other agencies or instrumentalities. The general principle is universally acknowledged. Particular applications must be determined by reference to the law governing immunities. It is not within the scope of the present Convention or comment to consider particular applications.

The immunities of sovereigns and heads of States are considered in Adinolfi, *Diritto Internazionale Penale* (1913), pp. 176-180; Alcorta, *Principios de Derecho Penal Internacional* (1931), I, p. 268 ff; Tobar y Borgono, *Du Conflit International du Sujet des Compétences Pénales* (1910), pp. 227-255; and Travers, *Le Droit Pénal International* (1921), II, secs. 876-879. The immunities of persons entitled to diplomatic privilege are considered in the Draft Convention on Diplomatic Privileges and Immunities, especially in Articles 18 and 19 and comment thereon, *Research in International Law* (1932), pp. 15-187, 97, 99; and in Adinolfi, *op. cit.*, pp. 180-187; Alcorta, *op. cit.*, I, 270 ff; Diaz, *Derecho Penal Internacional* (2d ed. 1911), pp. 88-104, 163-172; Tobar y Borgono, *op. cit.*, p. 256 ff; and Travers, *op. cit.*, II, secs. 789-792, 837-875. Similar limitations with respect to jurisdiction over consuls, especially as regards offences committed in the performance of their duties, are considered in the Draft Convention on the Legal Position and Functions of Consuls, particularly in Articles 21, 27 and 28, and comment thereon, *Research in International Law* (1932), pp. 189-449, 338, 356, 358; and in Alcorta, *op. cit.*, I, p. 276; Tobar y Borgono, *op. cit.*, p. 510 ff; and Travers, *op. cit.*, II, secs. 793-830. For a list of treaties dealing with consuls, see Feller and Hudson, *Diplomatic and Consular Laws and Regulations* (1933), II, pp. 1419-1472. Materials on the immunities of foreign military forces

are collected in Adinolfi, *op. cit.*, p. 193 ff; Aleorta, *op. cit.*, I, pp. 308-310; Diaz, *op. cit.*, pp. 104-105; Tobar y Borgono, *op. cit.*, p. 748 ff; and Travers, *op. cit.*, II, sees. 879, 956-974. With respect to the immunities of public and private ships, see the Draft Convention on the Law of Territorial Waters, especially Articles 15, 17, 18 and 19, *Research in International Law* (1929), pp. 241-380, 297, 299, 307, 328; and Aleorta, *op. cit.*, I, pp. 282-298, 300-301; Diaz, *op. cit.*, pp. 120 ff, 158 ff; Jessup, *Law of Territorial Waters and Maritime Jurisdiction* (1927), ch. 3; Tobar y Borgono, *op. cit.*, pp. 597-703; Travers, *op. cit.*, II, sees. 883-943. Offences on foreign airships within or over the territory are considered in Aleorta, *op. cit.*, I, pp. 307-308; and Travers, *op. cit.*, II, sees. 944-953.

With regard to immunities accorded to international institutions for their members, agents, or premises, see Hill, "Diplomatic Privileges and Immunities in International Organizations," 20 *Georgetown L. Jour.* (1931), 44; Preuss, "Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest," 25 *Am. Jour. Int. L.* (1931), 694; and Rey, "*Les immunités des fonctionnaires internationaux*," 23 *Rev. de Dr. Int. Privé* (1928), 253, 432. On immunities, in general, see van Praag, *Juridiction et Droit International Public* (1915).

While the immunities mentioned above are those more often invoked and most fully discussed in the literature, the present article is not confined to any particular list or enumeration. Enumeration in comment is only by way of illustration. The exercise of jurisdiction under this Convention must be in conformity with the limitations established by any immunity accorded to States or to international Institutions by international law or by conventions in force.

It would appear, for example, that an immunity under international law may be claimed under certain circumstances where an act, otherwise punishable, has been authorized or adopted by a State as its public act. A classical instance is *M'Leod's Case*, arising out of the Fenian invasion of Canada in 1838. The case is summarized in Moore, *Act of State in English Law* (1906), p. 126 ff, as follows:

In the course of the conflict between the Canadian and Fenian Forces at the boundary line of United States and Canadian territory, the Canadian forces crossed the line and attacked a vessel called the *Caroline*, forming part of the Fenian forces, which was lying at her mooring in American waters. The vessel was sunk, and some lives were lost. The British Government assumed responsibility for the act, and the United States demanded explanations, which were given and accepted. In 1841, M'Leod, who was a member of the colonial forces engaged in the *Caroline* incident, was in New York, and was there arrested and indicted for murder. Great Britain at once addressed herself to the Federal authorities and demanded M'Leod's surrender, on the ground that "the transaction on account of which M'Leod has been arrested, and is to be put on his trial, is a transaction of a public kind, planned and executed by persons duly empowered by Her Majesty's colonial

authorities to take any steps and do any acts which might be necessary for the defence of Her Majesty's territories, and for the protection of Her Majesty's subjects; and that consequently those subjects of Her Majesty who engaged in that transaction were performing an act of public duty for which they cannot be made personally answerable to the laws and tribunals of any foreign country" ("State Papers," 1840-1, vol. xxix, p. 1127). It was added that "the question is one especially of a political and international kind, which can be discussed and settled only between the two Governments, and which the Courts of Justice of the State of New York cannot by possibility have any means of judging, or any right of deciding." In this view, the Government of the United States entirely concurred, the Secretary of State (Mr. Daniel Webster) writing: "The Government of the United States entertains no doubt that after this avowal of the transaction as a public transaction authorised and undertaken by the British authorities, individuals concerned in it ought not by the principles of public law and the general usage of civilised States to be holden personally responsible in the ordinary tribunals of law for their participation in it." (*Ibid.*, p. 1131.)

See further Moore, *op. cit.*; Scott, *Cases on International Law* (1922), p. 398. In this case, M'Leod's act was done within the territory of the United States and the adoption of his act by Great Britain as its public act was thus pleaded to prevent an exercise of territorial jurisdiction otherwise unquestionable.

By way of further example, it would no doubt be contrary to international law for a State to treat all members of the armed forces of an enemy State, whether nationals of the enemy State or of a neutral State, as criminals. The common provision punishing the carrying of arms against the State or against an allied State is generally made applicable only to nationals. See Belgium, Penal Code (1878), Art. 113; France, Penal Code (1810), Art. 75; Germany, Penal Code (1871), Art. 88; Italy, Penal Code (1930), Art. 242. The German Project of 1927 contains a section (sec. 120) providing for the punishment of anyone who shall recruit German nationals for a foreign military service. This section is made applicable without respect to the nationality of the offender or the place of the offence (sec. 6). However, the enforcement of this section against a French officer recruiting German nationals in France for the Foreign Legion in Morocco, for illustration, would be without doubt a violation of international law. Apparently with such eventualities in view, sec. 23 of the Project provides that "a punishable act does not exist if the illegality of the act is excluded by public [including international] or civil law."

The principle of the present article has been recognized expressly in the national laws of a number of States. Some national codes include a general reference to principles of international law. Thus the Penal Code (1881) of the Netherlands provides:

Art. 8. L'applicabilité des articles 2-7 est restreinte par les exceptions reconnues dans le droit des gens.

See also Denmark, Penal Code (1930), Art. 12; and Norway, Penal Code (1902), Art. 14. The Costa Rican Penal Code (1924), provides:

Art. 223. The penal law of the Republic is binding on all the inhabitants, including aliens; but proceedings by virtue of it cannot be brought in the country against the persons who, by their diplomatic character or other reason, enjoy, according to international law or the dispositions of a public treaty, the privileges of immunity or extraterritoriality.

Similar provisions are found in Argentina, Code of Criminal Procedure (1888), Art. 25, No. 1; Brazil, Project of Penal Code (1927), Art. 11; Bulgaria, Penal Code (1896), Art. 3, No. 1; Chile, Code of Penal Procedure (1906), Art. 1; Colombia, Penal Code (1890), Art. 20, No. 1; Cuba, Project of Penal Code (Ortiz, 1926), Art. 33; Estonia, Penal Code (1931), Art. 5; Finland, Penal Code (1889), Art. 7; Guatemala, Penal Code (1889), Art. 8, No. 1; Hungary, Penal Code (1878), Art. 5; Italy, Penal Code (1930), Art. 2; Latvia, Penal Code (Russian Code of 1903), Art. 5; Lithuania, Penal Code (1930), Art. 5; Nicaragua, Penal Code (1891), Art. 11; Panama, Penal Code (1922), Art. 5; Rumania, Project of Penal Code (1926), Art. 3; Russia, Penal Code (1903), Art. 5, sec. 4; R.S.F.S.R., Penal Code (1922), Art. 1; Sweden, Penal Code (1864), sec. 4; Uruguay, Project of Penal Code (1932), Art. 9.

Similar also is the provision in the Resolutions of the Conference on the Unification of the Penal Law (Warsaw, 1927):

Art. 1, par. 3. Ne sont pas soumises aux lois pénales, les personnes qui, d'après le droit international ou d'après les conventions spéciales, sont soustraites à la juridiction pénale des tribunaux . . . (x).

See also Resolutions of the Institute of International Law (Cambridge, 1931), Art. 1; Treaty of Montevideo (1889), Art. 7. Article 5 of R.S.F.S.R. Penal Code (1926) provides for diplomatic settlement of such situations.

Provisions of the type noted above incorporate merely a reference to the general principle. They do not attempt an enumeration of the situations in which an immunity may be claimed but only refer to international law and treaties. The text of the present article follows this example.

There are other codes which do attempt something of the nature of an enumeration without, however, purporting to make the enumeration complete. One of the most restricted is the enumeration contained in the Spanish Penal Code (1928) as follows:

Art. 25. The penal laws are applicable to all persons, whatever may be their condition, saving the inviolability of the King, with the following exceptions: . . .

2. As to the Kings, Presidents or Chiefs or Hereditary Princes of other states, Ambassadors, Ministers plenipotentiary, and Ministers resident, Chargés d'Affaires, and aliens employed in the Legations; who, when they transgress will be put at the disposition of their respective governments.

3. As to Consuls-General, Consuls, and Vice-Consuls, being subjects of the state which names them, in the measure that international treaties determine.

Legislation dealing in a particular way with certain immunities or limitations is found also in Cuba, see Bustamante, *Derecho Internacional Privado* (1931), III, 23-31, and Project of Penal Code (Ortiz, 1926), Art. 34; Denmark, Penal Code (1866), sec. 8; France, Project of Penal Code (1932), Art. 12; Honduras, Law of Organization of Courts (1906), Art. 171; Iraq, Bagdad Penal Code (1918), Art. 2; Liberia, Criminal Code (1914), sec. 19; Portugal, Penal Code (1886), Art. 53; Spain, Organic Law of Judicial Power (1870), Art. 334; Venezuela, Penal Code (1926), Art. 4, No. 5.

Perhaps the most nearly complete of any of the enumerations now in effect is that found in the Bustamante Code, in force between fourteen or more of the Latin-American republics. Among its rules on criminal jurisdiction, the Bustamante Code provides:

Art. 297. The head of each of the contracting States is exempt from the penal laws of the others when he is in the territory of the latter.

Art. 298. The diplomatic representatives of the contracting States in each of the others, together with their foreign personnel, and the members of the families of the former who are living in his company enjoy the same exemption.

Art. 299. Nor are the penal laws of the State applicable to offenses committed within the field of military operations when it authorizes the passage of an army of another contracting State through its territory, except offenses not legally connected with said army.

Art. 300. The same exemption is applied to offenses committed on board of foreign war vessels or aircraft while in territorial waters or in the national air.

Art. 301. The same is the case in respect to offenses committed in territorial waters or in the national air, on foreign merchant vessels or aircraft, if they have no relation with the country and its inhabitants and do not disturb its tranquillity.

It is obvious, of course, that few or none of the national code provisions of this type are actually exhaustive. It may be that certain of the immunities stipulated in a particular code are not required by international law. On the other hand, international law may require others which are not stipulated. In a general convention on penal competence, it will be better to follow the more common practice of incorporating by general reference such immunities from the exercise of criminal jurisdiction "as are accorded by international law or international convention."

ARTICLE 13. ALIENS—PROSECUTION AND PUNISHMENT

In exercising jurisdiction under this Convention, no State shall prosecute an alien who has not been taken into custody by its authorities as permitted by international law or international convention, prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment,

prosecute an alien otherwise than by fair trial before an impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination.

COMMENT

This is the first of a series of four articles (Articles 13, 14, 15 and 16) formulating or restating certain essential safeguards which must in all cases limit the prosecution of aliens for crime. While the authority for much that is contained in these articles is ordinarily associated with the law and practice governing the protection of nationals abroad or the responsibility of States for injuries to aliens, it is believed that the underlying principles should have a place in the present Convention. They constitute, in a sense, an essential complement to the broad principles of penal competence which are formulated in the earlier articles of the Convention. They provide the obvious answer to the objection, almost always forthcoming when penal jurisdiction is stated in terms of general principles, that the competence thus defined may be abused. In one aspect, at least, they concern jurisdiction intimately. A State has jurisdiction as defined and limited in the present Convention. It may not act in excess of its competence thus defined, nor may it abuse its competence by acting in an improper manner. The present article and the three articles following are concerned primarily with the manner of exercising competence with respect to aliens.

The difference between competence and the manner of exercising competence, it being admitted that each is subject to limitations, is something which may easily be over-emphasized. There is a logical difference, to be sure, between saying that a State may proceed only so far along a certain course in prosecuting aliens for crime and saying that a State may proceed along the same course in prosecuting aliens subject to procedural limitations; but the difference does not warrant a complete disassociation either of the underlying ideas or of the principles in which they find convenient expression. A convention so deferential to logical categories as to deal with one and ignore the other would hardly be complete.

The present article incorporates a group of procedural limitations which each State is obligated to respect whenever it undertakes to prosecute and punish an alien. These limitations are a part of the procedural minima which international law requires of all States. Inability or unwillingness to assure respect for such minima was long the principal justification for maintaining extraterritorial jurisdiction in eastern countries. That many States do not succeed at the present time in keeping the administration of justice within their borders consistently above the minimum standard is evidenced by the continued accumulation of international cases of familiar type in which indemnities are awarded by claims commissions. For the present article, as for the present Convention, there may be claimed the advantages which are usually conceded to *lex scripta*. It provides a text to which

States may recur whenever an issue is raised as to an alleged abuse of the competence with respect to aliens which is herein defined and limited. It sets a standard which must be maintained if jurisdiction is to be exercised without incurring international responsibility.

The constitutions, penal codes and legislation of most countries contain safeguards with respect to prosecution for crime which protect aliens as well as nationals and which, if made effective, serve to insure the observance of the minimum standard. In the aggregate they are evidence that such safeguards are required by "the general principles of law recognized by civilized nations" (Statute of the Permanent Court of International Justice, Art. 38, par. 3).

Thus the Constitution of the United States provides:

Amendment 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 8. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 14, sec. 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

Similar safeguards are incorporated in the constitutions of States of the United States.

For constitutional provisions elsewhere, apparently having a more or less similar purpose, see Albania, Constitution (1928), Arts. 126, 128, 205; Argentina, Constitution (1853), Arts. 18, 102; Bolivia, Constitution (1880), Arts. 5-7, 9-10; Brazil, Constitution (1891), Art. 72, Nos. 13-16, 20-21; Chile, Constitution (1925), Arts. 11, 13-16, 18; Colombia, Constitution (1886), Arts. 23-26; Costa Rica, Constitution (1871), Arts. 39-40, 42-43; Cuba, Constitution (1901), Arts. 15-21; Denmark, Constitution (1915), Art. 78; Greece, Constitution (1927), Arts. 8-12, 17, 100; Guatemala, Constitution (1879), Arts. 30-36; Honduras, Constitution (1924), Arts. 30-40, 42,

48; Liberia, Constitution (1847), Art. 1, secs. 6-10, 20; Mexico, Constitution (1917), Arts. 19, 20, 22; Nicaragua, Constitution (1911), Arts. 24-37; Panama, Constitution (1904), Arts. 23-25; Paraguay, Constitution (1870), Arts. 20-22; Peru, Constitution (1919), Arts. 24, 27; Poland, Constitution (1921), Arts. 97, 98; Portugal, Constitution (1911), Art. 3, Nos. 20-24, 31; Uruguay, Constitution (1917), Arts. 153-156, 159, 164; Venezuela, Constitution (1931), Art. 13, No. 15; Yugoslavia, Constitution (1931), Arts. 6-8. See also Afghanistan, Constitution (1931), Arts. 19, 91; Austria, Constitution (1929), Art. 90; Bulgaria, Constitution (1879), Arts. 73-75; Estonia, Constitution (1920), Arts. 8, 9; Liechtenstein, Constitution (1921), Arts. 32, 33; Salvador, Constitution (1886), Arts. 19, 22; Turkey, Constitution (1924), Arts. 72, 73.

If to such constitutional provisions as those noted are added the provisions of similar effect in national codes of penal procedure and other legislation, and also the decisions of courts in the various countries determining the scope and effect of such provisions, there may be assembled an impressive body of evidence in support of the conclusion that the standards of international jurisprudence are the sublimation of national practice or at least of the ideals which set a standard for national practice.

The Draft Convention on Piracy, dealing with a particular crime, contains safeguards with respect to the prosecution of aliens for that crime. Article 14 of the Draft Convention provides:

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.
3. The law of the state must, however, assure protection to accused aliens as follows:
 - (a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.
 - (b) The accused person must be given humane treatment during his confinement pending trial.
 - (c) No cruel and unusual punishment may be inflicted.
 - (d) No discrimination may be made against the nationals of any state.
4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state. (Research in International Law, 1932, pp. 739, 852.)

The Draft Convention on the Responsibility of States, dealing with international responsibility for the mistreatment of aliens, formulates the general principle governing denial of justice in terms which are applicable to the criminal prosecution of aliens generally. Article 9 of the Draft Convention provides:

A State is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted

delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guaranties which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice. (Research in International Law, 1929, pp. 131, 173.)

The subject is generally treated under the responsibility of States for injuries to aliens and reference may be made to the Draft Convention on the Responsibility of States, *op. cit.*, pp. 131-239, and to the authorities there cited. See also Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 96-101; Moore, *Digest of International Law* (1906), VI, 273-285, 698-701, 767-773; Verdross, "Les Règles internationales concernant le Traitement des Etrangers," *Académie de Dr. Int., Recueil des Cours* (1931), III, 323; and the literature on the responsibility of States.

The following cases decided by the Claims Commission established between Mexico and the United States under the Convention of Sept. 8, 1923, as extended by subsequent conventions, may be noted as examples of a type of supporting authority: Case of *Faulkner*, Nov. 2, 1926, *Opinions*, p. 86 (also in 21 *Am. Jour. Int. L.*, 1927, 349); Case of *Roberts*, Nov. 2, 1926, *Opinions*, p. 100 (also in 21 *Am. Jour. Int. L.*, 1927, 357); Case of *Strother*, July 8, 1927, *Opinions*, p. 392; Case of *Chattin*, July 23, 1927, *Opinions*, p. 422; Case of *Turner*, July 23, 1927, *Opinions*, p. 416 (also in 22 *Am. Jour. Int. L.*, 1928, 663); Case of *Dillon*, Oct. 3, 1928, *Opinions*, p. 61; Case of *Kalkosch*, Oct. 18, 1928, *Opinions*, p. 126; Case of *Peter Koch*, Oct. 18, 1928, *Opinions*, p. 118; see also Case of *Quintanilla*, Nov. 16, 1926, *Opinions*, p. 136 (also in 21 *Am. Jour. Int. L.*, 1927, 568). And see cases cited in Ralston, *Law and Procedure of International Tribunals* (rev. ed. 1926), sec. 467 and *passim*; and de Lapradelle et Politis, *Répertoire de Dr. Int.* (1930), VI, 25. The records of other international tribunals may be made to yield similar supporting materials.

Turning to the particular safeguards which are incorporated in the present article, it will be noted that they are at once closely related to the exercise of penal jurisdiction and of fundamental importance. They express indispensable minima which must be observed in exercising jurisdiction over aliens under this Convention.

In the first place, no State shall prosecute an alien "who has not been taken into custody by its authorities as permitted by international law or international convention." In other words, there shall be no prosecution of aliens *in absentia*, *par contumace*, or *par défaut*. The codes of a few States contain provisions to the contrary; but no cases have been found in which such code provisions have been invoked to justify the prosecution of an alien who has not been taken into custody. Code provisions of this type have been widely criticized by writers. It is believed that diplomatic protest might follow if they were to be so invoked. The principle which forbids prosecu-

tion without custody is so obviously just as to make it an essential complement to the broad principles of penal jurisdiction formulated elsewhere in this Convention.

In the second place, in exercising jurisdiction under this Convention, no State shall "prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national." "The representatives of foreign governments often undertake by active attendance to watch criminal proceedings in which their countrymen are parties in interest." Borchard, *op. cit.*, p. 98. The right of the resident diplomatic or consular representative to communicate with any of his nationals who are held abroad on a criminal charge is indispensable if diplomatic interposition in behalf of nationals is to be effective. Disregard of this essential right has been the ground of diplomatic protest. See *U. S. For. Rel.* (1894), 302-315; Moore, *Digest of International Law* (1906), VI, 273. Like the exclusion of prosecution without custody, noted briefly above, it is a necessary complement to the broad principles of competence which are formulated in the earlier articles.

In the third place, it is stipulated that no State shall "subject an alien held for prosecution or punishment to other than just and humane treatment." The general principle is universally accepted. Controversies arise only with respect to its meaning in particular cases. "Unduly harsh or oppressive or unjust treatment during arrest, detention, trial or imprisonment, whether the accused was guilty or not," has frequently provided a ground for international reclamation and award. See, for example, Borchard, *op. cit.*, pp. 98-99, and cases cited. A similar safeguard is incorporated in the Draft Convention on Piracy, Art. 14, quoted *supra*. It is not to be doubted that international responsibility will ordinarily ensue from a failure to make this fundamental safeguard effective. Its relevancy in a draft convention on jurisdiction of crime seems obvious.

In the fourth place, no State shall "prosecute an alien otherwise than by fair trial before an impartial tribunal and without unreasonable delay." "If citizens of the United States are charged with a crime committed in a foreign country," said President Cleveland, "a fair and open trial, conducted with decent regard for justice and humanity, will be demanded for them." *Messages and Papers of the Presidents*, VIII, 497, 502. Judicial proceedings must be "regular and conducted in good faith and in accordance with the law and with the forms of civilized justice, and must not be arbitrary or unnecessarily harsh or discriminate against the alien on account of his nationality." Borchard, *op. cit.*, p. 98; and cases cited. "Treaties usually provide for due process of law in the litigation, civil or criminal, to which the respective citizens of the contracting states are parties, by stipulating for free access to courts, formal charges, an opportunity to be heard, to employ counsel, to examine witnesses and evidence, and a guaranty of essential safeguards against a denial of justice." *Ibid.*, p. 100. A similar safeguard

is incorporated in the Draft Convention on Piracy, Art. 14, quoted *supra*. Failure to secure a "fair trial before an impartial tribunal and without unreasonable delay" would undoubtedly amount to a denial of justice. See Draft Convention on Responsibility of States, Art. 9, and comment, *Research in International Law* (1929), pp. 173-187.

In the fifth place, no State shall "inflict upon an alien any excessive or cruel and unusual punishment." A "punishment disproportionate in severity to the offense charged" has been the ground for international reclamation and award. Borchard, *op. cit.*, p. 99; and cases cited. A similar safeguard is incorporated in the Draft Convention on Piracy, Art. 14, quoted *supra*. An "unnecessarily harsh, cruel, or arbitrary punishment" inflicted upon an alien constitutes a denial of justice. Draft Convention on Responsibility of States, Art. 9, *Research in International Law* (1929), pp. 173, 185.

Finally, no State shall "subject an alien to unfair discrimination." There may be reasonable discriminations between aliens and nationals, and between aliens who are nationals of different States. Indeed, treaties according special privileges to the nationals of one State may involve a discrimination against the nationals of another State. But such discriminations must be reasonable and just when tested by an international standard. Unfair discrimination has been the basis of numerous diplomatic interpositions; and the awards of claims commissions provide ample authority for the principle stated. There is good reason, therefore, for including it among the essential safeguards of the present article.

ARTICLE 14. ALIENS—NON BIS IN IDEM

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien after it is proved that the alien has been prosecuted in another State for a crime requiring proof of substantially the same acts or omissions and has been acquitted, or has been convicted and has undergone the penalty imposed, or, having been convicted, has been paroled or pardoned.

COMMENT

This article safeguards the alien accused of crime against more than one prosecution for the same offence. It embodies the just and salutary principle that no State may prosecute an alien after it is proved that he has been prosecuted in another State for substantially the same acts or omissions and has been acquitted, or has been convicted and punished, or has been convicted and paroled or pardoned. The principle is known throughout countries of the civil law as the rule of *non bis in idem*. In the Roman Law the underlying idea was expressed in the *Corpus Juris Civilis*, D.48.2.7.2, and C.9.2.9. A comparable, though not identical, common law principle is incorporated in the Fifth Amendment of the Constitution of the United

States in the following terms: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb."

Since it is quite impracticable under present conditions to establish in all cases a single jurisdiction for each offence, and since the present Convention incorporates principles under which there may be concurrent jurisdiction in two or more States over many offences, it is indispensable that the principle of *non bis in idem* should be accepted as an integral part of the conventional scheme. An accused who has been acquitted should not be required to prove his innocence again. One who has been convicted and punished has paid his debt to society and should not be again placed in jeopardy. So also as to one who, having been convicted, has obtained a parole or pardon. The principle is so obviously just, indeed, and so widely approved in the world's legal systems, that it hardly seems necessary to adduce reasons in its support. The reasons which have led to practically universal acceptance of the principle as between different tribunals of the same State are equally applicable as between the tribunals of different States. As Barbey, author of one of the most thorough and most recent studies of the subject, has said:

Point n'est besoin d'insister longuement sur les inconvients qui résulteraient, pour le justiciable, de l'inobservation, à son égard, de la règle *Non bis in idem*. Ils sont les mêmes d'ailleurs, soit que la question d'application de ce principe se pose sur le plan interne, soit qu'elle se pose, au contraire, sur le plan international. Autant dans le cas d'un acquittement que dans celui d'une condamnation exécutée, l'individu qui a été jugé et qui a subi la peine éventuellement prononcée contre lui doit pouvoir recouvrer son entière liberté individuelle et considérer son sort comme définitivement réglé. (*De l'Application Internationale de la Règle Non Bis in Idem*, 1930, p. 169.)

The prestige of judicial administration no less than fairness to the accused requires that the principle of *non bis in idem* be observed. A definitive judgment, appellate procedure having been exhausted, should be regarded as *res adjudicata* (*ehose jugée*). Barbey says:

Le prestige de la justice ne pourrait manquer d'être affecté par une dualité ou une multiplicité éventuelles de sentences répressives divergentes à l'occasion d'un même délit. (*Op. cit.*, p. 71.)

Montéage says:

De l'énergique sanction assurée au respect de la chose jugée, dépendent en grande partie l'autorité de la justice et la confiance accordée à ses décisions. ("De l'autorité de la chose jugée qui s'attache aux jugements étrangers rendus en matière criminelle," Clunet, 1885, 397.)

La confiance en la justice et le respect de ses décisions reposent, de la part du plaideur, sur l'autorité de la chose jugée par le magistrat compétent, de quelque souveraineté qu'émane son pouvoir. Il faut donc, avec soin, lui éviter le spectacle d'un conflit, presque toujours inexplicable pour lui, entre deux juridictions mêmes ressortissant de deux souverainetés différentes. (*Ibid.*, p. 404.)

Failure to respect the definitive judgments of tribunals of a competent State indicates, indeed, a lack of respect for the tribunals of that State. Donnedieu de Vabres says:

De quel droit l'Etat qui intervient en second lieu s'arrogé-t-il, vis-à-vis d'une affaire qui a déjà été jugée, un pouvoir de révision? Même s'il admet la déduction de la peine subie, n'est-ce pas, en définitive, son appréciation personnel du fait imputé qu'il a la prétention d'imposer? Cette prétention n'est-elle pas contraire au principe de l'égalité des Etats? (*Les Principes Modernes du Droit Pénal International*, 1928, p. 311.)

While most States apply the principle of *non bis in idem* as between tribunals within the State, some have been more conservative than others in applying it to foreign judgments. Among States allowing fullest scope for the operation of the principle, the Netherlands is noteworthy. Foreign penal judgments appear to be given virtually the same effect as domestic judgments, even in cases in which the crime may have been committed in the Netherlands.

Penal Code (1866), Art. 68.—A l'exception des cas où les décisions judiciaires sont susceptibles de revision, personne ne peut être poursuivi une seconde fois en raison d'un fait à l'égard duquel un juge néerlandais ou un juge d'une colonie néerlandaise ou d'une possession du royaume dans une autre partie du monde a rendu un jugement en dernier ressort.

Dans les cas où la décision ayant de force de chose jugée émane d'un autre juge, la même personne ne peut être poursuivie pour le même fait, s'il y a eu:

1. Acquittement ou renvoi de la poursuite.
2. Condamnation suivie d'exécution intégrale, de grâce ou de prescription de la peine.

Of like effect, see Peru, Code of Crim. Proc. (1920), Art. 10; and the Swiss Cantons of Fribourg, Penal Code (1924), Art. 3, and Neuchâtel, Penal Code (1891), Art. 4.

France would appear to go almost as far, applying the principle of *non bis in idem* to offences committed by French nationals abroad and to offences committed by aliens in France. The *Code d'Instruction Criminelle* (ainsi remplacé L. 26 févr. 1910) provides:

Art. 5. Tout Français qui, hors du territoire de la France . . .

Toutefois, qu'il s'agisse d'un crime ou d'un délit, aucune poursuite n'a lieu si l'inculpé justifie qu'il a été jugé définitivement à l'étranger, et en cas de condamnation, qu'il a subi ou prescrit sa peine ou obtenu sa grâce . . .

Art. 7 (Ainsi complété, L. 3 avr. 1903). . . . Aucune poursuite ne peut être dirigée contre un étranger pour crime ou délit commis en France, si l'inculpé justifie qu'il a été jugé définitivement à l'étranger et, en cas de condamnation, qu'il a subi ou prescrit sa peine ou obtenu sa grâce

See case of *Burcklé* (July 29, 1905), *Clunet* (1907), 725, applying Art. 7, *supra*, in favor of a German who had been previously prosecuted in Germany

for a murder committed in France. See also Switzerland, Project of Penal Code (1918, altered 1928), Art. 3 (applying to those accused of crimes committed in Switzerland only if the former trial abroad was at the request of the Swiss authorities).

A number of States apply the principle to all crimes committed abroad over which they take jurisdiction. For example, see:

Belgium, Code d'Instruction Criminelle (1878), Art. 13.—Les dispositions précédentes ne seront pas applicables lorsque l'inculpé, jugé en pays étranger du chef de la même infraction, aura été acquitté.

Il en sera de même lorsque, après y avoir été condamné, il aura subi ou prescrit sa peine, ou qu'il aura été gracié.

Toute détention subie à l'étranger, par suite de l'infraction qui donne lieu à la condamnation en Belgique, sera imputée sur la durée des peines emportant privation de la liberté.

Similar provisions are found in Congo, Penal Code (1896), Art. 85; Egypt, Native Penal Code (1904), Art. 4; Guatemala, Penal Code (1889), Art. 7; Honduras, Law of Organization of the Courts (1906), Arts. 174 and 176; Monaco, Code Penal Proc. (1905), Art. 9; Paraguay, Penal Code (1914), Art. 10; Salvador, Code of Crim. Proc. (1904), Art. 21; Spain, Organic Law of the Judicial Power (1870), Art. 337; Spain, Penal Code (1928), Arts. 12, 14, 15; Uruguay, Project of Penal Code (1932), Art. 11; Zurich, Penal Code (1897), sec. 3.

In some States the principle of *non bis in idem* is applicable to foreign penal judgments only in case the judgment has been one of conviction. For example, see:

Sweden, Penal Code (1864), Art. 3.—Personne ne peut être puni dans le royaume pour une infraction commise au dehors s'il a déjà subi pour la même une peine dans un autre pays.

Provisions to the same effect are found in Nicaragua, Penal Code (1891)' Art. 13; Palestine, Code Crim. Proc. (1924), Arts. 5 and 7; Panama, Penal Code (1922), Art. 7 (requires that the penalty undergone abroad be as great as that provided by Panama Law); Portugal, Penal Code (1886), Art. 53; and San Marino, Penal Code (1865), Art. 5 (acquittal is sufficient in case of certain crimes; see Art. 6).

A somewhat anomalous position is taken by Italy in its Penal Code of 1930. Under the provisions of this Code, application of the principle would appear to depend upon the discretion of the Minister of Justice:

Art. 11. In the case specified in Article 6 the national or foreigner shall be tried in the State, even if he has been tried abroad.

In the cases specified in Articles 7, 8, 9 and 10, the national or foreigner who has been tried abroad shall be tried again in the State should the Minister of Justice so demand.

Art. 138. When a trial which took place abroad is repeated in the State, the punishment served abroad shall always be calculated, ac-

count being taken of its nature; and if detention prior to sentence took place abroad, the provisions of the preceding article shall apply.

In a considerable number of States, the principle of *non bis in idem* is applied to some or most crimes committed abroad, certain exceptions being made in consequence of the political nature of the crime or the nationality of the offender. For example, see:

Brazil, Law 2416 (1911), Art. 14, sec. 2.—La procédure et le jugement des crimes dont il est parlé à l'art. 14 n'auront pas lieu, si les criminels ont déjà été, pour ces mêmes crimes, absous, punis ou pardonnés à l'étranger ou si la peine ou le crime est déjà prescrit d'après la loi la plus favorable.

La procédure et le jugement des crimes dont il est parlé à l'art. 13 ne feront pas obstacle à la sentence ou à tout acte de l'autorité étrangère; toutefois, il sera tenu compte, dans l'exécution de la peine, du temps de prison passé à l'étranger pour ces crimes.

Legislation of similar effect is found in Bolivia, Law of Nov. 29, 1902, Art. 8; Chile, Code Crim. Proc. (1906), Art. 2, sec. 6; China, Penal Code (1928), Art. 7; Colombia, Penal Code (1890), Art. 20; Cuba, Project of Penal Code (Ortiz, 1926), Art. 37; Dominican Republic, Law of June 28, 1911, replacing Code Crim. Proc., Art. 5; Germany, Penal Code (1871), Arts. 4 and 5; Germany, Project of Introductory Law to Penal Code and Code of Criminal Procedure (1929), Tit. II (see Barbey, *De l'Application Internationale de la Règle Non Bis in Idem*, p. 112); Haiti, Code Crim. Proc. (1835), Art. 7; Hungary, Penal Code (1878), Art. 7 ff.; Italy, Penal Code (1890), Art. 7; Luxembourg, Code Crim. Proc. (modified by law of Jan. 18, 1879), Art. 5; Mexico, Federal Penal Code (1871), Art. 186, Federal Penal Code (1929), Art. 6, sec. 3, and Federal Penal Code (1931), Art. 4, sec. 2; Peru, Penal Code (1924), Art. 6; Rumania, Penal Code (1865), Art. 4, and Project of Penal Code (1928), Art. 10; Russia, Penal Code (1903), Art. 10, in force in Latvia, Estonia and Lithuania (see case of *Jacques J.* reported in Clunet, 1894, 921); Siam, Penal Code (1908), Art. 10; Switzerland, Cantons of Geneva, Code Penal Proc. (1884), Art. 8, and Vaud, Code Penal Proc. (1850), Art. 15; Uruguay, Penal Code (1889), Art. 8; Yugoslavia, Penal Code (1929), Art. 8.

In some of the national codes or projects the principle of *non bis in idem* is made applicable only in certain cases, while in other cases the accused is merely given credit for any punishment he may have already undergone abroad. See Albania, Penal Code (1927), Arts. 7 and 8; Brazil, Law 2416 (1911), Art. 14, sec. 2, quoted *supra*; Brazil, Project of Penal Code (Sa Pereira, 1927), Arts. 6–8; France, Project of Penal Code (1932), Art. 17; Venezuela, Penal Code (1926), Arts. 4–5. See also Switzerland, Project of Federal Penal Code (1918, modified 1928), Arts. 3–6; Turkey, Penal Code (1926), Art. 7.

A few States merely give the accused credit for any punishment he may have undergone abroad for the same offence. By way of example, see

Poland, Penal Code (1932), Art. 11, sec. 1.—En cas de condamnation en Pologne d'une personne punie à l'étranger pour le même acte, le tribunal imputera sur la peine, selon son appréciation, la peine qui a été subie à l'étranger.

See also Austria, Penal Code (1852), Art. 36; Czechoslovakia, Project of Penal Code (1926), Art. 66; Denmark, Penal Code (1866), sec. 7, and Penal Code (1930), Art. 10, sec. 4; Finland, Penal Code (1889), sec. 5; Japan, Penal Code (1907), Art. 5; and Norway, Penal Code (1902), Art. 13.

According to Barbey, *op. cit.*, p. 99, the only national legislation which contains no provision either for *non bis in idem* or for imputation of a punishment undergone abroad for the same offence is that of Soviet Russia in its Penal Code of 1922 (also true for the Code of 1926), and Switzerland in its Federal Penal Code of 1853 and its Code of Penal Procedure of 1851.

That the principle of *non bis in idem* is approved by the English common law, upon the plea of *autrefois acquit* or *autrefois convict*, see *Rex v. Hutchinson* (1677), cited in 1 Leach 135, 1 Show. 6, 3 Mod. 194, and Buller N. P. 245; *Rex v. Roche* (1775), 1 Leach 134; *Rex v. Aughet* (1918), 26 Cox C. C. 232. Stephen says:

Art. 265. . . . A plea of *autrefois convict* or *acquit* is sustained by proof of a previous conviction or acquittal in a foreign country. (*Digest of the Law of Criminal Procedure*, 1883.)

See also Archbold, *Pleading, Evidence and Practice in Criminal Cases* (27th ed. 1927), p. 159.

The same principle is widely approved in decisions and legislation in the United States. The American Law Institute incorporates the principle in its Restatement on the Administration of the Criminal Law (Tentative Draft No. 2, March 1, 1932) Double Jeopardy, sec. 21, as follows:

Acquittal or conviction elsewhere a bar to prosecution in this state. A conviction unreversed, or an acquittal on the merits of a person of a violation of a provision of the criminal law of the United States or of another state or country is a bar to a prosecution of such person in this State based on the same facts as was the prosecution in such other state or country.

It has been held in the United States that an acquittal or conviction in a Federal court does not bar prosecution in a State court, or vice versa, for a crime based on the same facts. See *Moore v. Illinois* (1852), 14 How. (U. S.) 13, 19; *United States v. Lanza* (1922), 260 U. S. 377; *United States v. McCain* (1924), 1 F. (2d), 985; *State v. Moore* (1909), 143 Iowa, 240; *Hall v. Commonwealth* (1923), 197 Ky. 179; *State v. Gendron* (1922), 80 N. H. 394; *State v. Rhodes* (1922), 146 Tenn. 398; *State v. Jewett* (1922), 120 Wash. 36. But cases of conflict between Federal and State authorities under a Federal Government are different from those which may arise between the courts of independent States of coördinate status; and, even so, under the modern statutes such cases are resolved in conformity with the principle stated in the

American Law Institute's Restatement. Among modern statutes of States of the United States, see, for example:

Arizona, Rev. Code (1928), sec. 4889.—Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of the United States or of another state or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.

Virginia, Code (1930) sec. 4775.—If the same act be a violation of both a State and Federal statute a prosecution or proceeding under the Federal statute shall be a bar to a prosecution or proceeding under the State statute.

Substantially similar to the provision of the Arizona Revised Code, quoted above, though in some cases applying only to decisions of other States or countries, see California, Penal Code (1931), sec. 656; Montana, Rev. Codes (1921), sec. 11583; North Dakota, Comp. Laws (1913), sec. 10330; South Dakota, Rev. Code (1919), sec. 3603; Utah, Comp. Laws (1917), sec. 8522. The phraseology varies in other legislation, though the underlying idea is the same.

Minnesota, Mason's Stat. (1927), sec. 9926.—Whenever, upon the trial of any person indicted for a crime, it appears that the offence was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits, upon a criminal prosecution under the laws of such state or country, founded upon the act or omission to act in respect of which he is upon trial, such former acquittal or conviction is a sufficient defense.

For similar statutes, see Nevada, Comp. Laws (1929), sec. 9963; and Washington, Rem. Comp. Stat. (1922), sec. 2271. Slightly varied texts incorporating the same general principle are the following:

California, Penal Code (1931), sec. 793.—When an act charged as a public offense is within the jurisdiction of another state or country, as well as of this state, a conviction or acquittal thereof in such state or country shall be a bar to a prosecution or indictment therefor in this state.

Mississippi, Code (1930), sec. 1189.—Every person charged with an offense committed in another state, territory or country may plead a former conviction or acquittal for the same offense in such other state, territory or country; and if such plea is established, it shall be a bar to any further proceedings for the same offense here.

New York, Penal Law (Cons. Laws 1918; Cahill's Cons. Laws 1930, ch. 41) sec. 33.—Whenever it appears upon the trial of an indictment that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state, or country, founded upon the act or omission in respect to

which he is upon trial, such former acquittal or conviction is a sufficient defense.

The California statute, quoted above, is followed in Idaho, Comp. Stat. (1919), sec. 8699 ("state, territory or country"); Indiana, Burns Stat. (1926), sec. 2045 (like Idaho); Montana, Rev. Codes (1921), sec. 11719 ("county" is misprint; "country" in earlier codes); Nevada, Comp. Laws (1929), sec. 10717 (like Idaho); North Dakota, Comp. Laws (1913), sec. 10512 (like Idaho); Oklahoma, Comp. Stat. (1921), sec. 2435 (like Idaho; "county" is misprint; "country" in earlier codes); Oregon, Code (1930), sec. 13-309 (like Idaho, but omits "or indictment"); South Dakota, Rev. Code (1919), sec. 4516 (like Oregon); Utah, Comp. Laws (1917), sec. 8652 (like Oregon). See also Texas, Rev. Crim. Stat. (1925), Crim. Prac., Art. 208, referring only to crimes committed out of the state by its inhabitants.

The principle is applied to allow a plea of acquittal or conviction in another State or country of the same charge of stealing or robbing and bringing into the State in Arkansas, Dig. Stat. (1921), secs. 2881-2882; Kansas, Rev. Stat. (1923), sec. 21-104; Michigan, Comp. Laws (1929), sec. 17278; Missouri, Rev. Stat. (1919), sec. 3686; and Wisconsin, Stat. (1929), sec. 353. 14. It is applied to dueling and acting as a second in a duel outside the State in Florida, Comp. Gen. Laws (1927), sec. 7120; Illinois, Rev. Stat. (1929), ch. 38, sec. 178; Maine, Rev. Stat. (1930), ch. 129, sec. 9; Massachusetts, Gen. Laws (1921), ch. 265, sec. 5; Rhode Island, Gen. Laws (1923), sec. 6023; Vermont, Gen. Laws (1917), sec. 6812; Virginia, Code (1930), sec. 4422; Washington, Rem. Comp. Stat. (1922), sec. 2422; West Virginia, Code (1931), ch. 61, Art. 2, sec. 23.

That the principle is a part of the common law, see, in addition to the English authorities cited above, *State v. Smith* (1921), 101 Ore. 127 (offences against prohibition laws). Accord, under the statutes, see *La Forge v. State* (1924), 28 Okla. Cr. 37. For the contrary, in some of the States of the United States, see *Strobhar v. State* (1908), 55 Fla. 167; *Phillips v. People* (1876), 55 Ill. 429; *Bloomer v. State* (1878), 48 Md. 521; *Commonwealth v. Andrews* (1806), 2 Mass. 13; and *Marshall v. State* (1877), 6 Neb. 120.

Not only has the principle of *non bis in idem* won a prominent place in most systems of national law, but it has been widely accepted, in one form or another, in treaties and in the resolutions of international bodies. It was given a place in the first general treaty on jurisdiction of crime, the Treaty of Lima of 1878, in the following article:

Art. 37. The foregoing provisions shall not be effective:

1. If the criminal has been tried and punished in the place of perpetration of the crime;
2. If he has been tried and acquitted or has obtained pardon of the punishment;
3. If the crime or the punishment has been prescribed according to the law of the country where he committed it.

And compare the following from the Resolutions of the Institute of International Law, adopted at Munich in 1883, the Resolutions of the International Prison Congress, adopted at Brussels in 1900, and from the Resolutions of the International Conference on the Unification of the Penal Law, adopted at Warsaw in 1927:

Institute of International Law, Resolutions of Munich (1883).—Art. 12. Les peines prononcées par jugement régulier des tribunaux d'un Etat quelconque, même non compétent, mais dûment subies, doivent empêcher toute poursuite dirigée à raison du même fait contre le coupable.

Seraient exceptés, toutefois, les délits contre la sûreté des Etats et ceux mentionnés ci-dessus, à l'article 8.

Toutes les fois qu'il y a lieu d'exercer de nouvelles poursuites après un jugement prononcé à l'étranger, on tiendra compte de la peine que le coupable a déjà subie du chef du même fait. L'appréciation du tribunal quant à la mitigation de la peine, dans ces cas, sera souveraine.

Art. 13. Les acquittements prononcés du chef d'insuffisance des preuves produites contre l'accusé seraient valables partout. De même, les grâces accordées par le souverain d'un pays ayant sous main le coupable.

Les acquittements motivés par la non-criminalité du fait auraient même force que la loi du pays déclarant non punissable ce même fait.

S'il y avait doute quant à la portée du jugement, la présomption serait en faveur du prévenu. . . .

Ces règles ne s'appliqueraient pas aux délits contre la sûreté de l'Etat, ni aux cas exceptionnels mentionnés à l'article 8.

It should be noted that the above articles in the resolutions adopted by the Institute in 1883 were not among those which it was considered necessary to revise when the Institute returned to the subject of penal competence in 1931.

International Prison Congress (1900).—Art. 3. Les règles qui précèdent ne sont plus applicables lorsque l'inculpé, jugé en pays étranger du chef de la même infraction, a été acquitté; ou bien lorsque, après avoir été condamné, il a subi ou prescrit sa peine ou qu'il a été gracié.

International Conference on the Unification of the Penal Law, Resolutions of Warsaw (1927).—Art. 2. . . . Sous la même réserve, aucune poursuite n'aura lieu si le national prouve qu'il a été acquitté ou condamné définitivement à l'étranger et, en cas de condamnation, qu'il a exécuté sa peine ou a bénéficié d'une mesure d'exemption.

Art. 3. Si le condamné se soustrait à l'exécution intégrale de sa condamnation, la durée de la peine subie à l'étranger sera déduite de la peine prononcée contre lui . . .

Later articles of the Warsaw Resolutions apply these rules to aliens in various cases.

The principle has likewise found a place in extradition laws and treaties. The following are sufficiently typical of national extradition laws:

France, Extradition Law (March 10, 1927), Art. 5.—L'extradition n'est pas accordée: . . . 4. Lorsque les crimes ou délits, quoique commis hors de France ou des possessions coloniales françaises, y ont été poursuivies et jugés définitivement.

Sweden, Extradition Law (June 4, 1913), Art. 9.—L'extradition ne doit pas être accordée: 1. Lorsque avant la demande un jugement aura été prononcé en Suède sur les faits imputés ou bien si la poursuite a été intentée devant un tribunal suédois.

See also Travers, *L'Entr'aide Répressive Internationale* (1928), pp. 135–144. And the following are sufficiently typical of the provisions incorporated in extradition treaties:

Bustamante Code (1928), Art. 358.—Extradition shall not be granted if the person demanded has already been tried and acquitted, or served his sentence, or is awaiting trial, in the territory of the requested state for the offense upon which the request is based.

Finland and Sweden, Extradition Treaty (1924), Art. 4.—Extradition shall not be granted (1) If a sentence has already been passed, or judicial proceedings instituted, in the country to which application for extradition is made, in respect of the offence for which extradition is demanded. (23 *League of Nations Treaty Series*, 42.)

France and Great Britain, Extradition Treaty (1876), Art. 11.—The claim for extradition shall not be complied with if the individual claimed has been already tried for the same offence in the country whence extradition is demanded. (67 *Brit. & For. State Papers*, 5, 16.)

See, by way of further example, the following extradition treaties: Bulgaria and Rumania (1924), Art. 4f, 33 *League of Nations Treaty Series*, 222; Czechoslovakia and Poland (1925), Art. 35, 46 *ibid.* 201; Denmark and Finland (1923), Art. 6, 18 *ibid.* 34; Estonia and Finland (1925), Art. 5, 43 *ibid.* 12; Estonia and Great Britain (1925), Art. 4, 50 *ibid.* 226; Estonia and Latvia (1921), Art. 4, 37 *ibid.* 424; Finland and Latvia (1924), Art. 5, 38 *ibid.* 344; Great Britain and Latvia (1924), Art. 4, 37 *ibid.* 370; Latvia and Lithuania (1921), Art. 4, 25 *ibid.* 312; and United States and Germany (1931), Art. 6, *United States Treaty Series*, No. 836. Such examples might be multiplied in considerable number.

In addition to the support for the principle of the present article which is found in national legislation and jurisprudence, in the resolutions of international bodies, and in treaties, there is significant approval of the principle in the works of reliable writers. The works of Barbey, *De l'Application Internationale de la Règle Non Bis in Idem* (1930), the latest important monograph on the subject, and of Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), ch. 8, one of the most important of recent general works on jurisdiction of crime, have already been quoted. See also Alcorta, *Principios de Derecho Penal Internacional* (1931), I, 168–185; Bar, “Rapport sur Conflit des Lois Pénales,” *Annuaire de l'Inst. de Dr. Int.* (1883–1885), pp. 143–146; Faustin-Hélie, *Traité de l'Instruction*

Criminelle (2d ed. 1866), II, 656 ff; Garraud, 6 *Rev. Int. de Dr. Pén.* (1929), pp. 328, 349; Jitta, *The Renovation of International Law on the Basis of a Juridical Community of Mankind* (1919), pp. 74-75; Montéage, "De l'autorité de la chose jugée qui s'attache aux jugements étrangers rendus en matière criminelle," *Clunet* (1885), 397; Ortolan, *Eléments de Droit Pénal* (4th ed. 1875) I, 392-393.

It is to be noted, on the other hand, that there is distinguished opinion among the writers which does not support the broad principle of the present article. Some would allow the principle of *non bis in idem* to be invoked only when the foreign penal judgment is based upon a jurisdiction of superior merit. See Gidel, *De l'Efficacité Extraterritoriale des Jugements Répressifs* (1905), pp. 52-57; and Peiron, *De l'Effet des Jugements Etrangers Rendus en Matière Pénale* (1885). Gidel sums up this position as follows:

La justice exige qu'un jugement pénal étranger fasse obstacle à l'exercice de poursuites contre un individu à l'occasion du même fait dans un autre pays, à la condition toutefois que le premier jugement ait été légalement rendu et qu'il soit définitif et qu'en cas de condamnation, la peine ait été subie ou éteinte par la prescription, la grâce ou l'amnistie. Il conviendra d'ailleurs, avons-nous fait remarquer, de n'accorder une pleine autorité au jugement étranger à ce point de vue négatif, que lorsque il émanera d'une juridiction dont la compétence l'emporte rationnellement sur celle du pays où il est question de renouveler les poursuites. Mais il est de toute nécessité, en tout cas, de tenir compte de la peine déjà subie à l'étranger. (*Op. cit.*, p. 169.)

Other writers would reject the principle of *non bis in idem* entirely on the ground that the ends of justice are served adequately by a rule of *non bis poena in idem*. Proponents of this limitation would allow a multiplicity of prosecutions but require that account be taken of any punishment already undergone. See Deloume, *Principes Généraux du Droit International en Matière Criminelle* (1882), pp. 115-121; Travers, *Le Droit Pénal International* (1922), III, sec. 1544; Travers, "Les Effets Internationaux des Jugements Répressifs," *Académie de Dr. Int., Recueil des Cours* (1924), III, 415. As Barbey observes:

Nous avons remarqué que même les adversaires les plus convaincus de l'application internationale de la règle *Non bis in idem* tempèrent, par une mesure d'humanité, la rigueur excessive de leur système; ils admettent, en effet, que si le délinquant ne peut invoquer à son profit une sentence prononcée contre lui à l'étranger, pour se soustraire à de nouvelles poursuites pénales, il ne doit cependant pas avoir à subir dans leur intégralité les diverses peines auxquelles il pourrait être condamné, dans les Etats différents, pour une même infraction. (*Op. cit.*, p. 239.)

The present Convention rejects both of the proposed limitations. In view of the difficulties involved in any attempt in complicated cases to rank the different jurisdictions according to merit, of the patent injustice of a rule of

non bis poena in idem in a system under which concurrent jurisdiction in two or more States must be a relatively frequent occurrence, of the many cases in which concurrent jurisdiction in two or more States is unavoidable under a convention based upon existing practice, of the extent to which the principle of *non bis in idem* has become established in contemporary practice, and of the fundamental justice of the principle, it is difficult to see how the present Convention could be made adequate otherwise. The principle must be so stated as to safeguard against a multiplicity of prosecutions as well as against a multiplicity of punishments. See Barbey, *op. cit.*, pp. 170-171.

In view of the support which the present article finds in contemporary practice, it hardly seems necessary to consider various theoretical objections which may be advanced by way of criticism of certain of its implications. The principle is an eminently practical one in a convention which seeks to reconcile and incorporate as much as is essential in the existing practices of States. The text is not one which can be easily abused since its principle can only be invoked after an acquittal elsewhere, *i.e.*, after a decision on the merits that the guilt of the accused has not been proved, or after a conviction elsewhere followed by discharge of penalty through punishment, pardon, or parole. Dismissal of prosecution for want of jurisdiction or on a procedural technicality is nowhere regarded as an acquittal and is in no case to be regarded as an acquittal under the present article.

The text safeguards aliens only, including alien corporations or juristic persons as well as natural persons. It does not protect nationals. It is to be noted that most States apply the principle of *non bis in idem* in prosecuting their subjects on a nationality principle for offences committed abroad. Certainly it is just and desirable that they should continue to do so. In the present state of international law, however, it would seem inappropriate for a convention on jurisdiction with respect to crime to incorporate limitations upon a State's authority over its nationals. Consequently the matter is left to the discretion of each State.

The text makes no provision for the case of a conviction elsewhere followed by partial discharge only of the penalty imposed. Under the penal codes of most civil law countries it is the practice in such cases to permit a second prosecution but to require that account be taken of the penalty already undergone. The rule is one of *non bis poena in idem* rather than *non bis in idem*. While this practice seems eminently just and desirable, it concerns a type of case which will not arise frequently, and it would appear to affect the measure of punishment only and not the competence to institute or continue a second prosecution. It has seemed most appropriate, therefore, to leave the matter to the discretion of each State.

The most difficult of application will be that part of the text which deals with identity of offences. The phrase used is "a crime requiring proof of substantially the same acts or omissions." In various national laws such

expressions as "same crime", "same offence", or "same facts" are used without qualification. For a relatively detailed study of the problem, see the American Law Institute's *Restatement on Administration of the Criminal Law* (Tentative Draft No. 2, March 1, 1932), pp. 9-20, 62-148, citing and discussing American cases. Under the text of the present article, it is an identity of the objective facts which produces an identity of offences. If two or more States have jurisdiction, there will be a crime against the laws of each and hence, in one sense, two or more crimes. But if substantially the same acts or omissions constitute the crime under the laws of each of the several States, there will be an identity of offences and the principle of *non bis in idem* will apply. It is immaterial by what name the crime may be called. Thus certain acts may constitute embezzlement under the laws of State X, larceny under the laws of State Y, and statutory theft under the laws of State Z, yet the safeguard which the present article provides against a multiplicity of prosecutions may be invoked. On the other hand, if the accused killed a man while stealing certain property, a former prosecution for larceny would present no bar to prosecution by another State for the homicide. Likewise if a single act of poisoning caused the death of both A and B, an acquittal or conviction in State X on a charge of killing A would be no bar to a prosecution in State Y on the charge of killing B. It is neither appropriate nor possible to anticipate the various types of case in which the text may have to be applied. As a statement of general principle, the text would appear to be sufficiently clear. Its application to particular cases must be left to the processes of international jurisprudence.

It is to be emphasized, finally, that in making the principle of *non bis in idem* applicable even to offences committed wholly within the State or a place subject to its authority, the text of the present article gives wider scope to the principle than is given at the present time in the legislation of most States. This will be apparent if reference is made to the review of contemporary legislation incorporated *supra*. The wider scope given the principle would probably be disapproved by those writers who accept it only when the foreign penal judgment is based upon a jurisdiction of superior merit. See Gidel, *De l'Efficacité Extraterritoriale des Jugements Répressifs* (1905), pp. 52-53; Peiron, *De l'Effet des Jugements Etrangers Rendus en Matière Pénale* (1885), pp. 24-37. Even so consistent an advocate of *non bis in idem* as Barbey is constrained to admit that

L'unanimité avec laquelle les législations et la doctrine consacrent le principe de la territorialité de la loi pénale, des considérations d'ordre pratique—telles que la plus grande facilité dont bénéficie normalement l'instruction au lieu de commission—et la nécessité, dans certain cas, de donner une satisfaction légitime à l'opinion publique, à l'endroit même où le délit a été commis, semblent donc motiver une . . . exception à l'application internationale de la maxime *Non bis in idem* . . . Il paraît devoir être admis . . . dans les conditions actuelles du droit pénal international, qu'une sentence répressive étrangère ne saurait, en

principe, paralyser le droit de poursuite dans l'Etat où l'infraction a été perpétrée. Plus exactement, il ne devrait être fait application de la règle *Non bis in idem*, à l'encontre de la compétence territoriale, qu'en vertu des dispositions d'un accord international assurant aux Etats contractants, en compensation d'une telle concession, le bénéfice d'une stricte réciprocité. (*De l'Application Internationale de la Règle Non Bis in Idem*, 1930, pp. 183-184.)

The adoption of the principle formulated in the present article will be a legislative measure. It is believed that it should be acceptable nevertheless. Practically all States have given some recognition to the principle. A number of States have legislation which goes as far as the present text. The extent to which jurisdiction may be concurrent in consequence of the overlapping of the several general principles recognized in the present Convention makes it of the utmost importance that adequate safeguards against multiplicity of prosecutions be provided. There will be some cases in which the State having territorial jurisdiction will be less concerned in prosecution than another competent State. The adoption of a general convention incorporating the present article will assure the reciprocity which is emphasized in the passage just quoted from Barbey. Limited as it is to a safeguard against multiple prosecutions of aliens for the same offence, it is believed that the present article will commend itself to all States as an essential part of the present Convention. As Garraud says:

Il serait illégitime d'obliger le juge à distinguer suivant que la décision rendue à l'étranger l'a été, suivant les circonstances d'espèce, par un juge ayant une compétence législative et judiciaire plus accentuée que la sienne propre (par exemple jugement étranger émanant du juge territorialement compétent, tandis que le juge ayant à statuer sur l'autorité de la chose jugée, n'aurait pu invoquer qu'une compétence subsidiaire personnelle,) auquel cas l'autorité de chose jugée de la sentence étrangère devrait être admise; ou au contraire moins élevée (situation inverse de la précédente: le juge étranger a statué par compétence personnelle, le juge local aurait eu compétence territoriale), auquel cas l'autorité de la chose jugée ne serait pas admise, et le procès pourrait être recommencé. La règle *non bis in idem*, règle de justice absolue, domine les principes sur la hiérarchie des compétences: une poursuite a eu lieu pour un fait déterminé, dans un Etat et par un juge faisant partie de la communauté internationale; quel que soit le titre en vertu duquel a agi le premier juge, si ce titre est certain au regard de la loi de l'Etat sur le territoire duquel il s'agit de donner effet à la sentence étrangère, une nouvelle poursuite dans un Etat et par un juge appartenant à la même communauté internationale, serait une injustice. (Rapport, "*De l'application par le juge d'un état des lois pénales étrangères*," Congrès de Bucarest, 6 *Rev. Int. de Dr. Pénal*, 1929, 328, 349.)

Contemplating the adoption of a general treaty such as the present Convention, there is every reason to agree with Donnedieu de Vabres:

La vérité est toujours en faveur du respect de la *res judicata* étrangère. Dans la plupart des législations internes, en droit français notamment,

il existe une compétence concurrente au profit du *judex loci*, du juge du domicile, du juge du lieu d'arrestation. La compétence fondée sur le lieu du délit a une supériorité certaine, que nous avons signalée, et qui trouve parfois son expression dans la loi. Admet-on cependant que le juge du domicile ayant été saisi par prévention, une nouvelle instance est possible devant le juge territorial? Non, sans doute! De même, en droit international. Pour subsidiaire ou très subsidiaire que soit la compétence du juge étranger, elle n'a pas moins une valeur universelle. Et lorsque les circonstances de fait lui ont permis de s'exercer la première, elle a donné naissance à un droit acquis. (*Les Principes Modernes du Droit Pénal International*, 1928, p. 319.)

See, however, Donnedieu de Vabres, "*La Valeur internationale des Jugements répressifs d'après le Mouvement législatif actuel*," 10 *Rev. de Dr. Pén.* (N. S., 1930), 457.

ARTICLE 15. ALIENS—ACTS REQUIRED BY LAW

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien for an act or omission which was required of that alien by the law of the place where the alien was at the time of the act or omission.

COMMENT

There is no precedent for the text of this article, either in national legislation or in treaties or the resolutions of international bodies. The principle formulated is nevertheless so obviously just that its acceptance as an integral part of the present Convention may be anticipated. Here, again, the limitation incorporated provides a safeguard for aliens only, including alien corporations or juristic persons as well as natural persons. A similar safeguard for nationals is left to the discretion of each State. The proviso of Article 7, *supra*, gives wider scope to a somewhat similar limitation applicable to offences against the security, territorial integrity or political independence of a State. The principle of *non bis in idem*, incorporated in Article 14, *supra*, is based upon an underlying concept of fairness and justice which is not wholly unlike the idea underlying the present article. The individual should not suffer, through no fault of his own, because one State punishes what another State requires. As in case of acts of State, discussed under Article 12, *supra*, the two States whose laws are in conflict should assume responsibility and settle the matter between them. The individual should not be victimized. The need for such a safeguard becomes apparent as soon as jurisdiction based upon the several principles recognized in this Convention is reduced to a coherent system. Without such a safeguard, there might result on occasion a wholly unnecessary and unwarranted hardship. The article is included, therefore, as legislation so eminently desirable and just that it can hardly fail to commend itself to the favorable consideration of States.

While the principle of the present article is probably in harmony with

relevant national and international practice, and while such departures as might be discovered are probably exceptions tending to demonstrate the soundness of the general principle, it should be noted that the unratified Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington, February 6, 1922, contains provisions which are based upon a different principle. The Treaty of Washington provided:

Art. 3. The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any power within the jurisdiction of which he may be found. (Hudson, *International Legislation*, 1931, II, 794, 796.)

It would of course be permissible for contracting parties to the present Convention to ratify the Treaty of Washington. See Article 2, *supra*. Such ratification would invest the contracting parties to the Treaty of Washington with a competence with respect to the nationals of such contracting parties which they would not have under the present Convention. However, the special competence thus created would rest upon a principle not in harmony with the principle of the present article and its exercise would be limited strictly to nationals of States ratifying the Treaty of Washington.

ARTICLE 16. ALIENS—ASSISTING ADMINISTRATION OF JUSTICE

In exercising jurisdiction under this Convention, no State shall prosecute or punish an alien during his presence within its territory or in a place subject to its authority, at the request of officials of that State, for the purpose of testifying before State tribunals or otherwise assisting in the administration of justice, except for crimes committed while present for such purpose.

COMMENT

When the competent authorities of a State ask an alien to come into the State or a place subject to its authority from abroad in order to assist in the administration of justice, fairness requires that the State should not take advantage of presence thus obtained to prosecute or punish the alien for an offence which he may have committed previously. If the State wishes to prosecute or punish for such an offence, it should either wait until he can be lawfully apprehended or obtain his surrender in the usual way. The State must decide whether the alien's testimony or other assistance is of more importance than his prosecution or punishment for prior offences. Having made its decision, the State should abide the result.

The principle thus stated is rather widely recognized in national practice and finds formal expression in the national laws of a number of countries. Thus the French Extradition Law of March 10, 1927, Art. 33, provides:

Si, dans une cause pénale, la comparution personnelle d'un témoin résidant en France est jugée nécessaire par un gouvernement étranger, le Gouvernement français, saisi de la citation par la voie diplomatique, s'engage à se rendre à l'invitation qui lui est adressée.

Néanmoins, la citation n'est reçue et signifiée qu'à la condition que le témoin ne pourra être poursuivi ou détenu pour des faits ou des condamnations antérieures à sa comparution.

In the United States, while there is relatively little legislation dealing with the matter, a broad immunity from prosecution or service of process for persons summoned from without the State is stipulated in a number of statutes. The legislation of New York is typical:

Laws of New York, 1932, ch. 255 (being section 618a of Code of Criminal Procedure, as amended), sec. 1, clause 3.—If a person comes into this state in obedience to a subpoena directing him to attend and testify in a criminal prosecution in this state he will not while in this state pursuant to such subpoena be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena.

If a person passes through this state while going to another state in obedience to a subpoena to attend and testify in a criminal prosecution in that state or while returning therefrom, he shall not while so passing through be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the subpoena.

See also South Dakota, Sess. Laws (1923), p. 134, ch. 157, sec. 1; Wisconsin, Laws (1933), ch. 48, sec. 2, clause 3.

While it cannot be said that the principle of the present article is well established in Great Britain or the United States, in the absence of express statutory provision, the immunity probably being assured at common law only with respect to civil proceedings (see Alexander, *Law of Arrest*, 1932, p. 30; Archbold, *Criminal Pleading*, 27th ed., 1927, p. 494; Wharton, *Criminal Procedure*, 10th ed., 1918, I, 11-18; *United States v. Kirby* (1868), 7 Wall. (U. S.), 483; *In re Freston* (1883), 11 Q.B.D. 54), there is nevertheless something of a trend toward the principle here recognized. In *United States v. Baird* (1897), 85 Fed. 633, a witness who came under subpoena from Pennsylvania to New Jersey to testify there before a United States commissioner was arrested by New Jersey officers on a New Jersey criminal warrant while leaving the commissioner's office after testifying. The Federal District Court for New Jersey held that he must be discharged from custody and escorted safely to the New Jersey border by Federal officers. The National Conference of Commissioners on Uniform State Laws have recommended a similar provision for immunity. After consultation with the Commissioners,

and consideration of their draft and its own, the American Law Institute adopted (see *Am. L. Inst. Proc.*, IX, 174-178) a provision almost identical with the New York statute quoted *supra*. See American Law Institute, *Restatement on the Administration of the Criminal Law* (Tentative Draft No. 1), sec. 3, p. 9.

The principle has had its most impressive development in Europe, where it has been incorporated in a significant number of treaties of extradition and of judicial assistance. The formula more frequently used is that found in a recent extradition treaty between Latvia and the Netherlands (1930):

Art. 12. Aucun témoin, quelle que soit sa nationalité, qui, cité dans l'un des deux pays, comparaitra volontairement devant les juges de l'autre pays, ne pourra y être poursuivi ou détenu pour des faits ou condamnations criminelles antérieurs, ni sous prétexte de complicité dans les faits, objets du procès où il figurera comme témoin. (117 *League of Nations Treaty Series*, No. 2701.)

Substantially the same formula is found in the following treaties: Argentina and Belgium (1880), Art. 15, 15 Martens, *N. R. G.* (2^{me} sér.), 736; Argentina and Spain (1881), Art. 15, 12 *ibid.* 486; Monaco and Rumania (1881), Art. 15, 14 *ibid.* 117; Monaco and Switzerland (1885), Art. 16, 14 *ibid.* 312; Spain and Uruguay (1885), Art. 16, 14 *ibid.* 456; Austria-Hungary and Monaco (1886), Art. 14, 12 *ibid.* 509; Portugal and Russia (1887), Art. 13, 14 *ibid.* 175; Serbia and Switzerland (1887), Art. 16, 14 *ibid.* 387; Colombia and Spain (1892), Art. 18, 27 *ibid.* 171; Italy and Montenegro (1892), Art. 16, 22 *ibid.* 302; Luxembourg and Russia (1892), Art. 15, 18 *ibid.* 607; Argentina and the Netherlands (1893), Art. 16, 33 *ibid.* 635; Luxembourg and the Netherlands (1893), Art. 12, 22 *ibid.* 387; the Netherlands and Orange Free State (1893), Art. 12, 27 *ibid.* 207; the Netherlands and Russia (1893), Art. 12, 21 *ibid.* 3; Belgium and Orange Free State (1894), Art. 11, 22 *ibid.* 627; Denmark and the Netherlands (1894), Art. 12, 21 *ibid.* 701; Guatemala and Mexico (1894), Art. 16, 33 *ibid.* 567; the Netherlands and Portugal (1894), Art. 12, 22 *ibid.* 568; the Netherlands and Rumania (1894), Art. 12, 22 *ibid.* 619; the Netherlands and Spain (1894), Art. 12, 21 *ibid.* 707; Brazil and the Netherlands (1895), Art. 13, 37 *ibid.* 417; the Netherlands and Sweden (1895), Art. 13, 23 *ibid.* 105; Austria-Hungary and Switzerland (1896), Art. 19, 23 *ibid.* 244; Belgium and Serbia (1896), Art. 15, 23 *ibid.* 195; Germany and the Netherlands (1896), Art. 13, 23 *ibid.* 423; France and Italy (for Tunis, 1896), Art. 14, 23 *ibid.* 375; the Netherlands and Serbia (1896), Art. 12, 24 *ibid.* 636; Belgium and the Netherlands (1898), Art. 12, 15 *ibid.* 546; Denmark and Spain (1898), Art. 13, 15 *ibid.* 792; the Netherlands and Switzerland (1898), Art. 13, 28 *ibid.* 153; Congo and France (1899), Art. 17, 33 *ibid.* 105; Italy and Mexico (1899), Art. 16, 29 *ibid.* 392; Austria and Rumania (1901), Art. 14, 30 *ibid.* 567; the Netherlands and San Marino (1902), Art. 12, 31 *ibid.* 428; Belgium and San Marino (1903), Art. 17, 31 *ibid.* 565; Belgium and Montenegro (1905), Art. 15, 34 *ibid.* 731; Denmark

and Monaco (1905), Art. 12, 2 Martens, *N.R.G.* (3^{me} sér.), 294; Paraguay and Switzerland (1906), Art. 17, Martens, *N.R.G.* (2^{me} sér.), 281; Germany and Greece (1907), Art. 17, 2 *L.N.T.S.* No. 54; Belgium and Bulgaria (1908), Art. 14, 3 Martens, *N.R.G.* (3^{me} sér.), 782; Germany and Paraguay (1909), Art. 13, 9 *ibid.* 388; Austria-Hungary and Serbia (1911), Art. 15, 6 *ibid.* 612; Mexico and Salvador (1912), Art. 16, 6 *ibid.* 456; Bulgaria and Rumania (1924), Art. 17, 35 *L.N.T.S.* No. 846; Hungary and Rumania (1924), Art. 18, 24 Martens, *N.R.G.* (3^{me} sér.), 450; Belgium and Latvia (1926), Art. 14, 63 *L.N.T.S.* No. 1497; Austria and Finland (1928), Art. 15, 89 *ibid.* No. 2007; Finland and Italy (1929), Art. 18, 111 *ibid.* No. 2593; Finland and Estonia (1929), Art. 15, 23 Martens, *N.R.G.* (3^{me} sér.), 328; Austria and Belgium (1932), Art. 16, 26 *ibid.* 157; Finland and the Netherlands (1933), Art. 15, 139 *L.N.T.S.* No. 3221.

Some of the more recent treaties incorporate a formula which is similar in effect but somewhat more precise in terms. See, for example, the treaty between Czechoslovakia and Yugoslavia (1923):

Art. 61. No witness or expert, whatever his nationality may be, who appears of his own free will in answer to a summons before the authorities of the State making application can be prosecuted or detained in that State for previous criminal offences or convictions. Such persons may not claim this privilege, however, if through their own fault, they failed to leave the territory of the State making application within forty-eight hours from the time when their presence before the Court was no longer required. (30 *League of Nations Treaty Series*, No. 768.)

This formula appears in the following treaties: Czechoslovakia and Rumania (1925), Art. 16, 54 *L.N.T.S.* No. 1273; Bulgaria and Czechoslovakia (1926), Art. 17, 60 *ibid.* No. 1412; Czechoslovakia and Estonia (1926), Art. 17, 61 *ibid.* No. 1495; Czechoslovakia and Latvia (1926), Art. 17, 60 *ibid.* No. 1465; Belgium and Czechoslovakia (1927), Art. 16, 73 *ibid.* No. 1720; Czechoslovakia and Spain (1927), Art. 17, 121 *ibid.* No. 2791; Czechoslovakia and France (1928), Art. 19, 114 *ibid.* No. 1660; Hungary and Yugoslavia (1928), Art. 15, 104 *ibid.* No. 2385; Bulgaria and Spain (1930), Art. 17, 114 *ibid.* No. 2653; Czechoslovakia and Turkey (1930), Art. 24, 138 *ibid.* No. 3196; Germany and Turkey (1930), Art. 17, 133 *ibid.* No. 3071; Latvia and Spain (1930), Art. 17, 113 *ibid.* No. 2641; Belgium and Poland (1931), Art. 17, 131 *ibid.* No. 3005; Czechoslovakia and Denmark (1931), Art. 17, 26 Martens, *N.R.G.* (3^{me} sér.), 139; Czechoslovakia and Latvia (1931), Art. 17, 126 *L.N.T.S.* No. 2889; Czechoslovakia and the Netherlands (1931), Art. 17, 26 Martens, *N.R.G.* (3^{me} sér.), 148.

Provisions to the same effect, but in varying phraseology, are found also in the following treaties: Argentina and Paraguay (1877), Art. 16, 12 Martens, *N.R.G.* 460; Argentina and Italy (1886), Art. 15, 33 Martens, *N.R.G.* (2^{me} sér.), 47; Brazil and Uruguay (1887), Art. 12, 14 *ibid.* 444; Peru and Spain (1898), Art. 14, 29 *ibid.* 574; Estonia and Latvia (1921), Art. 15,

37 *L.N.T.S.* No. 964; Estonia and Lithuania (1921), Art. 15, 43 *ibid.* No. 1054; Latvia and Lithuania (1921), Art. 15, 25 *ibid.* No. 620; Bulgaria and Yugoslavia (1923), Art. 15, 26 *ibid.* No. 643; Finland and Sweden (1923), Art. 15, 23 *ibid.* No. 575; Austria and Poland (1924), Art. 80, 56 *ibid.* No. 1326; Albania and Yugoslavia (1926), Art. 15, 91 *ibid.* No. 2056; Italy and Panama (1930), Art. 19, 140 *ibid.* No. 3240.

The same immunity is stipulated in practically all treaties of recent times which provide for the summoning of witnesses for personal appearance. The only treaties in which it is not included appear to be some of the earlier treaties, such as those between France and Switzerland (1828), Art. 6, 7 Martens, *N.R.G.* 665; France with Norway and Sweden (1869), Art. 11, 5 Martens, *N.R.G.* (3^{me} sér.), 684; and those cited by Travers, *L'Entr'aide Répressive* (1928), sec. 649, between France and Hesse-Darmstadt (1853), Lippe-Detmold (1854), Portugal (1854), Waldeck and Pymont (1854), Austria-Hungary (1855), and Saxe-Weimar (1858). In short, the evidence of international practice which is revealed in the treaties of the last century shows an overwhelming preponderance in support of the principle incorporated in the present article. See Travers, *L'Entr'aide Répressive* (1928), sec. 649; Travers, *Le Droit Pénal International* (1922), IV, sec. 1858; von Martitz, *Internationale Rechtshilfe in Strafsachen* (1897), II, sec. 74. And see Fiore, *Effetti Internazionale delle Sentenze e degli Atti* (1877), II, p. 163.

Taking account particularly of the international practice which is recorded in a network of bilateral treaties, the League of Nations Committee of Experts for the Progressive Codification of International Law has submitted a Draft Convention on Communication of Judicial and Extra-Judicial Acts in Penal Matters and Letters Rogatory in Penal Matters, containing the following:

Art. 2. The Contracting Parties reciprocally undertake, at the request of a competent authority, to serve writs of summons upon witnesses or experts resident in their territory, irrespective of the nationality of such witnesses or experts. A witness or expert appearing voluntarily before an authority of the requesting Party in response to a writ of summons served upon him by the authority of the Party requested shall in no case, whatever his nationality, be subject, during his presence in the territory of the requesting Party, to criminal prosecution on a charge of having been a principal, an accomplice or an accessory, or of having helped to promote the act in respect of which the criminal proceedings are taken or any other act committed before he entered the territory of the requesting State. In like manner, no sentence passed upon him, on account of acts committed before he entered the country, may be executed on his person, nor may he be arrested for any infringement of the law which took place before his journey. . . .

The special position of the witness or expert as regards the jurisdiction of the foreign State shall be forfeited if he fails to leave the territory of that State within a reasonable time after having been heard. This time limit shall be fixed for him by the tribunal making the requisition. (*League of Nations Document*, 1927. V. 6. p. 28.)

Thus it may be claimed for the present article that it is scarcely more than a crystallization in text of a principle which is at once in harmony with general international practice and the most obvious requirements of fairness and justice. It represents no new departure, but is a principle which is clearly ripe for statement in the form in which it appears in this Convention.

As in the three articles immediately preceding (Articles 13, 14 and 15), the text protects aliens only. It is common practice to extend the same immunity or privilege to nationals and this practice is to be commended; but the present Convention consistently avoids the inclusion of safeguards which would protect individuals against action by the State or States to which they owe allegiance as nationals. It is assumed that in the existing state of international law provision for such safeguards should be left in all cases to the discretion of each State. It is of course clear that there is nothing in the present Convention which prevents States from concluding other treaties, or from giving effect to other treaties in force, which assure such protection to their nationals. Cf. Article 2, *supra*.

The text provides a temporary immunity only. The alien is safeguarded "during his presence . . . for the purpose of testifying before State tribunals or otherwise assisting in the administration of justice." The immunity begins at the moment the alien enters the State or a place subject to its authority. It continues, of course, until he has had a reasonable time in which to leave the State or a place subject to its authority after testifying or otherwise assisting. If the alien remains of his own free will after a reasonable time has elapsed, his immunity will be terminated. If he remains because of illness, interruption of the transport system, detention by local authorities, or other circumstance over which he has no control, he cannot be said to remain of his own free will and the immunity will continue. After the termination of the temporary immunity, the State resumes its original right to apprehend within its territory or a place subject to its authority or to obtain the surrender of the alien from another State for prosecution and punishment.

The text assures the alien an immunity while he is assisting either civil or criminal administration. While the legislation and treaties supporting the text deal chiefly with the immunity of persons called in by the State's officials to assist in the administration of criminal justice, and while it seems less likely that a State will call in aliens to assist in civil cases, there seems to be no good reason why the principle should not apply whether the proceedings assisted are civil or criminal. Some civil litigation may be quite as important to the good order and well-being of a State as are criminal cases. If the State concludes that it is more important to have an alien's aid in a civil case than it is to proceed with the prosecution of a crime previously committed, the same reasons of fairness and justice should prevent the State from taking advantage of his presence thus obtained.

The immunity provided prevents punishment as well as prosecution so

long as the immunity lasts. Consequently if one who has been convicted but not punished returns to testify or otherwise assist, at the request of State officials, he may not be punished until he has had a reasonable opportunity to leave the State or a place subject to its authority. On the other hand, the alien may claim the immunity which this article provides only if he enters the State or a place subject to its authority "at the request of officials of that State." No immunity may be claimed by one who enters at the request of a party to a cause of action or other person having no authority from the State to make a request in its behalf.

Finally, the immunity does not safeguard against prosecution or punishment for offences committed "while present for such purpose" (*e.g.*, perjury in giving testimony before the tribunal). See *Ex parte Levi* (1886), 28 Fed. 651. The French Extradition Law, quoted *supra*, allows immunity only "pour des faits ou des condamnations antérieures à sa comparution," the Laws of New York, quoted *supra*, only for "matters which arose before his entrance into this state under the subpoena," and a similar limitation is incorporated in the extradition treaties, the treaties of judicial assistance, and the Draft submitted by the League of Nations Committee of Experts. In conformity with practice and sound principle, the present article protects against prosecution or punishment for acts or omissions committed "before entering the territory of the requesting State" (see the Draft of the League of Nations Committee of Experts, quoted *supra*) and expressly excepts "crimes committed while present for such purpose."

ARTICLE 17. APPREHENSION IN VIOLATION OF INTERNATIONAL LAW

In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.

COMMENT

If custody of "any person", national or alien, is obtained "by recourse to measures in violation of international law or international convention," the present article provides that the State thus obtaining custody may neither prosecute nor punish such person until it has first obtained the consent of the State or States whose rights were violated by such measures. It cannot be said that the principle thus formulated is either a restatement of existing practice or a reconciliation of conflict between contemporary doctrines. It is of the nature of legislation and is proposed as such on the ground that its inclusion in a comprehensive convention on the subject of international penal competence is indicated by the most persuasive considerations of policy.

It is everywhere agreed, of course, that "recourse to measures in violation

of international law or international convention" in obtaining custody of a person charged with crime entails an international responsibility which must be discharged by the release or restoration of the person taken, indemnification of the injured State, or otherwise. It is not everywhere agreed that there may be no prosecution or punishment in reliance upon custody thus obtained "without first obtaining the consent of the State or States whose rights have been violated by such measures." Thus the present article assures an additional and highly desirable sanction for international law in the matter of recovery of fugitives from criminal justice. It removes much of the incentive to such irregular or illegal recoveries as have been the source of international friction in the past. Cf. the *Savarkar Case* (1911), Scott, *The Hague Court Reports*, p. 276; *Dominguez v. State* (1921), 90 Tex. Cr. 92, Dickinson, *Cases*, p. 755; *Vaccaro v. Collier* (1930), 38 F. (2d) 862, (1931), 51 F. (2d) 17; *Ex parte Lopez* (1934), 6 F. Supp. 342; Moore, *Treatise on Extradition and Interstate Rendition* (1891), I, ch. 7; Moore, *Digest of International Law* (1906), IV, 328. It provides an added incentive for recourse to regular methods in securing custody of fugitives. And if, peradventure, the custody of a fugitive has been obtained by unlawful methods, the present article indicates an appropriate procedure for correcting what has been done and removing the bar to prosecution and punishment. The desirability of such a provision in a convention which embodies a comprehensive statement of the broad penal competence supported by contemporary practice would seem to require no emphasis.

While it is frankly conceded that the present article is of the nature of legislation, it is not to be understood that the principle stated is without support in national jurisprudence or international practice. In the United States, for example, the law is in accord with this article in cases in which a person has been brought within the country by recourse to measures in violation of an international convention. A complete lack of jurisdiction in such cases has been asserted in noteworthy language in *United States v. Ferris* (1927), 19 F. (2d) 925, *Annual Digest*, 1927-1928, Case No. 127, Hudson, *Cases*, p. 676, a prosecution of members of the crew of a foreign ship for conspiracy to violate the Prohibition and Tariff Acts following seizure of the ship some 270 miles off the west coast of the United States. In sustaining pleas to the jurisdiction, Judge Bourquin said:

Hence, as the instant seizure was far outside the limit [established by treaty], it is sheer aggression and trespass (like those which contributed to the War of 1812), contrary to the treaty, not to be sanctioned by any court, and cannot be the basis of any proceeding adverse to the defendants. The prosecution contends, however, that courts will try those before it, regardless of the methods employed to bring them there. There are many cases generally so holding, but none of authority wherein a treaty or other federal law was violated, as in the case at bar. That presents a very different aspect and case. "A decent respect for the opinions of mankind", national honor, harmonious rela-

tions between nations, and avoidance of war, require that the contracts and law represented by treaties shall be scrupulously observed, held inviolate, and in good faith precisely performed—require that treaties shall not be reduced to mere “scraps of paper”. . . .

It seems clear that, if one legally before the court cannot be tried because therein a treaty is violated, for greater reason one illegally before the court, in violation of a treaty, likewise cannot be subjected to trial. Equally in both cases is there an absence of jurisdiction.

Cf. Ford v. United States (1927), 273 U. S. 593; 21 *Am. Jour. Int. L.* (1927), 505; *Annual Digest*, 1925–1926, Case No. 110, in which it was held that an extraterritorial arrest was within the limits prescribed by treaty.

A similar principle has been emphatically approved by the Supreme Court of the United States in case of proceedings instituted to forfeit for violation of the customs statutes a foreign vessel seized outside territorial waters in violation of treaty. The court said:

The objection to the seizure is not that it was wrongful merely because made by one upon whom the government had not conferred authority to seize at the place where the seizure was made. The objection is that the government itself lacked power to seize, since by the treaty it had imposed a territorial limitation upon its own authority. (*Cook v. United States*, 1933, 288 U. S. 102, 121.)

Lacking the power to seize, in consequence of the treaty, the United States had no power to subject the vessel to its laws. The objection was not to the jurisdiction of the court alone, but to “the jurisdiction of the United States.” The objection was not met by seeking to distinguish between the custody of the Coast Guard and the subsequent custody of the marshal of the court, nor was the defect of jurisdiction cured by an answer to the merits on the part of the individual claimant. The Supreme Court concluded that “to hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty.” “The ordinary incidents of possession of the vessel and the cargo,” said the court, “yield to the international agreement.” *Cook v. United States* (1933), 288 U. S. 102, 121–122; 27 *Am. Jour. Int. L.* (1933), 305. See Dickinson, “Jurisdiction Following Seizure or Arrest in Violation of International Law,” 28 *Am. Jour. Int. L.* (1934), 231.

The principle of the present article finds further support in the rule of Anglo-American jurisprudence which forbids the trial of an extradited person for any offence, committed prior to his extradition, other than the offence for which he was surrendered under the extradition treaty. The rule is stated in the leading American case as follows:

a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty, can only be tried for one of the offences described in that treaty, and for the offence with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum

he had been forcibly taken under those proceedings. (*United States v. Rauscher*, 1886, 119 U. S. 407, 430; *Dickinson, Cases*, pp. 738, 744.)

See *Re Alice Woodall* (1888), 16 Cox C. C. 478. See also *Cosgrove v. Winney* (1899), 174 U. S. 64; *Johnson v. Browne* (1907), 205 U. S. 309. Cf. *In re Rowe* (1896), 77 Fed. 161; *State v. Rowe* (1898), 104 Ia. 323; *Cohn v. Jones* (1900), 100 Fed. 639; *State v. Spiegel* (1900), 111 Ia. 701; *Greene v. United States* (1907), 154 Fed. 401; *Collins v. O'Neil* (1909), 214 U. S. 113; *People v. Hanley* (1925), 240 N. Y. 455. Custody is legally obtained in such a case, but only for a particular purpose, and the extradited person may be subjected to the national authority for that purpose only. As the Supreme Court of the United States has said:

As this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them. (*United States v. Rauscher*, 1886, 119 U. S. 407, 422.)

In the case of *United States v. Rauscher* . . . the effect of extradition proceedings under a treaty was very fully considered, and it was there held, that, when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both in regard to himself and in good faith to the country which had sent him here, was, that he should be tried for no other offence than the one for which he was delivered under the extradition proceedings. (*Ker v. Illinois*, 1886, 119 U. S. 436, 443.)

It is urged that the construction contended for by the respondent is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then to punish him for another and different offense. (*Johnson v. Browne*, 1907, 205 U. S. 309, 321.)

For an exhaustive study of the whole subject, see Moore, *Treatise on Extradition and Interstate Rendition* (1891), I, ch. 6.

The same rule has been applied in the United States, in even more striking circumstances, where the national court was convinced that an international agreement must be implied, in the absence of a formal treaty, in order to escape the conclusion that there had been a violation by national authorities

of an obligation of international law. The case is *Dominguez v. State* (1921), 90 Tex. Cr. 92; Dickinson, *Cases*, p. 755; 20 *Mich. L. Rev.* 536; 31 *Yale L. Jour.* 443. A United States expeditionary force had been sent into Mexico in "hot pursuit" of bandits. Having apprehended a Mexican, the force discovered upon its return that he was not one of the bandits pursued and he was thereupon surrendered to local Texas authorities who proceeded to prosecute him for a murder previously committed in Texas. Relying upon the rule of the extradition cases, it was contended in behalf of the accused that the Texas court was without jurisdiction to prosecute him for the murder until he had been allowed an opportunity to return to Mexico. The prosecution contended, on the other hand, that the accused had been abducted or kidnapped without Mexico's consent and consequently that he could be prosecuted for the murder without any breach of treaty obligation. The only information as to the source and scope of the expedition's authority which the court had before it was the testimony of the officer in command that he was acting under instructions from the United States War Department. It was held that an agreement between Mexico and the United States must be presumed, consequently that the rule of the extradition cases was applicable, and that the accused might resist trial for the murder until such time as he should voluntarily subject himself to the jurisdiction of the United States or until the consent of Mexico should be obtained. The entry of the expeditionary force into Mexico for the purpose of apprehending bandits, said the court, would have been "a violation of Mexican territory contrary to the law of nations in the absence of consent of the Mexican Government." 90 Tex. Cr. 92, 97. Consequently it was to be assumed that the instructions from the War Department were in accord with a permission granted by the Mexican Government. The court concluded that

the same moral obligation that would restrain the United States Government from transgressing the implied limitations upon it under its treaty [of extradition] with Mexico, would necessarily prevail with reference to the agreement resting upon the "comity of nations", and if the legal obligation is the same, the appellant cannot be held for the offense which we are now considering without the opportunity to return to his country in order that it may there determine whether he shall be surrendered for trial under the treaty of extradition. (90 Tex. Cr. 92, 98-99.)

The principle of Anglo-American jurisprudence which forbids the trial of an extradited person for any offence other than that for which he was extradited is also a principle of international practice. Moore says:

Among writers on international law there is almost uniform concurrence in the opinion that a person surrendered for one offence should not be tried for another until he shall have been replaced within the jurisdiction of the surrendering state or had an opportunity to return thereto. (*Treatise on Extradition and Interstate Rendition*, 1891, I, p. 217.)

See Donnedieu de Vabres, *Les Principes Modernes du Droit Pénal International* (1928), p. 293 ff; Travers, *Le Droit Pénal International* (1922), V, sec. 2534 ff; Travers, *L'Entr'Aide Répressive Internationale* (1928), sec. 354 ff. The principle is expressly stipulated in practically all modern extradition treaties and is incorporated in the Convention on Extradition, Art. 23, *Research in International Law* (1935).

In Great Britain, the United States, and perhaps elsewhere, the national law is not in accord with this article in cases in which a person has been brought within the State or a place subject to its authority by recourse to measures in violation of customary international law. It is of course everywhere agreed that the State or States whose rights have been violated by such measures are entitled to satisfaction from the responsible State. See the *Colunje Claim* (1933), American and Panamanian General Claims Arbitration, p. 733. "As a rule, the release or restoration of the person carried away, is requested" (Moore, *Treatise on Extradition and Interstate Rendition*, I, p. 288); and such a request ordinarily brings prompt and unconditional compliance. See Moore, *op. cit.*, I, ch. 7; Moore, *Digest of International Law* (1906), IV, p. 328; Travers, "*Des arrestations au cas de venue involontaire sur le territoire*," 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1917), 627, 642; Clunet, *Questions de Droit relatives à l'Incident Franco-Allemand de Pagny* (1887). Cf. the *Savarkar Case* (1911), Scott, *The Hague Court Reports*, p. 276. But the competence of the national authorities to proceed with prosecution and punishment, in the absence of an international reclamation, is asserted. A plea in behalf of the individual accused that custody was obtained irregularly and in violation of international law will not be entertained. The view is held that only the injured State can be permitted to raise the issue, that the issue is essentially international and political in character, and that the national authorities may proceed with prosecution and punishment as in case of custody lawfully obtained. See *Ex parte Scott* (1829), 9 B. & C. 446; *State v. Brewster* (1835), 7 Vt. 118; *Ker v. People* (1884), 110 Ill. 627; *Ker v. Illinois* (1886), 119 U. S. 436; *Ex parte Wilson* (Tex. Crim. App. 1911), 140 S. W. 98; *United States v. Unverzagt* (1924), 299 Fed. 1015, *Annual Digest*, 1923-1924, Case No. 161; *Ex parte Ponzi* (1926), 106 Tex. Cr. 58; *Ex parte Lopez* (1934), 6 F. Supp. 342; the position of the United States in the Martinez controversy with Mexico, *U. S. Foreign Relations* (1906), II, p. 1121; Moore, *Treatise on Extradition and Interstate Rendition* (1891), I, ch. 7; Travers, "*Des arrestations au cas de venue involontaire sur le territoire*," 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.* (1917), 627.

In the American case of *State v. Brewster* (1835), 7 Vt. 118, in which it was moved that the indictment be dismissed on the ground that the accused had been forcibly taken against his will from Canada by citizens of the United States for the purpose of being prosecuted for the offences named, the court said:

It is a well settled rule of international law, that a foreigner is bound to regard the criminal laws of the country in which he may sojourn, and for any offence there committed, he is amenable to those laws. In this case, the offence, if committed at all, was committed within our jurisdiction, and is punishable by our laws. The respondent, although a foreigner, is, if guilty, equally subject to our jurisdiction with our own citizens. His escape into Canada did not purge the offence, nor oust our jurisdiction. Being retaken and brought in fact within our jurisdiction, it is not for us to inquire by what means, or in what precise manner, he may have been brought within the reach of justice.

It becomes then immaterial, whether the prisoner was brought out of Canada with the assent of the authorities of that country or not. If there were anything improper in the transaction, it was not that the prisoner was entitled to protection on his own account. The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complain, it is a matter which concerns the political relations of the two countries, and in that aspect, is a subject not within the constitutional powers of this court. (7 Vt. 118, 121-122.)

In the case of *Ex parte Lopez* (1934), 6 F. Supp. 342, there was a petition for habeas corpus in behalf of one who had been abducted from Mexico to stand trial in the United States for violation of the United States narcotic laws and the Government of Mexico intervened and asked that the accused be delivered into its custody:

Where he will be detained and held under provisional arrest, if requested, pending further disposition in accordance with the form and procedure in such cases made and provided, under and by virtue of the Treaty between said Governments; all to the end that the friendly relations existing between the Government of the United States of America and the United States of Mexico may continue unimpaired by reason of the unhappy occurrence of the invasion of the sovereignty of Intervenor, and the abduction of one of its citizens from its soil, and that the solemn compact between said governments may not be nullified by the unlawful and illegal acts of individual citizens of either of said governments.

The writ of habeas corpus was denied and the intervention dismissed, the court saying:

The intervention of the government of Mexico raises serious questions, involving the claimed violation of its sovereignty, which may well be presented to the Executive Department of the United States, but of which this court has no jurisdiction. *State v. Brewster*, 7 Vt. 121.

See also *The Ship Richmond* (1815), 9 Cr. (U. S.) 102, and *The Merino* (1824), 9 Wh. (U. S.) 391, in which forfeitures for violation of national laws were prosecuted to a successful conclusion although the ships had been seized within the territorial waters of a friendly State.

British and American prize law is to the same effect. It has been held consistently that captures made in violation of neutral territorial waters will be restored only upon demand of the neutral State. As against an individual enemy or neutral claimant, such captures are regarded as valid.

Lord Stowell said that it was "a known principle" of his court that "the privilege of territory will not itself enure to the protection of property, unless the state from which that protection is due, steps forward to assert the right." *The Purissima Conception* (1805), 6 C. Rob. 45, 47. See also *The Twee Gebroeders* (1800), 3 C. Rob. 162, 162 n.; *The Anna* (1805), 5 C. Rob. 373; *The Eliza Ann* (1813), 1 Dods. 244; *The Bangor* [1916], P. 181; *The Düsseldorf* [1920], A. C. 1034, 1037; *The Valeria* [1921], 1 A. C. 477; *The Pellworm* [1922], 1 A. C. 292; *The Anne* (1818), 3 Wh. (U. S.) 435; *The Santissima Trinidad* (1822), 7 Wh. (U. S.) 283, 349; *The Lilla* (1862), 2 Sprague 177; *The Sir William Peel* (1866), 5 Wall. (U. S.) 517; *The Adela* (1868), 6 Wall. (U. S.) 266; *The Florida* (1880), 101 U. S. 37, 42.

On the other hand, it appears that the prize tribunals of France, Germany and Italy consider a capture made in violation of neutral territorial waters as "absolutely illegal irrespective of whether the neutral power in whose waters the capture was made intervenes or not." Garner, *Prize Law During the World War* (1927), pp. 227-230.

Travers concludes:

1° L'application d'une loi pénale, préalablement reconnue compétente, n'est nullement subordonnée à un acte de soumission volontaire ou à l'agrément de l'auteur du fait incriminé. De ce principe découle la règle de la parfaite légalité des arrestations opérées à l'encontre d'individus arrivés contre leur plein gré sur le territoire, que ces arrestations aient lieu en vue d'extraditions ou en raison soit de poursuites en cours sur le territoire, soit de décisions répressives prononcées par des juridictions locales.

2° Le respect des souverainetés étrangères constituant une des règles fondamentales du droit international, exception doit être faite à la règle générale lorsque l'acte, qui a été la cause de la venue involontaire sur le territoire, a constitué une atteinte à une souveraineté étrangère, mais les États étant seuls juges des exigences de leur droit de souveraineté, le vice, existant en ce cas, ne peut être invoqué que par le gouvernement lésé. Il ne saurait appartenir à un malfaiteur quelconque de parler au nom de la souveraineté violée.

3° Le vice découlant du caractère involontaire de la venue sur le territoire est, si on admet son existence au cas où il n'y a pas eu violation d'une souveraineté étrangère, purgé dès que l'individu a pu, en fait, regagner une frontière; cet individu se trouve en effet, en ce cas, à partir de ce moment, sur le territoire par l'effet de sa volonté. ("*Des arrestations au cas de venue involontaire sur le territoire*," 13 *Rev. de Dr. Int. Privé et de Dr. Pénal Int.*, 1917, 627, 646.)

It will be seen that the practical effect of the Anglo-American rule, approved by Travers, *supra*, is that the national law lends no support whatever to the observance of admitted international obligations. On the contrary, it takes advantage of an admitted violation of international obligation to proceed with the prosecution and punishment of a person of whom custody has been illegally obtained. Whatever refinements of distinction may be invoked, its practical consequences are in direct conflict with the salutary

rule of United States law that there is no jurisdiction to prosecute a person who has been arrested in violation of treaty. It is believed that the distinction made in United States law between arrests in violation of treaty and arrests in violation of customary international law is arbitrary and unsound, prompted by a shortsighted desire to prosecute the person of whom custody has been illegally obtained, and that it should not be approved in a general international convention on jurisdiction with respect to crime. The present article adopts the United States rule applicable to arrests in violation of treaty. It rejects the rule of such English and American cases as *Ex parte Scott*, *State v. Brewster*, *Ker v. People*, *United States v. Unverzagt*, and *Ex parte Lopez*, noted *supra*. It thus accomplishes a desirable clarification and simplification of the law in conformity with the best traditions of both national and international jurisprudence.

If the person or thing which is the subject of controversy has been brought within reach of the court's process by a breach of treaty or international law, the court should approve no arbitrary or face-saving distinctions. The court is an arm of the nation and its jurisdiction can rise no higher, by virtue of process served within the territory, than the jurisdiction of the nation which it represents. If there was no jurisdiction in the nation to make the original seizure or arrest, there should be no jurisdiction in the court to subject to the nation's law. In terms of American precedents, this means that the underlying principle of *United States v. Rauscher* is correct and that the distinction attempted in *Ker v. Illinois* is arbitrary, unsound, and should be repudiated; that the principle of *The Mazel Tov* [*Cook v. United States*, 288 U. S. 102] is unimpeachable; and that such cases as *The Ship Richmond* and *The Merino* must be relegated to the category of cases discredited and overruled. To hold otherwise would go far to nullify the purpose and effect of the salutary principle, well established in Anglo-American jurisprudence, that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." (Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 *Am. Jour. Int. L.*, 1934, 231, 244.)

It only remains to be emphasized that by no means every irregularity in the recovery of a fugitive from criminal justice is a "recourse to measures in violation of international law or international convention." If the State in which the fugitive is found acquiesces or agrees, through its officers or agents, to a surrender accomplished even in the most informal and expeditious way, there is no element of illegality. In the *Savarkar Case* (1911), Scott, *The Hague Court Reports*, p. 276, a tribunal of the Permanent Court of Arbitration held that there was no violation of international law even though there was evidence of a mistake on the part of a local officer of the State from which the fugitive was taken. The award declared that

Whereas, while admitting that an irregularity was committed by the arrest of Savarkar and by his being handed over to the British police,

there is no rule of international law imposing in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.

Cf. the Colunje Claim (1933), American and Panamanian General Claims Arbitration, p. 733. The determination of debatable questions as to whether there has been "a violation of international law or international convention," in particular circumstances, may be safely left to the processes of international settlement and adjudication.

ARTICLE 18. INTERPRETATION OF CONVENTION

The provisions of the present Convention shall in no case be interpreted

(a) To impose upon a State an obligation to exercise the jurisdiction herein defined and limited;

(b) To invalidate an exercise of jurisdiction asserted upon untenable grounds, if jurisdiction might have been assumed under this Convention on other grounds;

(c) To foreclose possible objections to the making of a particular act or omission a crime, based upon grounds falling outside the scope of this Convention.

COMMENT

In view of the scope of the competence which is recognized in the present Convention, in conformity with national legislation and international practice, the Convention should safeguard explicitly against certain implications or interpretations. Such safeguards, applicable to the Convention as a whole as well as to each and every provision incorporated therein, are embodied in the text of the present article.

In the first place, the Convention is in no case to be so interpreted as to impose upon a State any obligation whatever to exercise all of "the jurisdiction herein defined and limited." A State may be under an international obligation to exercise penal competence in certain cases, by virtue of some principle of international law or treaty provision; but the present Convention imposes no such obligation. A State may not wish to exercise in full, for example, the territorial competence which is formulated in Article 3, the competence with respect to its public or private ships or aircraft which is stated in Article 4, the competence with respect to nationals or persons assimilated to nationals which is stated in Articles 5 and 6, or the competence with respect to aliens for acts done outside the State which is defined and limited in Articles 7, 8, 9, 10, and 11. The Convention imposes no obligation to exercise such competence; it attempts only to define and limit the competence which a State may exercise. It is conceivable, furthermore, that a State may wish to delegate to another State by treaty or otherwise the exercise of some part of its penal competence. Thus States under an extrater-

ritorial régime have done something of the kind in the past; and it is not inconceivable that States under some form of guaranty, protection, mandate or other special relationship may find it advantageous to do something of the kind in the future. The Convention does not prevent such a delegation of the competence which it defines and limits.

In the second place, while the Convention expressly negatives any inference that a State is competent because competence is not expressly denied (see Article 2, *supra*), a State should not be regarded as incompetent in a particular case because it has misconceived the principle upon which its jurisdiction is properly based. For example, if a State in a particular case should proceed to prosecute and punish in reliance upon evidence that the person prosecuted was a national (see Article 5, *supra*), only to discover upon additional evidence that the person prosecuted had been naturalized in another State before the act or omission was committed, it should not be regarded as incompetent to continue the prosecution if the additional evidence also revealed that the act or omission was committed in whole or in part within its territory (see Article 3, *supra*).

In the correspondence between Mexico and the United States concerning the Cutting incident, arising out of the arrest in Mexico of a United States national charged with publishing in the United States defamation of a Mexican national, it was contended in behalf of the United States that Mexico could not properly base its claim to jurisdiction over Cutting on the ground that he had committed an offence against a Mexican national in the United States; but it was conceded that Mexico could properly base its claim to jurisdiction on the ground that Cutting had circulated in Mexico a libel printed in the United States "in such manner as to constitute a publication of the libel in Mexico within the terms of the Mexican law." See Bayard to Connerly, Nov. 1, 1887, *U. S. For. Rel.* (1887), 751, 753; Dickinson, *Cases*, 673, 679. Cf. *Commonwealth v. Blanding* (1825), 3 Pick. (Mass.) 304; *State v. Piver* (1913), 74 Wash. 96.

In the case of the *S.S. Lotus*, before the Permanent Court of International Justice, it was contended in behalf of France that Turkey was without jurisdiction to prosecute for involuntary manslaughter the officer in charge of a French ship which had run down and sunk a Turkish ship on the high seas with the resulting loss of eight Turkish nationals. It was not clear whether the Turkish prosecution had been based upon Article 6 of the Turkish Penal Code, asserting jurisdiction to prosecute a foreigner for an offence committed abroad to the prejudice of a Turkish subject, or upon other provisions of Turkish legislation. The court was evenly divided, but it was decided, by the President's casting vote, that the court was not required to pass upon the international competence of Turkey to prosecute under Article 6 of its Penal Code since Turkey's competence could be sustained on the ground that the offence might be regarded as having been committed on the Turkish ship. The court said:

For even were Article 6 to be held incompatible with the principles of international law, since the prosecution might have been based on another provision of Turkish law which would not have been contrary to any principle of international law, it follows that it would be impossible to deduce from the mere fact that Article 6 was not in conformity with those principles, that the prosecution itself was contrary to them. The fact that the judicial authorities may have committed an error in their choice of the legal provision applicable to the particular case and compatible with international law only concerns municipal law and can only affect international law in so far as a treaty provision enters into account, or the possibility of a denial of justice arises. (*Publications P.C.I.J.*, Series A, Judgment No. 9, p. 24.)

It is believed that this is correct in principle and that it is not unlike the practice often followed in administering national law in cases in which a complaining party is clearly entitled to relief but has misconceived the course to be pursued. *Cf. Dupont de Nemours & Co. v. Vance* (1856), 19 How. (U. S.) 162. Consequently the present article stipulates that nothing in the Convention shall be so interpreted as to "invalidate an exercise of jurisdiction asserted upon untenable grounds, if jurisdiction might have been assumed under this Convention on other grounds."

In the third place, it is necessary to emphasize, while defining the jurisdiction to prosecute and punish for crime in the broadest terms, that the present Convention does not recognize an unlimited competence to make acts or omissions punishable. It is true that this is a matter of substantive penal law and hence is outside the scope of the present Convention. The Convention assumes that the formulation of substantive penal law is generally reserved to States. It must not be implied; however, that States may denounce acts or omissions as punishable without limitation. National standards of approved and objectionable behavior have varied greatly in the past and will undoubtedly vary greatly in the future. *Cf. Sellin, "Crime," Encyclopedia of the Social Sciences*, IV, 563. While perhaps unlikely, it is conceivable that one or more States may attempt at some time in the future to denounce as criminal certain acts or omissions with respect to which an overwhelming majority of States would refuse emphatically to admit any objectionable quality whatever. The right to object to such a conceivable attempt is not in any way affected by the Convention's provisions. The broad definition of competence to prosecute and punish for crime which the Convention incorporates, especially in the matter of crimes committed by aliens outside the territory, makes it imperative that there should be no possibility of unintended implications in this respect. Hence nothing in the Convention shall ever be so interpreted as to "foreclose possible objections to the making of a particular act or omission a crime, based upon grounds falling outside the scope of this Convention."

ARTICLE 19. SETTLEMENT OF DISPUTES

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application

of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

[See comment on identic article (28) of Convention on Extradition.]

APPENDIX 1

TREATY TO ESTABLISH UNIFORM RULES FOR PRIVATE INTERNATIONAL LAW

Signed at Lima, November 7, 1878¹

FIFTH TITLE. NATIONAL JURISDICTION OVER CRIMES COMMITTED ABROAD

Art. 34. Those who outside of the country commit the crimes of falsifying the national money, bank-notes having legal circulation, public bonds or other national documents, will be tried by the courts of the Republic according to its laws, when they are arrested on its territory or their extradition is obtained.

The national courts are likewise competent to try:

1. Citizens of the Republic who have committed abroad a crime of arson, murder, robbery, or any other which gives rise to extradition; provided that there is a complaint of the victim or a request by the Government of the country where the crime was committed; and

2. Aliens who, after having committed the same crimes against citizens of the Republic, come to reside in it; provided that a complaint by the interested party precedes [the action]; and

3. Pirates.

Art. 35. The proceedings in these cases will be subject to the laws of the country [where the trial occurs].

Art. 36. When the punishment for the crime is different in the place of its perpetration from the place of the trial, the less severe shall be applied.

Art. 37. The foregoing provisions shall not have effect:

1. If the criminal has been tried and punished at the place of the commission of the crime; or

2. If he has been tried and acquitted, or has received remission of the penalty; or

3. If action for the crime, or the punishment, has become impossible by lapse of time according to the law of the country in which the crime was committed.

APPENDIX 2

RESOLUTIONS RELATIVE TO CONFLICTS OF PENAL LAWS WITH RESPECT TO COMPETENCES

Adopted by the Institute of International Law at Munich,
September 7, 1883.²

Art. 1^{er}. La compétence territoriale de la loi pénale est celle du pays où se trouve le coupable lors de son activité criminelle.

Art. 2. La justice pénale d'un pays dans le territoire duquel se réalisent ou devaient se réaliser, selon l'intention du coupable, les effets de son activité, n'est pas compétente à raison de ces effets seuls.

Art. 3. Par contre, si la réalisation desdits effets devait, selon l'intention de l'agent, avoir lieu seulement dans un pays dont la législation pénale ne regarde comme criminels ni l'action

¹ The signatories were Argentina, Bolivia, Chile, Costa Rica, Ecuador, Peru and Venezuela. Translation from text in Seijas, *El Derecho Internacional Hispano-Americano*, I, pp. 260-269 (Caracas, 1884).

² *Annuaire de l'Institut de Droit International*, VII^e année, 1883-1885, p. 156.

destinée à produire ces effets, ni ces effets mêmes, l'Etat dans le territoire duquel l'action est commise ne pourra déclarer punissable cette action comme tentative ou acte préparatoire.

Il pourra déclarer punissable cette action expressément comme délit spécial, en faisant abstraction des effets que l'agent voulait atteindre.

Art. 4. Par le mot "coupable," on comprend toutes sortes de "coupables"—principaux, secondaires ou accessoires—participant d'une façon quelconque à l'infraction (auteurs, provocateurs, aides et complices en général, continuateurs, recéleurs et tous ceux qui favorisent l'impunité).

Art. 5. Toutefois, des Etats limitrophes ou voisins pourraient, en vertu d'un traité et après consentement préalable du gouvernement, s'accorder réciproquement une prorogation de leur compétence territoriale en vue de réunir, dans le même procès, le jugement du coupable accessoire ou secondaire avec celui du coupable principal, ou d'un autre coupable accessoire ou secondaire, pourvu qu'il ne s'agisse pas d'infractions ou attentats à la sûreté politique d'un Etat, et que le tribunal décerne la peine encourue selon la loi de l'activité criminelle (Art. 1-3).

Art. 6. Lorsque la loi pénale d'un pays, compétente d'après la principe de la territorialité (Art. 1-3), considère comme infraction une et indivisible dans le sens juridique, des actes commis en partie au dedans des frontières et en partie au dehors, la justice pénale de ce pays pourrait juger et punir même les actes commis à l'étranger.

Il y aurait donc une compétence pénale double ou même multiple, dont l'une, dûment exercée par prévention, exclurait l'autre et serait respectée partout, sauf les cas de délit contre la sûreté de l'Etat et des infractions mentionnées à l'article 8.

Art. 7. Chaque Etat conserve le droit d'étendre sa loi pénale nationale à des faits commis par ses nationaux à l'étranger.

Art. 8. Tout Etat a le droit de punir les faits commis même hors de son territoire et par des étrangers en violation de ses lois pénales, alors que ces faits constituent une atteinte à l'existence sociale de l'Etat en cause et compromettent sa sécurité, et qu'ils ne sont point prévus par la loi pénale du pays sur le territoire duquel ils ont eu lieu.

Art. 9. Les nationaux restent responsables, selon la législation de leur patrie, pour toute infraction dont ils se rendent coupables dans des pays qui ne sont soumis à aucune souveraineté quelconque ou qui sont régis par une justice pénale fondée sur des principes tout à fait différents de ceux qui sont adoptés par les législations des pays chrétiens ou reconnaissant les principes du droit des pays chrétiens.

Dans cette hypothèse, cependant, le juge est tout particulièrement tenu d'avoir égard aux circonstances de fait qui peuvent amoindrir ou exclure la culpabilité.

La législation nationale peut établir des règles spéciales pour ces cas.

Art. 10. Chaque Etat chrétien (ou reconnaissant les principes du droit des pays chrétiens), ayant sous sa main le coupable, pourra juger et punir ce dernier, lorsque, nonobstant des preuves certaines de prime abord d'un crime grave et de la culpabilité, le lieu de l'activité ne peut être constaté ou que l'extradition du coupable, même à sa justice nationale, n'est pas admise ou est réputée dangereuse.

Dans ces cas, le tribunal jugera d'après la loi la plus favorable à l'accusé en égard à la probabilité du lieu du crime, à la nationalité du coupable et à la loi pénale du tribunal même.

Art. 11. Le tribunal qui, d'après les règles mentionnées ci-dessus, doit appliquer la loi la plus favorable à l'accusé en cas de divergence des peines sanctionnées dans les législations différentes, apprécie souverainement la gravité des peines. La peine de mort est toujours regardée comme étant la plus sévère.

Art. 12. Les peines prononcées par jugement régulier des tribunaux d'un Etat quelconque, même non compétent, mais dûment subies, doivent empêcher toute poursuite dirigée à raison du même fait contre le coupable.

Seraient exceptés, toutefois, les délits contre la sûreté des Etats et ceux mentionnés ci-dessus, à l'article 8.

Toutes les fois qu'il y a lieu d'exercer de nouvelles poursuites après un jugement prononcé

à l'étranger, on tiendra compte de la peine que le coupable a déjà subie du chef du même fait. L'appréciation du tribunal quant à la mitigation de la peine, dans ces cas, sera souveraine.

Art. 13. Les acquittements prononcés du chef d'insuffisance des preuves produites contre l'accusé seraient valables partout. De même, les grâces accordées par le souverain d'un pays ayant sous sa main le coupable.

Les acquittements motivés par la non-criminalité du fait auraient même force que la loi du pays déclarant non-punissable ce même fait.

S'il y avait doute quant à la portée du jugement, la présomption serait en faveur du prévenu.

La prescription est traitée de la même manière que l'acquittement motivé par la non-criminalité.

Ces règles ne s'appliquent pas aux délits contre la sûreté de l'Etat, ni aux cas exceptionnels mentionnés à l'article 8.

Art. 14. L'exécution de la peine ne peut jamais avoir lieu hors du pays où le jugement est prononcé, sauf le cas d'une convention internationale ou conclue entre les membres d'un Etat formant un système fédératif.

Art. 15. L'aggravation de la peine à raison de récidive, quand la condamnation antérieure est émanée d'un tribunal étranger, ne peut être appliquée qu'après examen préalable de l'infraction antérieure. Cependant, selon l'avis du tribunal, le *dossier* de l'instruction étrangère pourra suffire. Le tribunal, vu les circonstances et les doutes soulevés, pourra écarter souverainement la question d'aggravation à raison de récidive.

APPENDIX 3

TREATY ON INTERNATIONAL PENAL LAW

Signed at Montevideo, January 23, 1889¹

TITLE I. JURISDICTION

Art. 1. Crimes are tried by the courts and punished by the laws of the nation on whose territory they are perpetrated, whatever may be the nationality of the actor, of the victim, or of the injured party.

Art. 2. Acts of a criminal nature committed in a State, which would be justiciable by its authorities if their effects were produced there; but which only injure rights and interests protected by the laws of another State, will be tried by the courts and punished according to the laws of the latter.

Art. 3. When a crime affects different States, the jurisdiction of the courts of the injured country on whose territory the criminal is apprehended will prevail to judge it.

If the criminal takes refuge in a State different from those injured, the jurisdiction of the courts of the country which had priority in seeking extradition will prevail.

Art. 4. In the cases covered by the preceding article, treating of a single criminal, only one trial shall take place; and the more severe penalty of those provided by the various penal laws infringed shall be applied.

Art. 6. Acts done in the territory of a State, which were not punishable according to its laws, but which were punishable by the nation where their effects were produced, cannot be judged by the latter except when the criminal falls within its jurisdiction.

Art. 7. For the trial and punishment of crimes committed by anyone of the personnel of a legation, the rules established by public international law shall be observed.

Art. 8. Crimes committed on the high seas or in neutral waters, whether on board of warships or merchant vessels, are tried and punished by the laws of the State to which the vessel's flag belongs.

Art. 9. Crimes committed on board warships of a State, which are in territorial waters of

¹ The signatories were Argentina, Bolivia, Paraguay, Peru and Uruguay. Translated from text in 18 Martens, *Nouveau Recueil Général de Traités* (2^{me} sér.), p. 432.

another, are tried and punished according to the laws of the State to which the said vessels belong.

There likewise are tried and punished according to the laws of the country to which the warships belong, the punishable acts committed outside the vessel by members of the crew or those who have some office on board, when the said acts chiefly concern the disciplinary order of the vessels.

If in the performance of the criminal acts there took part only persons not belonging to the personnel of the warship, the trial and punishment will take place according to the laws of the State in whose territorial waters the vessel is.

Art. 10. Crimes committed on board of a warship or merchant vessel under the conditions laid down by Article 2 shall be tried and punished according to the provisions of that article.

Art. 11. Crimes committed on board merchant vessels are tried and punished by the law of the State in whose jurisdictional waters the vessel was at the time of the commission of the offence.

Art. 12. For the purposes of criminal jurisdiction, there are declared territorial waters those within five miles from the coast of the mainland and islands which form part of the territory of each State.

Art. 13. Crimes considered as piracy by public international law fall within the jurisdiction of the State under whose power the criminals come.

APPENDIX 4

RESOLUTIONS OF THE INTERNATIONAL PRISON CONGRESS

Brussels, August 10, 1900 ¹

Art. I. Chaque Etat peut punir, conformément à ses lois, les crimes et les délits commis hors de son territoire, par des nationaux ou par des étrangers, soit comme auteurs, soit comme complices, contre la sûreté, la fortune, ou le crédit publics de cet Etat.

La poursuite n'est pas subordonnée à la présence de l'inculpé sur le territoire de l'Etat lésé.

Art. II. Chaque Etat peut punir, conformément à ses lois, toutes les autres infractions d'une certaine gravité dont ses nationaux se sont rendus coupables hors du territoire, soit comme auteurs, soit comme complices, alors même que le fait incriminé ne serait pas punissable dans le pays sur le territoire duquel il a été commis.

Parmi ces infractions doivent être comprises toutes celles qui peuvent donner lieu à extradition.

La poursuite n'a lieu que si l'inculpé est trouvé sur le territoire national.

Lorsque l'infraction a été commise contre un étranger, la poursuite peut être subordonnée à une plainte de la partie lésée ou de sa famille ou à un avis officiel donné par l'autorité du pays sur le territoire duquel le fait a été perpétré.

Art. III. Les règles qui précèdent ne sont plus applicables lorsque l'inculpé, jugé en pays étranger du chef de la même infraction, a été acquitté; ou bien lorsque, après avoir été condamné, il a subi ou prescrit sa peine ou qu'il a été gracié.

Art. IV. La loi pénale du pays où une infraction a été commise est applicable non seulement à cette infraction elle-même, mais aussi à tous les actes de participation, eussent-ils été accomplis à l'étranger ou par des étrangers.

APPENDIX 5

TRAVERS, PROJET DE DISPOSITIONS DE DROIT INTERNATIONAL A INSÉRER DANS UN CODE PÉNAL ²

Art. 1. La loi pénale est applicable à toutes les infractions et à toutes les tentatives d'infraction par elle prévues lorsque s'est réalisé, sur le territoire, en tout ou en partie, soit un

¹ *Actes* (1901), Vol. I, 177-178.

² Travers, *Le Droit Pénal International* (1922), V, § 2739.

élément constitutif de ladite infraction ou de ladite tentative, soit un fait influant sur la qualification même ou sur la quotité de la peine et tenant à l'activité de l'agent.

Les ambassadeurs, légats, chefs et membres de missions et représentations diplomatiques envoyés auprès du gouvernement, ne pourront être ni arrêtés ni poursuivis à dater du moment où ils seront entrés en fonctions près du gouvernement jusqu'au jour où, après les avoir cessés, ils auront eu le temps de gagner la frontière. Le gouvernement pourra leur notifier qu'ils ont à cesser immédiatement leurs fonctions et les faire reconduire à la frontière.

Les chefs d'États étrangers et les courriers diplomatiques ne pourront être poursuivis pendant la durée de leur présence sur le territoire.

Art. 2. La loi pénale est également applicable aux faits par elle prévus dont tous les éléments se seront accomplis hors du territoire à la condition :

ou que l'infraction ait eu à bord d'un bateau portant le pavillon national,

ou que la personne poursuivie ait la qualité de national et que soit il n'existe point de loi pénale locale, soit la loi locale ait renoncé à toute compétence, soit l'infraction consiste dans la violation d'une disposition de la loi nationale obligatoire pour le ressortissant à l'étranger,

ou que la partie lésée ait la qualité de national et que soit la loi locale n'existe point, soit ladite partie lésée se soit trouvée à l'étranger comme prisonnier de guerre, otage, évacué civil ou membre d'une mission officielle,

ou que l'infraction ait été commise dans un territoire voisin ne possédant pas de législation pénale,

ou que l'acte incriminé ait intéressé ou pu intéresser la sécurité soit des armées nationales se trouvant à l'étranger soit de leurs membres,

ou que l'acte incriminé soit l'un des faits réprimés par le Code pénal comme portant atteinte au crédit ou à la sécurité de l'État,

ou que l'auteur de l'acte incriminé soit trouvé sur le territoire, que son extradition ne soit pas demandée ou ne puisse être accordée et que la peine édictée par le Code pénal puisse être de un an de prison au moins.

Art. 3. Les compétences ci-dessus précisées s'étendent aux faits connexes.

Art. 4. La compétence se détermine vis-à-vis des complices en appliquant les règles posées pour les auteurs principaux. Peu importe que les poursuites contre ces derniers soient ou ne soient pas recevables.

Art. 5. Les poursuites n'auront lieu, au cas d'acte accompli dans tous ses éléments hors du territoire, que sur l'initiative du ministère public. Cette initiative pourra être provoquée par la plainte de la partie lésée ou la dénonciation d'autorités étrangères. La partie lésée et les autorités étrangères pourront, si le ministère public refuse d'agir, se pourvoir devant le Cour d'appel.

Les poursuites pourront avoir lieu même si le fait a déjà été poursuivi à l'étranger. Déduction devra seulement être faite au cas de condamnations successives, de la peine subie à l'étranger.

APPENDIX 6

RESOLUTIONS ON INTERNATIONAL PENAL LAW

Adopted by the Conference for the Unification of Penal Law, Warsaw,
November 5, 1927 ¹

PRINCIPE DE TERRITORIALITÉ

Art. 1^{er}. Les lois pénales de l'Etat . . . (x) s'appliquent à quiconque commet une infraction sur le territoire . . . (x).

Ces lois s'appliquent également aux infractions commises soit sur un navire . . . (x), soit dans les eaux territoriales, soit au-dessus du territoire . . . (x).

¹ *Conférence Internationale d'Unification du Droit Pénal* (Varsovie, 1^{er}-5 Novembre 1927). *Actes de la Conférence*, I, p. 131.

Ne sont pas soumises aux lois pénales, les personnes qui, d'après le droit international ou d'après les conventions spéciales, sont soustraites à la juridiction pénale des tribunaux . . . (x).

L'infraction sera considérée comme ayant été commise sur le territoire de l'Etat . . . (x), quand un acte d'exécution a été tenté ou accompli sur ce territoire ou quand le résultat de l'infraction s'est produit sur ce territoire.

PRINCIPE DE LA PERSONNALITÉ

Art. 2. Les lois pénales de l'Etat . . . (x) s'appliquent à tout national qui participe comme auteur, instigateur ou auxiliaire à une infraction commise à l'étranger, si celle-ci est aussi prévue par la loi du lieu de l'infraction.

S'il y a une différence entre les deux lois, le juge tiendra compte de cette différence en faveur du prévenu dans l'application de la loi nationale.

Sauf les exceptions prévues à l'article . . . , la poursuite est subordonnée contre le national, pour les infractions par lui commises à l'étranger, à son retour ou séjour volontaires, ou à son extradition.

Sous la même réserve, aucune poursuite n'aura lieu si le national prouve qu'il a été acquitté ou condamné définitivement à l'étranger et, en cas de condamnation, qu'il a exécuté sa peine ou a bénéficié d'une mesure d'exemption.

Art. 3. Si le condamné se soustrait à l'exécution intégrale de sa condamnation, la durée de la peine subie à l'étranger sera déduite de la peine prononcée contre lui.

Aucune poursuite ne pourra être exercée pour l'infraction commise à l'étranger qui, d'après la loi du lieu du délit, est subordonnée à une plainte, si cette plainte n'a pas été portée ou a été légalement retirée.

Art. 4. Les dispositions des deux articles précédents sont applicables aux étrangers domiciliés en . . . (x), s'ils ne sont pas citoyens d'un pays avec lequel l'Etat . . . (x) a signé un traité d'extradition ou si leur extradition n'a pas été demandée par leur pays. Elles sont également applicables aux apolytes domiciliés en . . . (x).

Ces dispositions sont applicables également aux instigateurs et auxiliaires qui ont participé en Etat . . . (x) à une infraction commise à l'étranger.

Art. 5. Sera punissable, même par défaut, quiconque aura participé à l'étranger à un crime ou délit: 1° contre la sûreté de l'Etat; 2° de contrefaçon ou falsification de sceau, poinçons, cachets ou timbres de l'Etat.

Si l'agent a été arrêté sur le territoire . . . (x) ou si son extradition est obtenue, la peine prononcée contre lui par les tribunaux . . . (x) sera exécutée, même si pour les faits prévus aux alinéas précédents il avait été jugé définitivement à l'étranger.

Au cas d'une condamnation prononcée à l'étranger pour la même infraction, la peine déjà subie sera déduite de celle prononcée par les tribunaux de . . . (x).

Un étranger, qui aura participé à l'étranger à un crime ou délit contre un citoyen ou contre l'administration de l'Etat . . . (x), sera poursuivi au pays . . . (x), sous condition que l'acte commis soit punissable selon la loi de l'Etat où il a été commis, et que l'inculpé se trouve sur le territoire de l'Etat . . . (x).

DELITS DU DROIT DES GENS

Art. 6. Sera également puni d'après les lois . . . (x), indépendamment de la loi du lieu où l'infraction a été commise et de la nationalité de l'agent, quiconque aura¹ commis à l'étranger une des infractions suivantes:

- a) piraterie;
- b) falsification de monnaies métalliques, autres effets publics ou billets de banque;
- c) traite des esclaves;
- d) traite des femmes ou enfants;
- e) emploi intentionnel de tous moyens capables de faire courir un danger commun;
- f) trafic de stupéfiants;

g) trafic de publications obscènes;

h) autres infractions punissables, prévues par les conventions internationales conclues par l'Etat . . . (x).

Art. 7. Tout autre crime ou délit commis à l'étranger, par un étranger, pourra être puni dans le pays . . . (x) dans les conditions prévues aux articles précédents, si l'agent se trouve sur le territoire de l'Etat . . . (x) et si l'extradition n'a pas été demandée ou n'a pu être accordée et si le ministre de la Justice requiert la poursuite.

CHANGEMENT DE NATIONALITÉ

Art. 8. La loi . . . (x) s'appliquera également à l'étranger qui, au moment de la perpétration de l'acte, était ressortissant de . . . (x); elle s'appliquera également à celui qui a obtenu la nationalité . . . (x) après la perpétration de l'acte.

APPENDIX 7

BUSTAMANTE CODE

ANNEXED TO THE CONVENTION ON PRIVATE INTERNATIONAL LAW

Adopted at Havana, February 20, 1928¹

BOOK III

INTERNATIONAL PENAL LAW

CHAPTER I

PENAL LAWS

Article 296. Penal laws are binding on all persons residing in the territory, without other exceptions than those established in this chapter.

Article 297. The head of each of the contracting States is exempt from the penal laws of the others when he is in the territory of the latter.

Article 298. The diplomatic representatives of the contracting States in each of the others, together with their foreign personnel, and the members of the families of the former who are living in his company enjoy the same exemption.

Article 299. Nor are the penal laws of the State applicable to offenses committed within the field of military operations when it authorizes the passage of an army of another contracting State through its territory, except offenses not legally connected with said army.

Article 300. The same exemption is applied to offenses committed on board of foreign war vessels or aircraft while in territorial waters or in the national air.

Article 301. The same is the case in respect to offenses committed in territorial waters or in the national air, on foreign merchant vessels or aircraft, if they have no relation with the country and its inhabitants and do not disturb its tranquillity.

Article 302. When the acts of which an offense is composed take place in different contracting States, each State may punish the act committed within its jurisdiction, if it by itself constitutes a punishable act.

In the contrary case, preference shall be given to the right of the local sovereignty where the offense has been committed.

Article 303. In case of related offenses committed in the territories of more than one contracting State, only the one committed in its own territory shall be subject to the penal law of each.

Article 304. No contracting State shall apply in its territory the penal laws of the others.

¹ Final Act of the Sixth International Conference of American States, p. 16. In force January 1, 1935, for the following States: Brazil, Bolivia, Costa Rica, Cuba, Dominican Republic, El Salvador, Chile, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Venezuela.

CHAPTER II

OFFENSES COMMITTED IN A FOREIGN CONTRACTING STATE

Article 305. Those committing an offense against the internal or external security of a contracting State or against its public credit, whatever the nationality or domicile of the delinquent person, are subject in a foreign country to the penal laws of each contracting State.

Article 306. Every national of a contracting State or every foreigner domiciled therein who commits in a foreign country an offense against the independence of that State remains subject to its penal laws.

Article 307. Moreover, those persons are subject to the penal laws of the foreign State in which they are apprehended and tried who have committed outside its territory an offense, such as white slavery, which said contracting State has bound itself by an international agreement to repress.

CHAPTER III

OFFENSES COMMITTED OUTSIDE THE NATIONAL TERRITORY

Article 308. Piracy, trade in negroes and slave traffic, white slavery, the destruction or injury of submarine cables, and all other offenses of a similar nature against international law committed on the high sea, in the open air, and on territory not yet organized into a State, shall be punished by the captor in accordance with the penal laws of the latter.

Article 309. In cases of wrongful collision on the high sea or in the air, between ships or aircraft carrying different colors, the penal law of the victim shall be applied.

CHAPTER IV

SUNDRY QUESTIONS

Article 310. For the legal concept of reiteration or recidivism will be taken into account the judgment rendered in a foreign contracting State, with the exception of the cases in which same is contrary to local law.

Article 311. The penalty of civil interdiction shall have effect in each of the other States upon the previous compliance with the formalities of registration or publication which may be required by the legislation of such State.

Article 312. Prescription of an offense is subordinated to the law of the State having cognizance thereof.

Article 313. Prescription of the penalty is governed by the law of the State which has imposed it.

APPENDIX 8

RESOLUTION ON THE CONFLICT OF PENAL LAWS WITH
RESPECT TO COMPETENCE

Adopted by the Institute of International Law at Cambridge, July 31, 1931 ¹

L'Institut, prenant en considération l'évolution de la science du droit pénal international et du droit positif, estime qu'il y a lieu de modifier et de compléter les résolutions votées dans sa session de Munich, en 1883, en remplaçant les articles 1 à 11 par les dispositions suivantes:

Article 1^{er}

"La loi pénale d'un Etat régit toute infraction commise sur son territoire, sous réserve des exceptions consacrées par le droit des gens."

¹ *Annuaire de l'Institut de Droit International*, II, 1931, p. 235.

Article 2

“La loi d'un Etat peut considérer une infraction comme ayant été commise sur son territoire aussi bien lorsqu'un acte de commission ou d'omission qui la constitue y a été perpétré ou tenté que lorsque le résultat s'y est produit ou devait s'y produire.

“Cette règle est aussi applicable aux actes de participation.”

Article 3

“Chaque Etat a le droit d'étendre sa loi pénale à toute infraction ou à tout acte de participation délictueuse commis par ses nationaux à l'étranger.”

Article 4

“Tout Etat a le droit de punir des actes commis en dehors de son territoire, même par des étrangers, lorsque ces actes constituent :

“a) Un attentat contre sa sécurité;

“b) Une falsification de sa monnaie, de ses timbres, sceaux ou marques officiels.

Cette règle est applicable lors même que les faits considérés ne sont pas prévus par la loi pénale du pays sur le territoire duquel ils ont été commis.”

Article 5

“Tout Etat a le droit de punir des actes commis à l'étranger par un étranger découvert sur son territoire lorsque ces actes constituent une infraction contre des intérêts généraux protégés par le droit international (tels que la piraterie, la traite des noirs, la traite des blanches, la propagation de maladies contagieuses, l'atteinte à des moyens de communication internationaux, canaux, câbles sous-marins, la falsification des monnaies, instruments de crédit, etc.), à condition que l'extradition de l'inculpé ne soit pas demandée ou que l'offre en soit refusée par l'Etat sur le territoire duquel le délit a été commis ou dont l'inculpé est ressortissant.”

APPENDIX 9

RESOLUTION ON INTERNATIONAL PENAL LAW

Adopted by the Fourth Section of the International Congress of Comparative Law, The Hague, August 2-6, 1932

1. Le principe général en vertu duquel la loi pénale de chaque Etat régit les infractions commises sur son territoire n'exclut pas la possibilité d'attribuer compétence judiciaire à un Etat pour la poursuite de certaines infractions commises hors de son territoire, même par des étrangers.
2. Une infraction est considérée comme ayant eu lieu sur le territoire, lorsqu'un des actes d'omission ou de commission qui la constituent y a été perpétré ou tenté.
3. Tout Etat a le droit de punir les actes commis en dehors de son territoire, même par des étrangers lorsque les actes constituent
 - a) Un attentat contre sa sécurité;
 - b) Un délit de contrefaçon du sceau de cet Etat ou d'usage du sceau contrefait;
 - c) Un délit de falsification de monnaie ou de valeur du timbre ou d'effet de crédit public de cet Etat.

Cette règle est applicable, lors même que les faits considérés ne sont pas prévus par la loi pénale du pays sur le territoire duquel ils ont été commis.

4. Tout Etat a le droit de punir les actes commis en dehors de son territoire par un étranger, même contre un étranger, lorsque les faits constituent, d'après sa loi pénale, un acte délictueux, si l'inculpé se trouve sur son territoire, et s'il ne peut être extradé. L'exercice de ce droit doit être limité à la poursuite d'infractions graves, dirigées contre les intérêts généraux de l'humanité; ce sont notamment :

- A. La piraterie.
 - B. La traite des esclaves.
 - C. La traite des femmes et des enfants.
 - D. Le trafic des stupéfiants.
 - E. Le trafic des publications obscènes.
 - F. Le faux monnayage, la falsification des papiers de valeur et des instruments de crédit.
 - G. La propagation des maladies contagieuses.
 - H. L'attentat à des moyens de communication, canaux et câbles sous-marins.
 - I. Ou d'autres infractions prévues par les conventions internationales.
- Pour tous autres délits, l'exercice de le droit doit être subordonné à la requête de la personne lésée ou à la dénonciation de l'autorité étrangère, ainsi qu'à l'initiative de l'autorité nationale.

PART III
LAW OF TREATIES

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DRAFT CONVENTION
ON
THE LAW OF TREATIES

ARTICLE 1. EXPLANATION OF THE TERM "TREATY"

As the term is used in this Convention:

- (a) A "treaty" is a formal instrument by which two or more States establish or seek to establish a relation under international law between themselves.
- (b) The term "treaty" does not include an agreement effected by exchange of notes.
- (c) The term "treaty" does not include an agreement to which a person other than a State is or may be a party.

ARTICLE 2. EXPLANATION OF CERTAIN OTHER TERMS

As the terms are used in this Convention:

- (a) A "State" is a member of the community of nations.
- (b) A "signatory" of a treaty is a State on behalf of which the treaty has been signed.
- (c) A "party" to a treaty is a State which is bound by the treaty.

ARTICLE 3. CAPACITY TO MAKE TREATIES

Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited.

ARTICLE 4. NAME GIVEN TO A TREATY

The international juridical effect of a treaty is not dependent upon the name given to the instrument.

ARTICLE 5. FORM OF A TREATY

- (a) Although a treaty, as the term is used in this Convention, must be a formal instrument, no particular form is required.
- (b) In the absence of agreement upon a procedure which dispenses with the necessity of signature, a treaty must be signed on behalf of each of the States concluding it.

ARTICLE 6. RATIFICATION

- (a) As the term is used in this Convention, a ratification of a treaty is an act by which the provisions of the treaty are formally confirmed and approved by a State.
- (b) A treaty may designate the organ of a State by which a ratification should be executed by that State; in the absence of such a designation, a

ratification may be executed by the head of State or by any other authorized organ of the State.

ARTICLE 7. WHEN RATIFICATION IS NECESSARY

The ratification of a treaty by a State is a condition precedent to its coming into force so as to bind that State

- (a) when the treaty so stipulates; or
- (b) when the treaty provides for ratification by that State and does not provide for its coming into force prior to such ratification; or
- (c) when ratification was made a condition in the full powers of the State's representatives who negotiated or signed the treaty; or
- (d) when the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification.

ARTICLE 8. NO OBLIGATION TO RATIFY

The signature of a treaty on behalf of a State does not create for that State an obligation to ratify the treaty.

ARTICLE 9. OBLIGATION OF A SIGNATORY PRIOR TO RATIFICATION

Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed subject to ratification is under no duty to perform the obligations stipulated, prior to its ratification of the treaty; under some circumstances, however, good faith may require that, pending ratification, the State shall, for a reasonable time after signature, refrain from taking action which would render its performance of the obligations stipulated impossible or more difficult.

ARTICLE 10. DATE OF COMING INTO FORCE

Unless otherwise provided in the treaty itself,

- (a) A treaty which is not subject to ratification shall come into force on the date of signature.
- (b) A treaty which contains provision for exchange or deposit of ratifications shall come into force upon such exchange or deposit of ratifications by all the signatories.
- (c) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications, shall come into force when it is ratified by all the signatories and when each signatory has notified its ratification to all other signatories.

The provisions of this article are limited by the provisions of Article 17 of this Convention.

ARTICLE 11. RETROACTIVE EFFECT

Unless otherwise provided in the treaty itself, a treaty which comes into force subsequently to the date of signature shall not be deemed to have retroactive effect as from the date of signature.

ARTICLE 12. ACCESSION

(a) As the term is used in this Convention, an accession to a treaty is an act by which the provisions of the treaty are formally approved and accepted by a State on behalf of which the treaty has not been signed or ratified.

(b) Unless otherwise provided in the treaty itself, a State may accede to a treaty only after the treaty has come into force and only with the consent of all the parties to the treaty.

(c) A treaty may designate the organ of a State by which an accession should be executed by that State; in the absence of such a designation, an accession may be executed by the head of State or by any other authorized organ of the State.

(d) An accession becomes effective only when it is deposited or communicated in accordance with any stipulation in the treaty itself providing for the deposit or communication of accessions; in the absence of such a stipulation, an accession becomes effective only when it is notified to all the parties.

(e) When an accession becomes effective, the acceding State thereupon becomes a party to the treaty upon a basis of equality with other parties.

ARTICLE 13. USE OF THE TERM "RESERVATION"

As the term is used in this Convention, a reservation is a formal declaration by which a State, when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty.

ARTICLE 14. RESERVATIONS AT TIME OF SIGNATURE

Unless otherwise provided in the treaty itself,

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when signing only with the consent of all other signatories.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when signing only with the consent of all other States which sign before the date fixed.

(c) If a treaty is open for signature at any time in the future, a State may make a reservation when signing, if it signs before the treaty has been brought into force, only with the consent of all the States which become signatories before the treaty is brought into force; if it signs after the treaty has been brought into force, only with the consent of all the States which have become signatories or parties prior to the time of signature by that State.

(d) If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty.

ARTICLE 15. RESERVATIONS AT TIME OF RATIFICATION

Unless otherwise provided in the treaty itself,

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when ratifying only with the consent of all other States which are signatories and of all the States which have acceded to the treaty prior to the ratification by what State.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when ratifying only with the consent of all other States which become signatories before the date fixed and of all the States which have acceded to the treaty prior to the ratification by that State.

(c) If a treaty is open for signature at any time in the future, a State may make a reservation when ratifying, if it ratifies before the treaty has been brought into force, only with the consent of all other States which become signatories before the treaty is brought into force; if it ratifies after the treaty has been brought into force, only with the consent of all other States which have become signatories or have acceded to the treaty prior to the ratification by that State.

(d) If a State has made a reservation when ratifying a treaty, the reservation has effect only in the relations of that State with other States which have become or may become parties to the treaty.

ARTICLE 16. RESERVATIONS AT TIME OF ACCESSION

Unless otherwise provided in the treaty itself,

(a) A State may make a reservation when acceding to a treaty only with the consent of all the signatories to the treaty and of all States which have previously acceded to the treaty.

(b) If a State has made a reservation when acceding to a treaty, the reservation has effect only in the relations of that State with other States which have become or may become parties.

ARTICLE 17. REGISTRATION AND PUBLICATION

(a) A treaty, the registration of which is required by Article 18 of the Covenant of the League of Nations, is not binding until so registered.

(b) A treaty, the registration of which is not required by Article 18 of the Covenant of the League of Nations, is not binding until it has been registered with or communicated to the Secretariat of the League of Nations, or until it has been officially published by one of the States which become parties in such manner that its contents may be known by States not parties or signatories.

(c) If such registration, communication or publication is effected within a reasonable time after the date on which the treaty would otherwise have come into force in accordance with Article 10 of this Convention, the treaty may be regarded as having been binding from that date.

ARTICLE 18. TREATIES AND THIRD STATES

(a) A treaty creates obligations only for the parties thereto.

(b) If a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or a signatory to the treaty, such State is entitled to claim the benefit of that stipulation so long as the stipulation remains in force between the parties to the treaty.

ARTICLE 19. INTERPRETATION OF TREATIES

(a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve; the historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.

(b) When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve.

ARTICLE 20. PACTA SUNT SERVANDA

A State is bound to carry out in good faith the obligations which it has assumed by a treaty (*pacta sunt servanda*).

ARTICLE 21. TREATIES CONCLUDED BY INCOMPETENT ORGANS

A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty.

ARTICLE 22. EFFECT OF LATER TREATIES

(a) A later treaty supersedes an earlier treaty between the same parties, to the extent that the provisions of the later treaty are inconsistent with the provisions of the earlier treaty.

(b) Two or more of the States parties to a multipartite treaty to which other States are parties may make a later treaty which will supersede the earlier treaty in their relations *inter se*, only if this is not forbidden by the provisions of the earlier treaty or if the later treaty is not so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose.

(c) If a State assumes by a treaty with another State an obligation which

is in conflict with an obligation which it has assumed by an earlier treaty with a third State, the latter obligation takes priority over the former.

ARTICLE 23. EXCUSES FOR FAILURE TO PERFORM

Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system.

ARTICLE 24. EFFECT OF GOVERNMENTAL CHANGES

Unless otherwise provided in the treaty itself, the obligations of a State under a treaty are not affected by any changes in its governmental organization or its constitutional system.

ARTICLE 25. EFFECT OF SEVERANCE OF DIPLOMATIC RELATIONS

If the execution of the provisions of a treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties thereto, the operation of the treaty is suspended as between any parties upon the severance of their diplomatic relations; in the absence of agreement to the contrary, however, the operation of the treaty as between such parties will be revived by the reestablishment of their diplomatic relations.

ARTICLE 26. EFFECT OF TERRITORIAL CHANGES

Changes in the territorial domain of a State, whether by addition or loss of territory, do not, in general, deprive the State of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as a result of the change.

ARTICLE 27. VIOLATION OF TREATY OBLIGATIONS

(a) If a State fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting within a reasonable time after the failure, may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty *vis-à-vis* the State charged with failure.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

ARTICLE 28. REBUS SIC STANTIBUS

(a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a deter-

mining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

ARTICLE 29. ERROR

(a) A treaty entered into upon an assumption as to the existence of a state of facts, the assumed existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority not to be binding on the parties, when it is discovered that the state of facts did not exist at the time the treaty was entered into.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

ARTICLE 30. SEPARABLE PROVISIONS

Articles 27, 28 and 29 of this Convention may be applied to a separate provision of a treaty only if such provision is clearly independent of other provisions in the treaty.

ARTICLE 31. FRAUD

(a) A State which has been induced to enter into a treaty with another State by the fraud of the latter State, may seek from a competent international tribunal or authority a declaration that the treaty is void.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

ARTICLE 32. DURESS

(a) As the term is used in this Convention, duress involves the employment of coercion directed against the persons signing a treaty on behalf of a State or against the persons engaged in ratifying or acceding to a treaty on

behalf of a State; provided that, if the coercion has been directed against a person signing a treaty on behalf of a State and if with knowledge of this fact the treaty signed has later been ratified by that State without coercion, the treaty is not to be considered as having been entered into by that State in consequence of duress.

(b) A State which has entered into a treaty in consequence of duress, may seek from a competent international tribunal or authority a declaration that the treaty is void.

(c) Pending agreement by the parties upon and decision by a competent international tribunal or authority, a party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(d) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

ARTICLE 33. TERMINATION OF TREATIES

(a) A treaty may be terminated by agreement of the parties.

(b) A bipartite treaty is terminated when one of the parties thereto becomes extinct.

(c) Subject to any provision concerning its renewal or continuance contained in the treaty or agreed upon by the parties, a treaty concluded for a fixed period of time is terminated by the expiration of that period.

(d) The termination of a treaty puts an end to all executory obligations stipulated in the treaty; it does not affect the validity of rights acquired in consequence of the performance of obligations stipulated in the treaty.

ARTICLE 34. DENUNCIATION

A treaty may be denounced by a party only when such denunciation is provided for in the treaty or consented to by all other parties. A denunciation must be in accordance with the conditions set by the provision in the treaty or by the other parties.

ARTICLE 35. EFFECT OF WAR

(a) A treaty which expressly provides that the obligations stipulated are to be performed in time of war between two or more of the parties, or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war between two or more of them, is not terminated or suspended by the beginning of a war between two or more of the parties.

(b) Unless otherwise provided in the treaty itself, a treaty which does not expressly provide that the obligations stipulated are to be performed in time of war between two or more of the parties, and which by reason of its nature and purpose was not manifestly intended by the parties to be operative in time of war between two or more of them, is suspended as between the hostile belligerents during the continuance of a war between two or more of the

parties, and unless contrary provision is made at the conclusion of the war, it will again come into operation when the state of war is ended.

ARTICLE 36. SETTLEMENT OF DISPUTES

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

LAW OF TREATIES

INTRODUCTORY COMMENT

The law of treaties lies at the base of most of the modern international law. To be sure treaties date from very early times. They were employed even before the classical period of Greek history: one of the earliest treaties known to have been entered into was that of 1272 B.C., between Ramses II, King of Egypt, and Khetasar, King of the Hittites. Breasted, *History of Egypt* (1905), p. 437 ff. As a treaty in the classical period, mention may be made of that of 418 B.C. between Sparta and Argos. 2 Phillipson, *International Law and Custom of Ancient Greece and Rome* (1911), p. 60. Treaties between sovereigns were quite common in feudal Europe, and some of the current forms may not be wholly free of their influence. During the century which followed the Congress of Vienna of 1815, treaties were made with great frequency, most of the States of the world desiring to have a treaty foundation for their relations with other States. Now and then, in the 19th century, a voice of caution was sounded, but to no avail. Thus, in 1867, the Chichele Professor of International Law at Oxford advised "a sparing, an almost parsimonious use of the treaty-making power." Montague Bernard, *Four Lectures on Diplomacy* (1868), p. 204, cited in 1 Hudson, *International Legislation* (1931), p. xviii note. It has been estimated that in 1914 some 8000 treaties were in force between the various States of the world. See 1 Oppenheim, *International Law* (McNair's ed.), p. 701 note. If that estimate was in any degree accurate, the number of treaties must be much larger today; not simply because the number of States has been increased, but also because of the feverish pace at which treaties have been concluded during the years since 1920. Almost 3600 "treaties or international engagements" have been registered with the Secretariat of the League of Nations between May 19, 1920, and January 1, 1935; and it is well known that some treaties entered into since 1920, by members as well as non-members of the League of Nations, have not been registered. It therefore seems safe to say that several thousand treaties are now in force between various States of the world, and that their provisions constitute a large part of the current positive international law.

Yet at the threshold of this subject, one encounters the fact that there is no clear and well-defined law of treaties. This is partly because the making of treaties is for the most part in the hands of persons who are not experts and whose habits lead them to seek results with little regard for legal forms. This is particularly observable in connection with the recent cases of assumption of membership in the League of Nations. The Covenant of the League of Nations may be regarded as a treaty, or as a part of a treaty; yet

the utmost informality prevails in the process by which States assume its obligations. On the one hand, politicians like to speak in sonorous tones of the solemnity, even the sanctity, of treaty obligations; on the other hand, when such obligations are being undertaken the politicians are often impatient of the restraints which order and system would impose.

The unsatisfactory state of the law of treaties is due, also, to the lack of common standards accepted as such by the various governments. In many Foreign Offices, ancient forms have been handed down, some of them from time immemorial, which bear little resemblance to those used in other Foreign Offices, and any departure from these forms would be stoutly resisted by the guardians of the protocol. Such a lack of uniformity exists, that it is the exception rather than the rule even for two States employing the same language to mold their dealings with each other into precisely the same forms. The field of treaty law is essentially a field in which survivals flourish, and little progress has been made to date toward the establishment of uniform and universal standards.

Hence it is not surprising that in general usage the word "treaty" itself should be a term of vague and uncertain content. A recent commentator has referred to the "treaty" as "the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions." Arnold D. McNair, in *British Year Book of International Law*, 1930, p. 101. This reference must not be taken to be based upon a use of the term with regard only to a particular kind of instrument. Some international instruments are called "treaties" *eo nomine*, but a whole repertory exists from which names for instruments may be chosen. "Convention", "protocol", "agreement", "arrangement", "declaration", "act", "covenant", "statute"—all of these terms have been employed with reference to international instruments concluded in recent times, and the choice of one rather than another is in most cases, if not in all, without any significance in international law.

The choice of a name for an instrument may have significance in national law. In the United States of America, for instance, particular names are sometimes used for constitutional reasons. The Constitution of the United States confers upon the President "power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." In practice, the limitation is observed only with reference to certain kinds of instruments, and with reference to those which arouse general interest. Terms were invented, therefore, to be applied to instruments as to which the limitation on the President's power is not observed; such instruments are now generally called "executive agreements", sometimes "conventions". For purposes of the constitutional law of the United States, they are not "treaties"; but for purposes of international law, they are not to be distinguished from treaties. Interesting recent examples are the provisional agreement between the United States and Saudi Arabia, of

November 7, 1933, concerning diplomatic and consular representation, juridical protection, commerce and navigation, *U. S. Executive Agreement Series*, No. 53; and the agreement between the United States and Brazil, of May 10, 1934, relating to a military mission, *ibid.*, No. 64.

If it may be said that instruments subsidiary to other instruments are usually given a title of protocol, other names are frequently given to them, and that term is not reserved for such usage; if it may be said that instruments relating to technical matters are more often called conventions than otherwise, the exceptions are so numerous that no rule can be laid down as to the use of that term. The fact seems to be that names are frequently given to international instruments for reasons which have nothing to do with the legal significance of particular terms, or even capriciously. It is true, therefore, that the term "treaty" is a much-overworked term. It is a catch-all, an omnibus. It is generic. It is frequently used as the name of particular instruments, but it continues to be the one word of general application to a great variety of instruments.

This seems to have been realized when the Covenant of the League of Nations was being drafted at Paris in 1919. Article 18 of the Covenant refers to "every treaty or international engagement" (Fr., *tout traité ou engagement international*). As the provision connotes, all international engagements are not put into the form of treaties, even when that term is used in a general sense. Binding engagements may be less formal, and the pronouncement of the Permanent Court of International Justice on the *Ihlen* declaration indicates that their legal force is not modified in consequence of informality. *The Eastern Greenland Case*, Series A/B, No. 53, p. 71.

The unsatisfactory state of the law of treaties is evident, also, in the diversity of practice with reference to the parties to international instruments. "The formula so common in the preamble, beginning with the heads of States, is a reflection of the ancient conception that the prince has an international personality and was a subject of international law." Basdevant, in 15 *Recueil des Cours, Académie de Droit International*, p. 564. In some quarters, there is stout insistence still that international law allocates competence to heads of States for the making of treaties, independently of any constitutional limitations on their authority. With the spread of constitutionalism, however, and with the rise of democratic control of States' international relations, the formerly prevailing practice has been much modified. Treaties may be entered into, today, by heads of States, by States, by Governments of States, or even by officials of Governments of States. The Treaty of Versailles of June 28, 1919, for example, was drafted as an inter-State treaty, and this form prevailed in multipartite instruments for several years thereafter; if there is a recent tendency to abandon this form, the fact is due to deference shown to constitutional complications within the British Commonwealth of Nations. See *League of Nations Official Journal*, 1927, p. 377; 1 Hudson, *International Legislation* (1931), p. xli. In legal

effect, it would seem that little importance is to be ascribed to this question of parties; a State may assume an international obligation in its own name, or in the name of the head of State, or in the name of its Government, or in the name of an official of its Government. Nor is it necessary that the designation of the party entering into a treaty should be the same for each of the parties; thus, it is not infrequent that for one party a treaty will name the head of State, and for another party the same treaty will name the State itself. Little attention seems to have been given to the designation of parties in modern treaties, and apart from the constitutional necessities of a particular State, a draftsman has little to guide him in the choice to be made.

Examples need not be multiplied to show that numerous questions of forms to be employed in the conclusion of treaties find no certain answer in the existing international law. A subcommittee which reported to the League of Nations Committee of Experts on Codification of International Law, in 1926, was entirely justified in saying that "the choice of nomenclature and form is governed by arbitrary considerations and depends upon the nature of the relations between States, the customs of the respective chancelleries, and sometimes even upon the carelessness of those who draft diplomatic instruments." *League of Nations Document C.196.M.70.1927.V.*, p. 112; 20 *American Journal of International Law*, Special Supplement, (1926), p. 215. The subcommittee was justified also in calling attention to "the prevailing anarchy as regards terminology." This anarchy may continue to prevail, perhaps without any catastrophic results. Yet the dominant position in international law and international relations which treaties have now come to hold, would seem to impose upon the legal profession a duty to attempt to substitute some measure of order for the existing confusion, and perhaps this may be done without loss of the obvious advantage of elasticity.

In 1926, the League of Nations Committee of Experts inscribed upon its list of possible subjects for codification the question "whether it is possible to formulate rules to be recommended for the procedure of international conferences and procedure for the conclusion and drafting of treaties, and what such rules should be." *League of Nations Document C.196.M.70.1927.V.*, p. 105. In submitting this question to the various Governments, however, it was said that the Committee envisaged only an attempt "to put at the disposal of the States concerned rules which could be modified as they chose in each concrete case but whose existence might save them much discussion, doubt and delay." The replies of some 25 or more Governments showed a preponderance of hospitality to the Committee's suggesting this subject for codification, the rules to be "drafted as a *jus dispositivum*, which would not limit the independence of States." See M. Rundstein's summary in *League of Nations Document C.196.M.70.1927.V.*, pp. 271-272. In 1927, therefore, the Committee of Experts reported as "sufficiently ripe" for an attempt at codification the subject, "Procedure for International Conferences and

Procedure for the Conclusion and Drafting of Treaties," *ibid.*, p. 7, pointing out that any draft on the subject "would simply be in the nature of *droit dispositif*, that is, of rules which would leave the parties concerned quite free to come to some different arrangement." *League of Nations Document C.198.M.72.1927.V*. When its report came before the Council of the League of Nations, the subject was thought to be "in no sense urgent," and it was suggested that the subject should be studied by the Secretariat of the League of Nations. *League of Nations Official Journal*, 1927, p. 754. This suggestion was later approved by the Assembly. *Records of Eighth Assembly, Plenary*, p. 210. No report on the subject has been published by the Secretariat.

In another quarter, also, the law of treaties has been deemed to be deserving of attention. In 1925, the American Institute of International Law, having been requested by the Governing Board of the Pan American Union to draw up projects for the codification of international law, prepared a *projet* on "Treaties". *Codification of International Law* (a brochure published by the Pan American Union, Washington, 1925), p. 77; 20 *American Journal of International Law*, Spl. Supp. (1926), p. 348. The *projet* was submitted by the Governing Board to the International Commission of Jurists, which adopted it with some modifications at its meeting in Rio de Janeiro in 1927. 22 *American Journal of International Law*, Spl. Supp. (1928), p. 244. This led to the adoption by the Sixth International Conference of American States, on February 20, 1928, of the Havana "Convention on Treaties." 4 Hudson, *International Legislation* (1931), p. 2378. Ratifications of this convention have been deposited with the Pan American Union by Brazil, the Dominican Republic, Haiti, Nicaragua, and Panama (on January 1, 1935), and the convention is assumed to be in force between these States though it has not been registered with the Secretariat of the League of Nations. The drafting of the convention is subject to many objections; indeed, it has a defect which may be fatal to its influence in that no explanation is given of the term "treaties" as used throughout the convention. Nor can it be said that the principles embodied in the convention constitute any significant contribution to the clarification of the law of treaties.

Few jurists and publicists have recently given attention to the subject of treaty law, though a few important contributions are to be noted. A comprehensive volume entitled *Die Lehre von den völkerrechtlichen Vertragsurkunden*, by L. Bittner, published at Berlin in 1924, is especially valuable, as are the lectures before the Academy of International Law in 1926, by Jules Basdevant, on "*La Conclusion et la Rédaction des Traités et des Instruments Diplomatiques autres que les Traités*" (15 *Recueil des Cours*, pp. 535-642). The writings of Arnold D. McNair have illuminated numerous dark spots in the field, and the introduction to Manley O. Hudson's collection of *International Legislation* (1931), has brought into relief some of the outstanding problems which have arisen from the divergences in recent practice. The

notes concerning treaties of the United States in Hunter Miller's *Treaties and other International Acts of the United States of America*, constitute a reservoir which cannot fail to influence future development of the law, and it is to be regretted that only three of the volumes in that series have been available in this exploration of the subject by the Research in International Law.

The following Convention has been prepared with a view to setting forth what is deemed to be the existing law, in some instances the desirable law, with respect to the more common problems arising with respect to instruments which may properly be described by the generic term TREATIES. It is realized that the use of that term, as explained in Article 1, excludes many international instruments; the field had to be delimited, however, and attempt has been made to avoid the dangers which would be inherent in a too inclusive project. Bipartite and multipartite instruments frequently present different problems, and one of the difficulties in the preparation of this draft has been to avoid a misleading assimilation of these two kinds of treaties. No effort has been made to present a classification of treaties based upon their subject-matter, and perhaps the following observation of the subcommittee of the League of Nations Committee of Experts, may be relied upon as justifying this omission: "The different classifications of international treaties are as numerous as the writers who have dealt with them, and vary with the individual point of view. Most of them are of little practical value." *League of Nations Document C.196.M.70.1927.V.*, p. 112.

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ARTICLE 1. EXPLANATION OF THE TERM "TREATY"

As the term is used in this Convention:

(a) A "treaty" is a formal instrument by which two or more States establish or seek to establish a relation under international law between themselves.

COMMENT

It is to be noted that Article 1 is introduced by the phrase, "as the term is used in this Convention." Article 1 does not embody a definition, therefore. Instead, it merely explains the use of a certain term which is frequently employed in later articles. It is designed to block out those phases of the subject with which this convention is intended to deal.

In the literature of diplomacy and international law the term "treaty" is employed in both a general and a restricted sense. In the former sense, it is well defined by Renault as "tout accord intervenu entre deux ou plusieurs états, quelque manière qu'il soit constaté (traité, convention, protocole, déclaration commune, échange des déclarations unilatérales)." *Introduction à l'Etude du Droit International* (1869), pp. 33-34. See also 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 353, and Chailley, *La Nature Juridique des Traités Internationaux* (1932), p. 6.

In a restricted sense the term "treaty" is sometimes employed to designate a particular type of instrument which, by reason of its importance or dignity, the nature of the subject-matter with which it deals, or the procedure by which it is concluded, is distinguished from other international agreements or instruments designated by other names, such as conventions, protocols, arrangements, etc. However, this distinction is not always observed. (See the Comment on Article 4.) J. B. Moore ("Treaties and Executive Agreements," 20 *Political Science Quarterly*, 1905, p. 388), remarks that while "in diplomatic literature the terms 'treaty,' 'convention,' and 'protocol' are all applied more or less indiscriminately to international agreements—in the jurisprudence of the United States, the term 'treaty' is properly to be limited, although the federal statutes, and courts do not always so confine it, to agreements approved by the Senate." Thus American courts have held that postal conventions concluded by the Postmaster-General under authority of an Act of Congress and ratified by the President without the advice and consent of the Senate are not "treaties" in the sense of the constitutional and municipal law of the United States. *Four Packages of Cut Diamonds v. United States* (1919), 256 Fed. Rep. 305.

Attention may be called in this connection to the resolution of the British Imperial Conference of 1923 on the subject of the negotiation, signature and ratification of treaties (*British Parliamentary Papers*, 1923, Cmd. 1987, p. 13) which stated that

apart from treaties made between Heads of States, it is not unusual for agreements to be made between governments. Such agreements, which are usually of a technical or administrative character, are made in the names of the signatory governments and signed by the representatives of those governments, who do not act under full powers issued by the Heads of the States: they are not ratified by the Heads of the States, though in some cases, some form of acceptance or confirmation by the governments concerned is employed.

The British Imperial Conference of 1926 (*ibid.*, 1926, *Cmd.* 2768, pp. 22-23) recommended that

all treaties (other than agreements between Governments) whether negotiated under the auspices of the League or not, should be made in the name of Heads of States, and, if the treaty is signed on behalf of any or all of the governments of the Empire, the treaty should be made in the name of the king as the symbol of the special relationship between the different parts of the Empire.

This distinction between "treaties" and other international engagements was urged on the Council of the League by the representatives of Great Britain. But manifestly no State is competent to lay down an internationally binding rule as to the form in which treaties shall be drafted. In this case the Imperial Conference of the British Commonwealth of Nations was merely endeavoring to clarify the situation in regard to the form of international agreements between members of the Commonwealth, because of a question which had arisen as to whether treaties concluded under the auspices of the League applied to the members of the Commonwealth *inter se*, and because of a controversy which had arisen between the British and Irish Free State Governments as to the necessity of registering with the Secretariat of the League the Treaty of 1921 between the two governments. Palmer, *Consultation and Coöperation in the British Commonwealth* (1934), pp. xliii, 139 ff; Keith, *The Sovereignty of the British Dominions* (1929), p. 374 ff.

The Havana Convention on Treaties signed on February 20, 1928, at the Sixth International Conference of American States does not define the term "treaty", but it is apparently used throughout that convention in the general sense to embrace all international agreements between States which are recorded in writing and are subject to ratification. There is no rule of international law and no definite usage which determines what shall be the essential constituent elements of a "treaty" or which lays down any tests or criteria by which a "treaty" may be distinguished from other international instruments such as conventions, protocols, arrangements, declarations, etc. See as to this the comment on Articles 4 and 5. The criteria which have sometimes been proposed are based on subjective distinctions which in practice are incapable of objective application.

It must be emphasized again that paragraph (a) of the article here under discussion is not intended to be a definition of what should be con-

sidered an ideal treaty or a statement of the essential characteristics of a treaty as that term is generally used. It is simply an explanation of the term "treaty" as the term is employed in this Convention; that is, the type of instrument to which the rules laid down in this Convention are applicable. The term treaty in the general sense as explained above embraces a great variety of instruments to many of which other names than "treaty" are given, although there is seldom if ever any juridical distinction between them. But they differ in form, content, and in other formal respects, and as to the parties in whose name they are concluded. Some are highly formal instruments while others are not. Some are in the form of exchanges of notes, and even of letters and telegrams. To some of them the designated parties are States, to others they are heads of States, and to others they are governments. To some of them States alone are parties; to some, States and other entities which are not States are parties; and to some, one State alone is apparently the only party. To all of these instruments the generic term "treaty" is often applied.

Obviously, it would be difficult if not impossible to formulate a body of general rules which would be applicable to all such instruments alike. It has seemed necessary therefore to delimit the field of this undertaking and consequently to restrict the term "treaty" to a particular group of instruments which includes those which may be said to be the more normal and usual type in which agreements between States are recorded. Paragraph (a) is intended therefore to define only this particular type of instrument and to it alone are the rules of this Convention applicable. It lays down the essential qualities or characteristics which an instrument must possess in order to come within the scope of this Convention. By way of emphasis, paragraphs (b) and (c) expressly exclude two types of instruments which do not fall within the category of treaties as the term "treaty" is used in this Convention, and the rules here proposed do not therefore apply to them.

This Convention, it may be remarked, makes no distinction between different kinds of treaties; save in a very few instances, the rules which it lays down in respect to bipartite treaties are the same as those which apply to multipartite treaties. From the juridical point of view, all treaties are essentially alike and are governed by the same rules of international law. Cf. 1 Anzilotti, *op. cit.*, p. 353; Tomšić, *La Reconstruction du Droit International en Matière des Traités* (1931), p. 13; Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), sec. 97; Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 157; and Mahaim, "Les Conventions Internationales du Travail," 56 *Revue de Droit International et de Législation Comparée* (1929), pp. 699 and 717. Mahaim points out that the difference between "contract" treaties and "law" treaties has reference to their content and not to their juridical nature. A somewhat different opinion, however, appears to be entertained by McNair in his article "The Functions and Differing Legal Character of Treaties," in the *British Year*

Book of International Law (1930), p. 100 ff. See also Jenks, "The Revision of International Labour Conventions," *ibid.* (1933), p. 42. McNair suggests that the branch of international law relating to treaties would be in a "more advanced state" if a sharper distinction were made by authors between different kinds of treaties, for example, between treaties having the character of contracts and those in the nature of law-making conventions, instead of endeavoring to lay down the same general rules to be applied to all alike. While it is recognized that some differentiation must be made between the rules governing the application, interpretation and termination of bipartite and multipartite instruments, it is believed that McNair has exaggerated the juridical distinction which he makes between different kinds of treaties. Those who emphasize, for example, the distinction between law-making treaties and those of a more purely contractual character admit that the distinction is often not a very sharp one and that the former may and sometimes do contain stipulations of a non-legislative character. See 1 Oppenheim, *International Law* (4th ed. 1928), p. 702 n. 4, and Wright, "The Interpretation of Multilateral Treaties," 23 *American Journal of International Law* (1929), p. 101. The latter author discusses at length the distinction between law-making treaties and so-called "contractual" treaties, and he quotes from the opinions of various other writers to show that the two types of treaties are different, but his discussion leads only to the conclusion that the differences relate not to their juridical character but rather to their content and purposes (*ibid.*, p. 99). See also the discussion by Ruffini (12 *Recueil des Cours*, 1926, p. 473 ff), which leads to the same conclusion.

The several characteristics of a treaty, as the term is used in this Convention, will now be discussed in turn.

(a) A treaty is a formal instrument. . . .

The provision that a treaty must be an "instrument" means that its stipulations must be recorded in a written document. It is not necessary, of course, that the instrument should be executed in hand-writing; a type-written or printed document recording the terms of an agreement would be an instrument equally with one written by hand.

While a treaty, as the term is used in this Convention, must be in the form of an instrument, it is not intended to deny that oral agreements between States may not be as binding upon the parties as those recorded in writing. It is meant only that, for the reasons explained in the comment on Article 5 (where the status of oral agreements is discussed in detail), it is not deemed advisable to include such agreements in the category of treaties as the term is used in this Convention. As pointed out in the comment on Article 5, most writers on international law lay it down as an essential condition that the stipulations of a treaty must be recorded in writing, and with rare exceptions this has been the practice. The Havana Convention of

1928 on Treaties (Article 2), and most of the draft codes that have been proposed, insist upon this requirement.

Paragraph (a) requires not only that a treaty shall be an "instrument" but that the instrument shall be a "formal" one. Under Article 5, the treaty will usually be signed on behalf of each of the States concluding it, but the parties may, if they so agree, dispense with this requirement. The signing of a treaty is not therefore necessary to give it the character of a formal instrument. In practice, treaties are usually concluded in a form which gives them the character of a "formal" instrument, but it is conceivable that they might not be. Thus a treaty might fail to mention the parties or the names of the negotiators. The instrument might be undated, unsigned and unsealed, and with no indication of the place where it was signed, if it was signed. It may be doubted whether an instrument which lacked all of these provisions could properly be regarded as a "formal" one, and therefore whether it would fall within the class of instruments to which the provisions of this Convention are intended to apply. This is not saying that such a treaty would not be binding on the parties. Agreements, for example, in the form of exchanges of notes, letters, telegrams and radio communications, or in the form of minutes or memoranda, may be equally binding with the most solemnly concluded and formally drafted instrument. Agreements in the form of autograph letters between the Heads of States have not been lacking in the past. For examples see 1 G. F. de Martens, *Précis du Droit des Gens* (Vergé trans., 1864), p. 164, and 1 De Louter, *Droit International Public Positif* (1920), p. 475. See also Basdevant, "*La Conclusion et Rédaction des Traités*," 15 *Recueil des Cours* (1926), p. 609. Nor have agreements in the form of telegrams been lacking. See the telegrams of October 28 and 29, 1924, between M. Herriot, President of the French Council of Ministers, and M. Tchitcherine, Minister of Foreign Affairs of the Soviet Union, by which the French Government formally recognized the Soviet Government and by which the status of the existing treaties between the two countries was fixed. 12 *Bulletin de l'Institut Intermédiaire International*, p. 26 ff, and Basdevant, *op. cit.*, p. 609. But all these agreements are excluded from the category of instruments with which this Convention deals, because it is believed that in view of the form which they take it would be difficult to frame a set of general rules which could be applied equally to all of them and to other kinds of instruments.

It will be noted that under paragraph (a), a treaty, as the term is used in this Convention, is the instrument itself and not the agreement which it records, the agreement being the accord of wills apart from and *dehors* the instrument. Basdevant (*op. cit.*, p. 554) observes "Bien que le traité s'incorpore ainsi dans un instrument écrit, l'accord juridique et l'instrument qui le constate sont deux choses distinctes: cela se manifeste notamment en ce que, tandis que l'accord juridique est un acte unique, il est dressé souvent plusieurs instruments pour constater cet acte." In this connection Genet

(3 *Traité de Diplomatie et de Droit Diplomatique*, 1932, p. 376), adverting to the distinction, says: 'Le fait est que les traités ne nous sont perceptibles que par leur instrument formel; par conséquent le traité est d'abord, un texte, un acte écrit.' It is believed that the distinction is a sound one and that the instrument, rather than the intangible agreement which it records, should be considered as the treaty, because it is the instrument which can be seen and read and which must be interpreted and applied. Without the instrument there is no evidence of an agreement, there is nothing to be interpreted or applied; in short, there is no treaty apart from the instrument which records its stipulations.

(a) . . . by which two or more States establish, etc.

This part of paragraph (a) restricts the term "treaty" as used in this Convention to instruments to which only States are parties. See also paragraph (c) discussed below. A "State," as defined in Article 2 (a) of this Convention is "a member of the community of nations." (See the comment on that article.) Agreements between other entities or associations than States or between them and States, although they may have the characteristics and force of treaties as the term is often understood and used, do not fall within the scope of this Convention. Under paragraph (a) a treaty must be an instrument to which at least two States are parties; there may be as many additional parties as choose or are permitted to enter into the treaty. An instrument to which only one State is a party would not under this Convention be a treaty. A treaty either creates rights and obligations for or establishes relations between States. It is difficult to see how a right could be created by a treaty or an obligation or a relation established unless there were at least two parties to the treaty: one which concedes the right and the other for whose benefit it is conceded, or one which assumes the obligation and one to whom the obligation is owed.

Unipartite declarations which have some of the characteristics of treaties have not, however, been lacking. Among others may be mentioned the declarations made by Albania and Lithuania at the time of their admission to the League of Nations and by which they assumed certain obligations. They were signed in each case on behalf of the State making the declaration but not by any representative of the League. Text of the Albanian declaration in 9 *League of Nations Treaty Series*, p. 174; of the Lithuanian declaration, in 22 *ibid.*, p. 394. It might be argued that these declarations could be regarded as treaties, on the ground that in reality they were bipartite instruments, the State making the declaration being one party, the Council of the League to which the declaration was made and to which, or to the League itself, the obligations were apparently owed, being the other party, even though they were not signed on behalf of the League or the Council. Some such instruments themselves contain statements which lend weight to this argument. Thus, Article 9 of the Austrian declaration of October 4, 1922 (Protocol No. III),

relative to the financial reconstruction of Austria (2 Hudson, *International Legislation* (1931), p. 896), states that "in the event of any difference as to the interpretation of this protocol the parties will accept the opinion of the Council of the League of Nations" and that "the present protocol (III) shall be communicated to those States which have signed protocol No. II." But it may be doubted whether such provisions were intended to suggest that the Council of the League or the League itself was to be regarded as a party to the declarations. Even if it be admitted that the League as a whole, or the Council, is in reality, if not technically, a party to the declarations and that consequently they fall within the category of treaties, they would still lack the quality of treaties as the term is explained in Article I of this Convention, which envisages as treaties only those instruments to which "States" are parties. Since the League of Nations is not a State, an instrument to which it is a party would not be a treaty, as the term is used in this Convention.

But this is not saying that the League cannot be a party to treaties and that therefore the declarations mentioned above are not treaties; it is meant merely to say that they are not treaties within the sense of this Convention, and its provisions are therefore not applicable to them. Because of their abnormal character and the difficulty of formulating general rules which would be applicable to a class of instruments which are distinctly *sui generis*, it seems desirable that they should be excluded from the scope of this Convention, as exchanges of notes, minutes, and other instruments which may be and sometimes are regarded as having the character of treaties, are excluded.

(a) . . . establish or seek to establish a relation.

The term "treaty" is often defined as an agreement or instrument which creates obligations between States. Many treaties in fact establish both rights and obligations for the States, or at least certain of them, which become parties to them. This is especially true of the class of so-called contractual treaties. For this reason paragraph (a) employs the term "relation," which is broad enough to include both rights and obligations. It is conceivable also that a treaty might define or establish relationships as between the parties without necessarily creating rights or obligations for the parties. This Convention, which defines a treaty as an instrument which "establishes or seeks to establish a relation" between two or more States, is sufficiently broad to embrace both sorts of agreements: those which establish rights and/or obligations and those which establish relations without creating rights or obligations.

It seems desirable also that the use of the term should not be limited to those instruments which do actually establish relations, that is, those which have actually come into force and are binding on certain States, but that it should include also those which have been negotiated and perhaps signed and even ratified by some States, yet which have not come definitively into

force because they have not been ratified by a sufficient number of States, or if so, the ratifications have not been exchanged or deposited. For the sake of convenience, it seems desirable to designate such instruments as treaties because there is no other suitable term by which they may be designated when it becomes necessary to refer to them. With a view to bringing such instruments within the category of treaties, the term has been qualified by paragraph (a) of Article 1 so as to include not only an instrument which "establishes" a relation between two or more States, but one which "seeks to establish" such a relation.

(a) . . . under international law.

Still another essential condition of a treaty, as the term is used in this Convention, is that the relation which it establishes or seeks to establish must be one "under international law." The purpose of this qualification is to exclude from the scope of this Convention instruments which are not governed by the rules or principles of international law. The law governing the validity, binding force, interpretation, application and termination of treaties between States can not be the municipal law of any one of them; it is well settled by the doctrine, practice, and jurisprudence that this law is international law. Ralston, *Law and Procedure of International Tribunals* (rev. ed., 1926), secs. 1 ff, and 141 ff.

The phrase "under international law" would exclude from the category of treaties, as the term treaty is used in this Convention, certain agreements which in the absence of the phrase would be treaties within the explanation laid down in paragraph (a). Thus a bill of lading issued to a State by a vessel owned and operated by another State would be excluded. Such a document would no doubt record an agreement between States, but its terms would be controlled by the private or municipal law of one of the States parties to it.

Would such agreements as those relating to loans, the guarantee of interest, the purchase or lease of buildings or building sites, the purchase of coal-ing stations, war ships, sites for military cemeteries and battle monuments, the sale of surplus war stocks, etc., which are closely analogous to contracts in private law, fall within the category of treaties as the term is defined in this Convention? Some writers maintain that such agreements are acts *jure gestionis* entered into by States in their capacity as *fiskus* and are governed by the rules of the private law of contracts. They cannot therefore be regarded as treaties. Liszt, *Le Droit International* (Gidel trans., 1928), p. 169. Other writers reject this distinction and maintain that all agreements between States, regardless of their nature or purpose, are governed by the rules of public international law. 1 De Louter, *Droit International Public Positif* (1920), p. 468. Cf. Anzilotti, 1 *Cours de Droit International* (Gidel trans., 1926), p. 341, who points out that a loan agreement, for example, may

be in the form of an ordinary contract or in the form of a treaty, whichever the parties choose to give it.

The agreement by which the United States Liquidation Commission acting for the United States, sold to the French Republic, acting through its Undersecretary of State of Finance, a quantity of surplus war stocks belonging to the United States and held in France at the close of the World War, was recorded in an instrument designated as a "contract." It was signed by the chairman of the Liquidation Commission for the United States and by the Undersecretary of State of Finance for France. The contract was confirmed on the part of France by a law passed by the French Parliament, but it was not subject to ratification by the President of the United States with the advice and consent of the Senate. Text of the contract in *Final Report of the United States Liquidation Commission* (Washington, 1920), p. 103 ff. Contracts of a similar character for the sale of war stocks or the liquidation of claims were entered into between the United States and other European Governments. *Ibid.*, pp. 28 ff, 118 ff, and 131 ff. Of a somewhat similar character was the "agreement" of August 29, 1927, between the Governments of the United States and France by which the United States acquired certain sites for battle monuments to be erected in France. *United States Treaty Series*, No. 757. So, also, was the Agreement of October 4, 1929, between the Governments of the United States and Belgium for the same purpose. 105 *League of Nations Treaty Series*, p. 190. The latter agreement was subject to ratification by both parties and the texts of both agreements were registered with the Secretariat of the League of Nations.

The war debts settlements concluded between the United States and various European Governments between 1922 and 1930 were in the form of "agreements" which were signed on behalf of the United States by the Chairman of the World War Debt Commission (the Secretary of the Treasury), and on behalf of the other party, usually, by its Ambassador or Minister at Washington, or by a special commissioner or commissioners representing it. The agreements were subject to the approval of the President of the United States and of Congress, but not to ratification by the President with the advice and consent of the Senate. The texts of some of these agreements may be found in the *Combined Annual Reports of the World War Foreign Debt Commission for the years 1922-1926* (Washington, 1927). The agreement with France may be found in 100 *League of Nations Treaty Series*, p. 28. Mention may also be made in this connection of the agreements entered into by the United States in 1932 with various European Governments for the postponement of the payments due in that year on their war debts. They were signed in each case by a Minister of the debtor State and by the Secretary of the Treasury of the United States and approved by the President. Texts of the agreements in the *Annual Report of the Secretary of the Treasury for the fiscal year 1932*, p. 290 ff.

Since all of the agreements mentioned in the two preceding paragraphs

were recorded in "formal instruments" by which obligations apparently under international law were assumed by one State *vis-à-vis* another State, they would seem to fall within the category of treaties as the term is used in this Convention—certainly if they are governed by the rules of international law, as it is believed they are. They do not appear to differ in any juridical sense from such an "agreement" as that of June 9, 1930, between Great Britain and China by which China loaned to the British Government a sanitarium and summer resort; or from the convention of June 1, 1929, between France and the Government of India, by which a French *loge* was leased to the Government of India (95 *League of Nations Treaty Series*, p. 63); or that between France and Japan signed April 29, 1911, for the lease by the Japanese Government of land to France for the site of an embassy (124 *Archives Diplomatiques*, 1912, pp. 116–117). Whether such agreements are to be regarded as having the juridical characteristics and effects of treaties would seem to depend, not upon the term by which they are designated, whether "contracts" or "agreements", or upon the objects which they are designed to accomplish, but essentially upon the character of the obligation which they create. Within the meaning of this Convention, if the obligation assumed is one between States, the engagement is recorded in a formal instrument, and is governed by the rules of international law rather than those of the municipal law of any party, the instrument must be regarded as a treaty to which the provisions of this Convention apply.

There has been some controversy as to whether agreements between the heads of monarchical States for the marriage of members of royal families may properly be regarded as treaties. See Barthélemy, "*Du Caractère international des Contrats de Mariage des Princes de Famille Souveraine*," 11 *Revue Générale de Droit International Public* (1904), p. 325 ff; Bluntsehli's draft, Art. 443; Despagnet, *Cours de Droit International Public* (4th ed., 1910), sec. 436; Pradier-Fodéré, *Traité de Droit International Public*, (1885), sec. 895; Strupp, *Eléments du Droit International Public* (Bloesizewski trans., 1927), p. 174; Piédelièvre, *Précis de Droit International* (1894–1895), sec. 314; 2 Rivier, *Principes du Droit des Gens*, p. 34; Pillaut, "*De la Nature Juridique et des Effets généraux des Traités Internationaux*," 46 *Journal du Droit International* (1919), p. 593, 594; Neumann, *Eléments du Droit des Gens* (1886), p. 93; and 1 Anzilotti, *Cours de Droit International* (Gidel trans.) p. 335, who remarks that if a marriage contract contains stipulations affecting the relations between the States to which the two families belong, as, for example, recognition of an official situation resulting from the marriage or of eventual rights of succession to the throne, the agreement would combine the elements of both a contract in municipal law and an international treaty.

Marriage arrangements between the members of reigning houses have frequently been concluded in the form of treaties, and they were expressly designated as such. The texts of some are reproduced in 2 Satow, *Guide to Diplomatic Practice* (1917), pp. 177–180; others are discussed by Barthélemy

in the article cited above (pp. 322, 329), while numerous examples may be found in the treaty collections. A recent example which may be mentioned was the treaty between Sweden and Great Britain for the marriage of Lady Louise Mountbatten to Prince Gustaf Adolf, Crown Prince of Sweden, signed at Stockholm, October 27, 1923 (22 *League of Nations Treaty Series*, p. 388), by which their Majesties the Kings of Great Britain and Sweden, "having judged it proper that an alliance should again be contracted between their respective Royal Houses by a marriage agreed to on both sides," gave their consent to such alliance. The treaty was signed by plenipotentiaries of the two sovereigns and, after ratification and exchange of ratifications, was registered with the Secretariat of the League of Nations. Another example was the treaty of 1906 between Great Britain and Spain for the marriage of King Alfonso of Spain to Princess Victoria of England. 99 *British and Foreign State Papers*, p. 176. The treaty was signed by Sir Edward Grey, British Secretary of State for Foreign Affairs, and the Spanish Ambassador at London, and was ratified and the ratifications were exchanged at London.

It would seem that there is no reason why the arrangement of a marriage between members of the reigning families of two States may not be concluded in the form of a treaty. If it is an agreement concluded by the competent treaty-making organs of the State, and establishes relationships or creates obligations which, under international law, bind one or both parties, it would be a treaty in the sense of this Convention. On the other hand, if the parties who conclude the agreement do so, not as treaty-making representatives of the State, but in their personal capacity as heads of reigning families, and the agreement in no way creates a binding obligation upon the State, or involves the State as such, it would not be a treaty as the term is used in this Convention.

Would instruments which, according to American terminology and practice, are designated as "executive agreements", that is, instruments which are concluded by the President without the advice and consent of the Senate, come within the category of treaties as the term "treaty" is used in this Convention? As to the character of such instruments see 5 Moore, *International Law Digest* (1906), p. 210 ff; also his article "Treaties and Executive Agreements," 20 *Political Science Quarterly* (1905), p. 385; Barnett, "International Agreements Without the Advice and Consent of the Senate," 15 *Yale Law Journal* (1905), pp. 18 and 63, respectively; Crandall, *Treaties, Their Making and Enforcement* (2nd ed., 1916), p. 102 ff; Wright, *Control of American Foreign Relations* (1922), pp. 54, 237, and 243; 1 Willoughby, *The Constitutional Law of the United States* (1st ed., 1910), ch. 33; and 1 Miller, *Treaties and Other International Acts of the United States* (1933), p. 9. Concerning them, Miller observes:

Perhaps there is no exact definition possible of the expression "Executive agreement". It is doubtless generally used to include international

agreements made by the Executive (whether under statutory authority or not), but excluding those made by and with the advice and consent of the Senate. In this sense it is obvious that the term comprises agreements and acts of a quite varied nature; for while such an agreement may finally be made by the President or under his direction, it may in some cases have a very different basis of authority from others; it may rest on a statute; it may follow a treaty; it may be an exercise of the power of the President under the Constitution, and without the aid of statute or treaty, such as *modus-vivendi* or an agreement for the determination of claims of American citizens against another country; or it may, as in the case of an armistice, be his act as Commander in Chief.

It may be added that, by their own terms, executive agreements are designated variously as "agreements", "provisional agreements", "accords", "memoranda of agreements" and "protocols", but the great majority of them are in the form of exchanges of notes. The term "executive agreement" is one of popular usage solely and no instrument is known which by its own terms has ever been so designated. The one fact which distinguishes them from "treaties", as that term is used in the Constitution of the United States, is that they are not subject to ratification by the President by and with the advice and consent of the Senate. Of one such agreement the Supreme Court of the United States said (*Altman v. The United States*, 1912, 22 U. S. 583):

While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, sec. 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of the two sovereign nations and made in the name and on behalf of the contracting countries and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President.

The distinction between so-called "executive agreements" and "treaties" is purely a constitutional one and has no international significance. An instrument to which the United States is a party does not need to be ratified by the President by and with the advice and consent of the Senate in order to be a treaty in the sense of this Convention. If it possesses the essential characteristics mentioned in paragraph (a), and does not fall within the category of instruments expressly excluded by paragraphs (b) and (c), it would be a treaty in the sense of this Convention regardless of what may be its status under the law of the United States, and the rules of this Convention are applicable to it. Whether it is binding only upon the particular President who concluded it, as is sometimes contended (see Wright, *op. cit.*, pp. 238 and 242), it is unnecessary to argue here. Whatever the facts as to this may be, so long as it is in force it is a treaty in the sense of this Convention if it ful-

fills the requirements of paragraph (a) and is not excluded by paragraphs (b) and (c), as it would be if it were in the form of an exchange of notes.

(b) The term "treaty" does not include an agreement effected by an exchange of notes.

COMMENT

Agreements in the form of an exchange of notes between certain high officials acting on behalf of States, usually their Ministers of Foreign Affairs or diplomatic representatives, are numerous today and have greatly multiplied in recent years. Those to which the United States is a party are listed in the *Treaty Information Bulletin*, 1932, No. 436. They are employed for a great variety of purposes and, like instruments which are designated as "treaties", they may deal with any matter which is a proper subject of international regulation. One of their most common objects is to record the understandings of the parties to a treaty which they have previously entered into; but they may record an entirely new agreement, sometimes one which has been reached as a result of negotiation. While the purpose of an agreement effected by an exchange of notes may not differ from that of instruments designated by other names, it is strikingly different in its form from a "treaty" or a "convention". Unlike a treaty, the relation which it establishes or seeks to establish is recorded, not in a single highly formalized instrument, but in two or more letters usually called "notes", signed by Ministers or other officials. Basdevant speaks of such an agreement as being composed of two unilateral instruments, each drafted by a representative of the State which is a party to it, and each binding upon the other as a result of the procedure of exchange. 15 *Recueil des Cours* (1926), p. 610.

Unquestionably, agreements concluded in this form have the juridical force and effect of treaties as the term is usually understood; they are considered by many writers as falling within the category of treaties equally with protocols, arrangements, declarations, and other international agreements designated by other names. They are often published in official treaty collections, and they may be registered with the Secretariat of the League of Nations in conformity with the provision of Article 18 of the Covenant. But it would be difficult because of their peculiar form to formulate a body of general rules which would apply equally to them and other instruments having a different form. For that reason it has seemed desirable to exclude them from the category of instruments to which all the rules of this Convention are intended to apply.

(c) The term "treaty" does not include an agreement to which a person other than a State is or may be a party.

COMMENT

The words "person other than a State" as here used have reference not only to individuals but to political or juridical entities which lack the attri-

butes of a State as that term is used in this Convention (Art. 2, par. (a)). Examples of such a "person" would be an association, company, institution, church, bank, commission, province, city, district, member of a federal union, or other organization or entity which does not have the attributes or capacity of a State. But it is not to be implied that an agreement between two or more such entities, and especially one between such an entity and a State, may not properly be regarded as a treaty. For the purposes of this Convention, it is not deemed advisable to deal with such agreements because, like others which have been excluded, they have peculiar features which distinguish them from the normal type of treaty and make it doubtful whether certain of the rules of this Convention could be applied to them.

In fact, agreements between such entities, on the one hand, and States, on the other, have not been lacking, and in recent years they have become rather common. An example to which reference may here be made was the "agreement" between Austria, Hungary, Italy, and Yugoslavia, on the one hand, and the Southern Railway Company (with the intervention of a committee representing the bondholders), on the other, relative to the administration and technical reorganization of the Southern Railway System, signed at Rome on March 29, 1923. The agreement was subject to ratification by the States which were parties thereto, and was registered with the Secretariat of the League of Nations. 23 *League of Nations Treaty Series*, p. 255. See also the convention of May 21, 1930, between the Secretary-General of the League of Nations and the Radio-Suisse Incorporated Wireless, Telegraph and Telephone Co. (*League of Nations Document C. 192, M. 92. 1930. VIII*), and the agreement between the Government of Venezuela and the French *Compagnie des Câbles télégraphiques*, signed May 11, 1909 (102 *British and Foreign State Papers*, p. 950). The latter agreement was signed by the Attorney-General of Venezuela and a representative of the company, and, by section 7 of the agreement, was to be ratified by the company in conformity with its statutes at the next meeting of the shareholders. Such agreements are not treaties in the sense of this Convention because in each case one of the parties was not a State and did not possess any treaty-making capacity. Moreover, it is possible that they may not be governed by the rules of international law but by those of private law. See Crusen, in 22 *Recueil des Cours* (1928), p. 35. It may be remarked, however, that international law has in the past attributed an international personality to certain associations which possessed some characteristics of States, and with which treaties were sometimes concluded. Such was the International Association of the African Congo with which treaties were concluded by various States.

An agreement or contract between a State and a native prince or chief of a people not a member of the community of nations, would not be a treaty in the sense of this Convention. As to the status of such agreements, Arbitrator Huber said in the *Island of Palmas Case*:

As regards contracts between a State or a Company such as the Dutch East India Company and native princes or chiefs or peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly devoid of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are nonetheless facts of which that law must in certain circumstances take account. 22 *American Journal of International Law* (1928), pp. 897-898.

It may be mentioned in this connection that the Convention on Private International Law, adopted at Havana February 20, 1928, is open to adhesion by "international juristic persons" (Art. 6), 4 Hudson, *International Legislation*, p. 2282. The convention, however, contains no indication as to the kinds of entities that would be embraced within this category; but it is clear from the context that entities other than States were envisaged.

The term "treaty" as used in this Convention would not include agreements between dependent political entities or territorial subdivisions of a State, or those entered into between them and States. Nor would it include agreements between the component member-states of federal unions (such as the German *Länder* and the Swiss Cantons) and foreign States, although both the *Länder* and Cantons have a limited power to conclude treaties with foreign countries. See Art. 78, Constitution of Weimar; Heckel, "Verträge des Reichs und der Länder mit auswärtigen Staaten nach der Reichsverfassung," 46 *Archiv des Öffentlichen Rechts* (1924), p. 209; Elben, *Die Staatsverträge Württemburgs mit nicht deutschen Staaten*, and Strupp, 2 *Jahrbuch des Völkerrechts*, p. 566, where a list of such treaties may be found. As to the treaty-making power of the Swiss Cantons, see Art. 1, sec. 9 of the Constitution of the Swiss Confederation; His, "De la Compétence des Cantons suisse de conclure des Traités internationaux," 10 *Revue de Droit International et de Législation Comparée* (1929), sér. 3, p. 454; and Huber, "The Intercantonal Law of Switzerland," 3 *American Journal of International Law* (1909), p. 62 ff. Although treaties concluded by the German *Länder* with foreign States are regarded by German jurists as having the juridical character of international treaties (Cf. Kohler, 4 *Zeitschrift für Völkerrecht*, p. 515), they would not fall within the category of "treaties" in the sense of this Convention because the German *Länder* are not States as defined by Art. 2, par. (a). The same may be said of treaties concluded by the Swiss Cantons, although the Swiss Federal Court appears to have considered that the rules of law applicable to such treaties are the same as those which apply to international treaties. *Lucerne v. Aargau*, 8 *Entscheidungen des Schweizerischen Bundesgerichts* (1882), p. 57, and *Canton of Thurgau v. Canton of St. Gallen*, 54 *ibid.* (1928), p. 188.

It seems desirable that the rules which this Convention lays down in respect to treaties should apply only to those instruments which record en-

gagements between political entities which are members of the community of nations. Under this Convention, treaties between the British Dominions, including India, or between them and foreign States, would be included, because the Dominions and India are members of the League of Nations and under the definition of a "State" given in Art. 2, par. (a) they are members of the community of nations and have the capacity to enter into treaties with other members of the community of nations. Many such treaties have been concluded and have been registered with the Secretariat of the League. See, for example, the convention of March 30, 1925, between the Irish Free State and New Zealand (56 *League of Nations Treaty Series*, p. 374); the treaty of February 24, 1925, between the United States and Canada (43 *ibid.*, p. 240); the agreement of January 14, 1930, between the German Reich and Canada (109 *ibid.*, p. 474); that of January 17, 1930, between the Reich and New Zealand (109 *ibid.*, p. 486); the convention of December 15, 1922, between Canada and France (21 *ibid.*, p. 38); the convention of April 26, 1920, between France and the Government of India (*ibid.*, p. 288); and the merchant shipping agreement of December 10, 1931, between Great Britain, Irish Free State, Canada, Australia, New Zealand, the Union of South Africa, and Newfoundland (129 *ibid.*, p. 178).

As to concordats between the Holy See and foreign States, the great majority of writers on international law have adopted the view that they are not to be classified as treaties. Their argument is that, in concluding such agreements, the Pope acts not in his capacity as a temporal sovereign of a State—indeed he possessed no such quality during the period 1870–1929—but as the spiritual head of the Roman Catholic Church, and that the matters with which concordats deal are, in the main, not political in character but religious and ecclesiastical and therefore not a proper matter for treaty regulation. Bluntschli's draft code (Art. 443) expressly excludes them from the category of treaties even when they deal in part with political matters. Rivier (2 *Droit des Gens*, p. 36) goes to the length of denying them the character of treaties even before 1870, when the Pope was acknowledged to be the temporal head of a State, because, he says, they were concluded by the Pope not in his capacity as temporal sovereign but as the spiritual head of the Catholic Church. One of the claims filed by the Bishop of Nicaragua before the Nicaraguan Mixed Claims Commission provided for by the decree of March 29, 1911, was for damages for violation of the concordat entered into by the Holy See and the Republic of Nicaragua in the year 1861. The Commission, adopting the opinion of Bluntschli, referred to above, held that a concordat cannot be regarded as an international treaty, but should be considered as "a temporary arrangement which ceases to bind the contracting parties from the time one of them declines to respect it." Schoenrich, "The Nicaraguan Mixed Claims Commission," 9 *American Journal of International Law* (1915), p. 869.

A number of writers maintain the contrary thesis, although they recognize

that a concordat is a type of treaty *sui generis*. They argue that, even if it were true that concordats deal in the main with religious and ecclesiastical matters, it is not less true that they are negotiated by one who is competent and was competent even between 1870 and 1929 to enter into agreements with foreign States, and that concordats are in fact concluded in the form of diplomatic instruments. In fact also, as they point out, their content has often included matters of a civil or legal character.

Whatever may be the matters dealt with in a concordat, there is no juridical basis, it is believed, for distinguishing between international agreements which relate to ecclesiastical matters and those which deal with civil or political matters, attributing the character of treaties to the latter but denying it to the former. Compare 3 Genet, *Traité de Diplomatie et de Droit Diplomatique* (1932), p. 504. See also Pillaut, 46 *Journal du Droit International*, p. 594; Heffter, *Droit International de l'Europe* (1883), sec. 40; 2 Merignhac, *Traité de Droit Public International* (1907), p. 135 ff; and Pradier-Fodéré, *Traité de Droit International Public* (1885), sec. 1028 ff. Anzilotti, who discusses the juridical nature of the Holy See and its concordats with learning and impartiality, concludes that if a concordat is conceived as an agreement between two coördinate and equal entities and exclusively from the point of view of its obligatory character, its formal analogy to an international treaty is complete, and that the difference in the nature of the matters with which they deal does not justify one in excluding them from the domain of international law and denying to them the character of international treaties. 1 *Cours de Droit International* (Gidel trans., 1929), pp. 140-142. See, in the same sense, Siotto-Pintor "*Les Sujets du Droit International Autres que les États*" (41 *Recueil des Cours*, 1932, p. 325), and Chechini (*Revista di Diritto Internazionale*, 1930, p. 207 ff), both of whom point out that in the Lateran Treaty and the Concordat of 1929 between Italy and the Holy See, political and ecclesiastical matters are mixed, and that both in effect form a single convention of a "concordatory" character. The argument based on the distinction between the matters dealt with by treaties and concordats therefore falls to the ground.

Since the recognition by the Italian Government in 1929 of the sovereignty, ownership and exclusive jurisdiction of the Holy See over the Vatican State,—a recognition which was itself accorded by the treaty of February 11 concluded with the Holy See—there can no longer be any doubt as to the capacity of the head of that State to enter into treaties with foreign States. See Fenwick, "The New City of the Vatican", 23 *American Journal of International Law* (1929), especially p. 374, and Brière, "*La Traité du Latéran et le nouveau État Pontifical*," 10 *Revue Générale de Droit International Public* (1929), p. 123. An agreement concluded by him, not in his capacity as the head of the Vatican State but in his capacity as the head of the Roman Catholic Church, would not fall within the category of treaties as the term is used in this Convention. The term "treaty" as here used is restricted to instru-

ments to which States alone are parties, and since the Holy See is not a State, as defined by Article 2 of this Convention, an agreement between it and a State would not be covered by its provisions. This is not saying that they are *not* treaties; it is only saying that they are not treaties in the sense of this Convention. This Convention excludes concordats, not because they deal ordinarily with religious or ecclesiastical matters, but because they are not agreements between States. An agreement, however, between the Vatican State as such and another State, or between the Pope in his capacity as the temporal head of that State and another State, even if it were called a concordat, would be a treaty in the sense of this Convention, provided of course it fulfilled the requirements of paragraph (a) and did not fall within the class of excluded instruments mentioned in paragraphs (b) and (c).

ARTICLE 2. EXPLANATION OF CERTAIN OTHER TERMS

(a) A "State" is a member of the community of nations.

COMMENT

It must be pointed out that this is not a definition, but an explanation of the use of the term "State" in this Convention. This use has been standardized in the various drafts of the Research in International Law.

The explanation of the term "treaty" in Article 1 shows that in this Convention the term is confined to instruments to which "States" are parties. Paragraph (a) of Article 2 sets the further limitation that, so far as this Convention is concerned, the parties must be members of the community of nations. No attempt need be made here to say which are the members of the community of nations, nor to lay down the criteria for such membership. Indeed, these criteria are not altogether definite.

No authoritative definition of a "State" exists. The Convention on Rights and Duties of States, signed at Montevideo, December 26, 1933, provides (Article 1) that "the State as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) a capacity to enter into relations with other States." This provision does not serve much purpose, however.

As it is used in this Convention, the term "State" would doubtless apply to all the present (January 1, 1935) members of the League of Nations, all sixty of which, though some of them are not generally spoken of as "States", are clearly members of the community of nations. It would also apply to the following non-members: United States of America, Brazil, Costa Rica, Egypt, Iceland, Liechtenstein, Monaco, San Marino, Saudi Arabia, Vatican City, and Yemen. Possibly, also, it would apply to other non-members. Lacking a definite set of criteria for membership in the community of nations, the precise application of the term "State" can be decided upon only with reference to a particular set of facts.

With this explanation, it is clear that this Convention will apply to most of

the international instruments which may be referred to as "treaties", though it will not apply to some instruments which may pass under that title.

It is to be noted that certain organizations or entities will be excluded by this explanation of the term "State". The League of Nations, for example, is not a member of the community of nations, though it may be said to have an international juridical personality. Numerous communities under various forms of dependence will also be excluded, as will members of federal unions in some cases, for they do not enjoy membership in the community of nations. Thus, if under Article I, Section X, of the Constitution of the United States, the State of New York may, with the consent of Congress, enter into an agreement with the Dominion of Canada, the agreement may have all the characteristics of a treaty, as the term is generally used, but it will not be a "treaty" as the term is used in this Convention, and the provisions of this Convention are not designed to apply to it.

An instrument to which two Swiss Cantons are parties, or to which a Swiss Canton and one of the States of the German Reich are parties, may be called a "treaty" *eo nomine*; but this Convention will not apply to it.

(b) A "signatory" of a treaty is a State on behalf of which the treaty has been signed.

COMMENT

Once a treaty has been signed on behalf of a State, such State is always thereafter a "signatory" of the treaty, as that term is here used. If and when the treaty comes into force with respect to such State, it will thereupon be a "party" to the treaty, and will then be referred to as such. It will still, nevertheless, be a "signatory" of the treaty. It will likewise still be a "signatory" of the treaty even though it never takes such other steps as may be necessary to make it a "party" thereto.

(c) A "party" to a treaty is a State which is bound by the treaty.

COMMENT

In the literature on treaties, and sometimes even in treaties themselves, the word "party" is occasionally so used that it is difficult to determine whether it refers to a State which is actually bound by a treaty and under an obligation to abide by its terms, or to a State on behalf of which a treaty has been negotiated or signed but which has not taken such further steps as may be necessary to bring the treaty into force with respect to it. Thus, for example, a statement to the effect that reservations to a treaty must be accepted by all the "parties" thereto not infrequently appears under such circumstances that it is almost impossible to know whether the word "parties" refers only to States which are actually bound by the treaty, or likewise to

States on behalf of which the treaty has been signed but which are not yet so bound. Made under such circumstances, the statement is, to say the least, confusing.

Although in practice the term "party" may sometimes be thus loosely used in referring to a State which has, for example, signed but not yet ratified a treaty which does not come into force with respect to it prior to such ratification, it is deemed desirable, in order to avoid ambiguity in this Convention, to exclude any such use of the term here and to confine it to what would seem to be its more proper usage. Consequently, in this Convention, the term "party" is used only in reference to a State which is actually bound by a treaty—whether that be as the result of signature alone, signature plus ratification, signature plus ratification and the exchange or deposit of ratifications, accession, or what not.

In other words, as the term is used in this Convention, a State is not a "party" to a treaty until the treaty has come into force with respect to it. Thus, even though a State may have deposited its ratification of a treaty, it may still not be a "party" to the treaty as that term is here used, because, for example, the treaty may not come into force until certain other ratifications are likewise deposited. Such a State is not, then, "bound" by the treaty; indeed, prior to the coming into force of the treaty it could probably even withdraw or vary its ratification, as the French Government did its ratification of the Convention for the Supervision of International Trade in Arms of June 17, 1925. See *United States Treaty Information Bulletin*, No. 14, p. 4; 1 Hudson, *International Legislation* (1931), p. lii, n. 5.

There may, of course, be "parties" to a treaty which are not "signatories" thereof. International Labor Conventions, for example, are not signed by the States members of the International Labor Organization, but the latter can and do become "parties" to them as a result of ratification. States which effectively accede to treaties likewise become "parties" to such treaties although in the normal case they do not sign them.

ARTICLE 3. CAPACITY TO MAKE TREATIES

Capacity to enter into treaties is possessed by all States, but the capacity of a State to enter into certain treaties may be limited.

COMMENT

This article deals with the subject of treaty-making capacity from the standpoint of international law. Whether treaties be viewed as consensual transactions or as legislative acts, it seems clear that each member of the community of nations must have the power to make them. Indeed, it may be set down as one of the essential features of such membership that a community should be capable of entering into treaty arrangements with other communities. The society of nations could hardly be said to exist as a society

if its members lacked such capacity. Hence, it is commonly said that capacity to enter into treaties is an "attribute of sovereignty."

Article 3 does not deal with the possibility that international instruments which have many of the characteristics of treaties may be entered into by communities which are not members of the community of nations, and hence not to be considered as States. The legal status of such instruments is outside the framework of this Convention, for, as the term is here used, a "treaty" must be between two or more States. Perhaps it may be said that capacity to make what may properly be called a treaty can only be possessed by members of the community of nations; certain recent instruments, such as the Simla Rules on Safety of Life at Sea, of June 11, 1931 (136 *League of Nations Treaty Series*, p. 204), to which the Governments of Ceylon, Hong-kong, the Netherlands East Indies and the Straits Settlements were among the parties, and the so-called "treaty" between Saudi Arabia and Trans-Jordan of July 27, 1933 (*British Parliamentary Papers, Cmd. 4691*), are examples of instruments recently concluded by communities all of which are clearly not States. Some separate category for such instruments may be necessary. International law contains no very definite prescriptions for statehood, or for the possession of sovereignty. (See, however, Article 1 of the Montevideo Convention on Rights and Duties of States, of December 26, 1933). Hence it is impossible to lay down in this Convention the criteria for determining whether a particular community is a State. The Convention therefore proceeds on the assumption of statehood possessed by various communities, and as the term "treaties" is here used its application is to be confined to instruments all the signatories or parties to which are States.

The possession of treaty-making capacity by all States is evidenced not only by the practice of making treaties, but also by frequent formulation as a *dictum* of international law. In the *Wimbledon Case*, the Permanent Court of International Justice stated that "the right of entering into international engagements is (*précisement*) an attribute of State sovereignty." (Series A, No. 1, p. 25; 1 Hudson, *World Court Reports* (1934), p. 175). This was repeated in the advisory opinion on *Exchange of Greek and Turkish Populations*, Series B, No. 10, p. 21. Numerous treatises might be cited to the same effect.

EXTENT OF CAPACITY

All States having capacity to make treaties, the difficult question is whether all States have capacity to make all kinds of treaties. Do any limitations exist on the capacity of some States? And if so, how do these limitations arise?

So far as general international law is concerned, it cannot be said that the capacity of States to enter into treaties is subject to any limitation. On the other hand, it seems difficult to say that general international law requires a State to maintain its capacity intact and unfettered. Several possible

sources of limitations must be examined: (1) the qualified status of a State; (2) the international obligations of a State assumed by treaty; and (3) a State's own constitution.

(1) Various communities of the world which have been States and which continue to exercise many of the prerogatives of States have come to possess a somewhat qualified status in the society of nations. If a State ceases to exist as such—recent instances are Hawaii and Montenegro—it may lose the treaty-making capacity altogether. As international law makes no very definite prescriptions for the beginning of statehood, so it sets no clear and unmistakable conditions for the continuance of statehood. Hence, some communities which may possibly claim to be States may have only a qualified status as such. The possibilities of qualification on the status of a State are not rigidly fixed by international law, and this is not a matter of definite categories. At least one category of special status is well recognized, that of a protectorate; yet the various communities or States which may be placed in this category do not necessarily have the same legal capacity. As was said by the Permanent Court of International Justice in its opinion on the *Tunis-Morocco Nationality Decrees*, “in spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.” (Series B, No. 4, p. 27; 1 Hudson, *World Court Reports*, 1934, p. 158.) It is therefore impossible to say that all protectorates are properly to be called States (as the term is explained in Article 1), or that all protectorates which may properly be called States have the same capacity to make treaties. The legal qualities of each protectorate must be appreciated, and a course of practice must be analyzed. It may be found that a particular protectorate possesses no treaty-making capacity.

It is not practicable, within the limits of this comment, to set forth the precise nature of each protectorate in the world. The case of the Regency of Tunis is, however, of special interest. Since 1881, Tunis has been under the protectorate of France. It seems to enjoy some capacity for making treaties, for it appears to be a party to various recent multipartite instruments, among others the Convention on Simplification of Customs Formalities of November 3, 1922, and the Agreement concerning Manned Lightships of October 23, 1930. (See *League of Nations Document A.6 (a)*. 1934. V. Annex, pp. 31, 88.)

There may be other categories than protectorates which should be considered in this connection. A community under a condominium might possibly be called a State with a limited treaty-making capacity. It is to be noted that the Sudan acceded to the Slavery Convention of September 25, 1926, and to the International Relief Union Convention of July 12, 1927, though the fact does not seem to justify any definite general conclusion.

It may be noted that Danzig is a State with a qualified status such that

its treaty-making capacity is limited. The Permanent Court of International Justice has pronounced it to be a State, but with a legal status which is *sui generis*. Series A/B, No. 44, pp. 23-25. The special features of its legal status depend *inter alia* upon provisions in Article 104 of the Treaty of Versailles of June 28, 1919, and Article 2 of the Danzig-Polish Convention of November 9, 1920; they have been considered from time to time by the Court. Series B, No. 18; Series A/B, No. 43, and No. 44. Cf., Hostie, "*Questions de principe relatives au statut international de Danzig*," 14 *Revue de Droit International et de Législation Comparée* (1933), p. 578 ff; 15 *ibid.*, p. 89 ff. Without attempting to summarize these features, which are intimately connected with Danzig's *début* as a member of the community of nations, it may be said that they place limitations upon Danzig's capacity to enter into treaties.

(2) A particular State may have assumed by treaty an international obligation to refrain from entering into other treaties of a certain character. In such a case, it may be thought that no limit thereafter exists upon the treaty-making capacity of the State as it was before the obligation was assumed; or it may be urged that a complete disability exists so long as the obligation endures. Which of these solutions is to be preferred may depend upon various considerations, and it may be useful to analyze some concrete cases.

(a) By Article 20 of the Covenant of the League of Nations, to which on January 1, 1935, sixty States (or Dominions) were parties, the members "solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms" of the Covenant. If two members of the League of Nations purport to enter into a treaty which is admitted to be and duly pronounced to be inconsistent with the terms of the Covenant, is this treaty void by reason of a lack of capacity in the parties? Or does its conclusion merely constitute a breach of the obligation resulting from Article 20 of the Covenant? An answer to these questions may, conceivably, depend upon the position ascribed to the Covenant as an international constitutional instrument. An interesting variance of the case would be a purported treaty between a member of the League and a State not a member of the League, similarly admitted to be and duly pronounced to be inconsistent with the terms of the Covenant. Would the member of the League be able to plead a lack of capacity as a ground for avoiding the obligations of the purported treaty?

(b) By a treaty between the Allied and Associated Powers and Poland, of June 28, 1919, Poland undertook that certain stipulations concerning the protection of minorities should be (Article 1) "recognized as fundamental laws, and that no law, regulation or official action" should "conflict or interfere" with, or "prevail over" these stipulations; Poland also agreed (Article 12) that the stipulations should "constitute obligations of international concern," and should "not be modified without the assent of a majority of

the Council of the League of Nations.” 1 Hudson, *International Legislation* (1931), p. 285. If Poland and another State should purport to enter into a treaty which is admitted to be and duly pronounced to be inconsistent with these stipulations, would the purported treaty be nugatory by reason of Poland’s lack of capacity? In this case, it might, conceivably, be of importance that the Minorities Treaty formed a part of the international action by which the independent Polish State was reestablished; this point could not be made with reference to some other treaties containing corresponding provisions, however.

(c) By a treaty of May 22, 1903, with the United States of America (33 *U. S. Statutes at Large*, p. 2248), Cuba agreed (Article 1) that “the Government of Cuba shall never enter into any treaty or other compact with any foreign Power or Powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign Power or Powers to obtain by colonization or for military or naval purposes, or otherwise, lodgment in or control over any portion of said island.” This treaty was in force until June 9, 1934. If during the period it was in force, Cuba had purported to enter into a treaty with another State whereby a part of its territory was to be ceded to that other State, would such treaty have been invalid because of a lack of capacity on Cuba’s part to enter into it? It may be said, of course, that the 1903 treaty was a part of the process by which Cuba achieved its status as a State. Did the treaty effect a limitation on Cuba’s treaty-making capacity, as a “birth mark” of the State? Or did it merely impose an obligation on Cuba for the nonperformance of which Cuba would be liable?

No decision of an international tribunal has been found which declares that a treaty is invalid for a lack of capacity of a party which had previously placed itself under obligation to another State agreeing not to enter into such a treaty. The two decisions of the Central American Court of Justice in *Costa Rica v. Nicaragua* and *El Salvador v. Nicaragua* are not to be placed on this ground. See Hudson, *Permanent Court of International Justice* (1934), pp. 52–56, 58–61; 11 *American Journal of International Law* (1917), pp. 181, 674.

(3) A State’s own constitution may place limitations on its capacity to enter into treaties. Some written constitutions of modern times provide that certain kinds of treaties are not to be made; the 1917 Constitution of Mexico, for example, provides (Article 15) that “no treaty shall ever be made for the extradition of political offenders, or of offenders of the common class who have been slaves in the country where the offense was committed.” 4 Dareste, *Constitutions Modernes* (4th ed., 1932), p. 211. Or a State which has no written constitution may be subject to a constitutional limitation in entering into treaties. The question arises whether such constitutionally imposed limitations are, in any international sense, limitations on a State’s capacity to enter into treaties. To what extent does international capacity

depend on a State's own constitution? It seems somewhat paradoxical to say that a State may lack a certain measure of international capacity when by its own act in amending its constitution, an act for which no consultation with other States is necessary, it may attain full capacity. If duality be predicated of international and national law, the effect of an undertaking by treaty in international law cannot be made to depend upon compliance with requirements of national law. If the theory of the duality of international law and national law be rejected, the question becomes less simple. Yet it may be doubted whether a State's own action can effectively create a limitation upon its international capacity. The raw materials of international law are not very helpful on this point. Some light may be thrown on constitutional limitations on treaty-making capacity by the opinion of the Permanent Court of International Justice on the *Treatment of Polish Nationals in Danzig* (Series A/B, No. 44), in which the court said (p. 24) that "according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted." Conversely, it was said, "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."

The three types of situations which have been discussed seem to justify the statement in Article 3 of the Convention that "the capacity of a State to enter into certain treaties may be limited." In the present state of international law, certainly one could not refute this statement; nor would it seem desirable for an international formulation of the law of treaties to ignore the possibility of limitation or to seek to abolish it. If the text of Article 3 is not more definite, it may serve nevertheless to reflect faithfully the state of the existing law, and to put one on guard against its being misconceived.

ARTICLE 4. NAME GIVEN TO A TREATY

The international juridical effect of a treaty is not dependent upon the name given to the instrument.

COMMENT

The words "international juridical effect" as used in this article have reference to the validity or binding force of a treaty as an international engagement between the States which are parties to it. The article is intended to lay down the principle that the obligations created or recognized by any instrument which fulfills the requirement of Article 1 of this Convention, cannot be challenged on the ground that the instrument has been given some other name than "treaty", nor can an interpretation be placed upon it which is in any way determined by the particular name it bears. Article 4 means also that every rule of this Convention which applies to an instrument desig-

nated as a "treaty" applies equally to every instrument designated by some other name, if that instrument falls within the category of treaties as the term "treaty" is used in this Convention. Thus the rules laid down in this Convention relative to the ratification, registration and publication, interpretation, execution and termination of treaties apply equally to all instruments which under Article 1 have the character of treaties, regardless of whether they are called "treaties" or something else. To give a specific example, a State could not avoid its obligation under Article 17 to register or publish a military engagement with another State by calling it a "protocol" or an "arrangement", if in fact it possessed all the characteristics of a "treaty" as that term is defined by Article 1.

The name by which an instrument is designated, like the particular form in which it is cast (see the comment on Article 5), is, juridically speaking, an immaterial matter. As there is no rule of international law or practice which requires treaties to be concluded in any particular form, so there is none which requires them to be labelled with any particular name. As to this Hudson remarks:

To some extent the various forms of treaties are but names given to instruments; and it would be impossible to say that all international conferences are guided by logical rules in the choice of names. . . . In practise though some recognized differences may be said to exist, the choice is frequently casual. No particular form is required to furnish the submission element necessary for international legislation, and forms not strictly consensual may be employed; interesting examples of this may be found in the recent development of what may be called international constitutional law. In many cases no name is designated in the instrument itself. 1 *International Legislation* (1931), p. xv.

The names actually employed today for the designation of instruments comprised under the generic term treaties are already numerous, and in recent years there has been a marked tendency to multiply them and to employ them without discrimination and without regard to the rules of logic and consistency. In addition to the terms "treaty" and "convention", which in earlier times were employed almost exclusively to designate the instruments which are considered today as treaties in the generic sense, there have come into use on a wide scale such terms as "protocol", "agreement", "arrangement", "accord", "act", "general act", "declaration", "*modus vivendi*", "statute", "regulations", "provisions", "pact", "covenant", "*compromis*", etc. In fact, the number of instruments designated by these terms is now in excess of those styled "treaties" and "conventions".

An examination of the more than 300 multipartite instruments concluded during the years 1919-1929 reproduced or referred to in Hudson, *op. cit.* (listed in Vol. I, pp. lxii-xeviii), will show that only 18 are designated as "treaties" and 123 as "conventions"; 105 are designated as "protocols", 39 as "agreements", 9 as "statutes", 12 as "declarations", 5 as "arrangements", 7 as "provisions", 2 as "general acts", 2 as "additional acts", and

several as "regulations" (*règlements*). Of the "treaties and other international acts" to which the United States was a party and which were listed by the Department of State as being in force on December 31, 1932, 123 were "treaties", 208 were "conventions", 102 were "agreements" (many of them being in the form of exchanges of notes), 55 were "arrangements" (many of which were also in the form of exchanges of notes), 35 were "protocols", 26 were actually designated by their own terms as "exchanges of notes", 8 as "declarations", 2 as "general regulations", 2 as "general acts", 1 as an "additional act", 1 as a "*modus-vivendi*", and 1 as a "compact". These statistics were compiled from a list published in the *Treaty Information Bulletin* of the Department of State, Supplement to Bulletin No. 39, December, 1932. Of the principal international engagements to which Japan was a party in 1925, 18 were styled "treaties", 34 were "conventions", 11 were "arrangements", 11 were "protocols", 6 were "declarations", 2 were "resolutions", and there was 1 "accord", 1 "recommendation", 1 "decision", and 1 "statute". See the list published by M. Adatei in 1 *Séances et Travaux de l'Académie Diplomatique Internationale* (1928), p. 43 ff. An examination of any modern treaty collection will show similar results.

A study of the large output of both bipartite and multipartite engagements that have been entered into between States or their governments in recent years leaves one with the conviction that the terminology employed for designating the instruments which record them is confusing, often inconsistent, unscientific, and in a perpetual state of flux. See Basdevant, "*La Conclusion et la Rédaction des Traités*," 15 *Recueil des Cours* (1926), p. 542; 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 353; and Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), p. 36. Mastny and Rundstein in their report for the Committee of Experts for the Progressive Codification of International Law (20 *American Journal of International Law*, Spl. Supp., 1926, p. 215), considered it their duty to "call the attention of the committee to the prevailing anarchy as regards terminology ('treaty', 'convention', 'pact', 'agreement', 'arrangement', 'protocol', 'declaration', etc.)." And they added:

Up to the present, all attempts to obtain a uniform classification based on principles which take due account of the need of co-ordinating nomenclature, form and contents, have failed. In practice little attention is paid to the exact meaning which should be given to terms customarily used. The choice of nomenclature and form is governed by arbitrary considerations and depends upon the nature of the relations between States, the custom of the respective chancelleries, and sometimes even upon the carelessness of those who draft diplomatic instruments.

Instruments recording international engagements differing in no respect in their juridical character or object and sometimes but little if any in form, are variously styled "treaties", "conventions", "protocols", "agreements", etc., with little regard to logic or consistency. Sometimes the same instru-

ment is designated in different places in its text by different terms. An example which may be cited is the recent Pact of Cordial Collaboration between Italy and Czechoslovakia. The preamble refers to it as a "pact", Article 3 speaks of it as a "convention", while Article 4 calls it a "treaty". 26 *League of Nations Treaty Series*, p. 22. See also the text of an instrument between Switzerland and Liechtenstein, signed November 10, 1920, and published in 2 *ibid.*, p. 306, which is referred to variously in the preamble or text as an "agreement", a "convention", and a "treaty". Miller (3 *Treaties and other International Acts of the United States of America*, 1933, p. 188), calls attention to a glaring example of the indiscriminate and inconsistent use of terms in the convention of October 3, 1824, between the United States and Colombia. Of the terminology employed in the instrument he says:

This agreement is frequently called a convention, following the wording of its heading, "General Convention of Peace, Amity, Navigation, and Commerce"; it is so styled in the presidential message of February 21, 1825, and in the Senate resolution of March 3 (Executive Journal, III, 416, 424), in both instruments of ratification, in the certificate of exchange of ratifications, and in the proclamation; but it might correctly have been called a treaty, as it is in the Presidential message to Congress of December 6, 1825 (American State Papers, Foreign Relations, V, 761), and in various places in the agreement itself. The preamble speaks of "a treaty or General Convention", and in Article 31 the expression "this treaty" or "the present treaty" occurs six times. Considering this use of the word "treaty" in the document itself, and in view of the fact that the agreement has, in the strictest sense of the word, every form of a treaty, it is referred to as such in the headnote and in these notes.

In neither the English nor the Spanish text is the title of the treaty consistently given in the four places in each where it is mentioned. In the English text it is written "General Convention of Peace, Amity, Navigation, and Commerce" in the heading; "treaty or General Convention of peace, friendship, Commerce, and Navigation" in the preamble; and "Treaty or general Convention of peace, amity, Commerce and Navigation" and "treaty of peace, Amity, Commerce and Navigation" in Article 31.

As a result of such loose usage, a scientific classification of treaties based on the terminology now employed is quite impossible, and such classifications as have been proposed are for the purposes of this Convention largely useless. Thus the suggested terminology based on the distinction between instruments that are subject to ratification and those which are not, is a distinction based on procedure rather than upon juridical differences. Cf. Dickinson, *The Law of Nations, Cases and Readings* (1929), p. 1017.

The term "protocol" is used in a variety of senses. Originally its most common rôle was analogous to that of a *procès-verbal*, but it is no longer so restricted. Basdevant, *op. cit.*, p. 628 ff; 2 Satow, *Guide to Diplomatic Practice* (1917), ch. 29; 2 Hyde, *International Law* (1922), sec. 514; Bittner, *op. cit.*, p. 298 ff; 3 Genet, *Traité de Diplomatie et de droit Diplomatique* (1932)

pp. 251 and 530 ff. Instruments which have the form and juridical force of "treaties" or "conventions" and which are intended to accomplish the same purposes are often designated as "protocols", when there is no apparent reason why they should not have been called "treaties" or "conventions". Such, for example, was the Final Protocol of September 7, 1901, between various States and accepted by the Emperor of China, embodying the terms of settlement of various matters growing out of the Boxer insurrection. 2 Malloy, *Treaties, etc.*, p. 2006. See the discussion by Bittner, *op. cit.* p. 296 ff, who dwells upon the variety of forms and purposes for which protocols are employed. As an instrument recording an international engagement, that is, one having the character of a treaty, a protocol is sometimes employed to supplement or amend, interpret, or provide for the execution of, a treaty or convention to which it is annexed. It may be employed, also, to settle a boundary dispute (*e.g.*, the protocol of June 25, 1911, between Belgium and Germany for the delimitation of the frontier between their respective territories in Africa), to submit a controversy to arbitration, to create a claims commission, to establish a new international régime, to record the understanding of the parties as to the meaning of a treaty, to effect a resumption of diplomatic relations, to record the reservations under which the parties agree to accept a treaty, etc.

As is well known, the instrument for the acceptance of the Statute of the Permanent Court of International Justice was in the form of a protocol of signature, executed at Geneva December 16, 1920. 1 Hudson, *International Legislation* (1931), p. 528. The undertaking by which various States agreed to assist in the economic and financial reconstruction of Austria was embodied in two protocols signed at Geneva October 4, 1922. 1 *Ibid.*, p. 882. A similar undertaking in regard to Hungary was in the form of protocols signed March 14, 1924. 2 *Ibid.*, p. 1247. So was the instrument relative to the settlement of refugees in Greece (protocol signed at Geneva September 29, 1923). 2 *Ibid.*, p. 1067.

Generally, protocols are subject to ratification, but sometimes they are not. As stated above, a protocol sometimes differs in no essential respect, either as regards its form, mode of conclusion, object, or the nature of the subject with which it deals, from a "treaty" or "convention". Thus while the use of submarines and noxious gases was prohibited by a "treaty" signed at Washington on February 6, 1922, a prohibition on the use of asphyxiating, poisonous, or other gases was incorporated in a "protocol" signed at Geneva June 17, 1925 (3 Hudson, *op. cit.*, p. 1670). General international agreements relative to the pacific settlement of differences between States are usually recorded in instruments denominated as "treaties" or "conventions", but one of the most famous of such instruments was the "protocol" of Geneva (unratified) of October 2, 1924. 3 *Ibid.*, p. 1378. Ralston (*Law and Procedure of International Tribunals*, rev. ed. 1926, p. 5), remarks that a "protocol" indicates a form of treaty usually minor in character, but he

correctly adds that "it is often employed in connection with treaties of a serious nature."

The term "agreement" (the corresponding term in French usually being *accord* but sometimes *arrangement*; in German *Übereinkommen*, sometimes *Vereinbarung* or *Abkommen*), to designate an instrument-recording international engagements, is employed today with increasing frequency. In latter years, it has been used to designate instruments entered into between States for a great variety of purposes: the creation of international bureaus or other international organizations, for the suppression of the manufacture, traffic in and use of prepared opium, regulation of telephone service, regulation of commercial relations, transit, conditions for the admission of immigrants, for the lease of lands for coaling stations, concerning the international regulation of industrial designs and models, for treatment of prisoners of war and interned civilians, for the repression of the trade in white women, concerning the exportation of bones, hides, and skins, for the acquisition of sites for soldiers monuments, for the loan of sanitariums, for the exchange of postal correspondence, etc. The alliance between Great Britain and Japan of 1902 was recorded in an instrument designated as an "agreement" which was signed on January 30 of that year. It was renewed and amplified in 1905 and 1911 by "agreements". 95 *British and Foreign State Papers*, p. 83; 104, *ibid.*, p. 173. Although not subject to ratification, these agreements had all the formal characteristics of "treaties", and might as well have been so designated. "Agreements" often deal with matters which were formerly and still are regulated by "treaties", "conventions", or other instruments bearing different names. Sometimes they are employed to complete an existing treaty or convention or to fill up the *lacunæ* which such treaty or convention may contain or to renew and extend their period of duration. It is impossible to lay down any criteria by which "agreements" may be distinguished juridically from other instruments recording international engagements but which are called by other names. Genet's description of an "agreement" as *une forme diplomatique très humble*, relating to "secondary points in international relations" (3 *Traité de Diplomatie et de Droit Diplomatique* (1932), p. 485) is, generally speaking, true, but there are many exceptions. However this may be, there can be no doubt that it is a type of international instrument which usually possesses all the juridical characteristics of a treaty as defined in this Convention. Like protocols, they are sometimes subject to ratification, sometimes not. Sometimes they are in form inter-state, sometimes inter-governmental instruments.

The term *procès-verbal*, like the term protocol, is now used in two or more senses. Originally, and still normally, an instrument which contains a summary of the proceedings and conclusions of a diplomatic conference or commission, it sometimes records the terms of an international engagement which does not differ in any juridical respect from a treaty or a convention. In the former sense it differs only slightly from a protocol of a conference. Among

examples of *procès-verbaux* having the character of international engagements and therefore falling within the category of treaties as defined by Article 1 of this Convention, may be mentioned that of April 19, 1892, signed at Zurich by the plenipotentiaries of Italy and Switzerland, recording their understanding of certain stipulations of the treaty of commerce signed on the same date (74 *British and Foreign State Papers*, p. 1128, and 2 Satow, *Guide to Diplomatic Practice* (1917), p. 250); the *procès-verbal* between Italy and Switzerland concerning the demarcation of the frontier between Pizzo Combolo and Sasso Lugprina, signed in 1877 (69 *British and Foreign State Papers*, p. 439); the *procès-verbal* which not only recorded the fact of the exchange of ratifications of the convention between Belgium and Austria regarding the settlement of Austrian debts due Belgian nationals, but also recorded an engagement between the parties extending the period of time referred to in Articles 1, 2, and 3 of the convention (5 *League of Nations Treaty Series*, p. 385); and the *procès-verbal* (of April 6, 1907) of the deposit of the ratifications of the International Sanitary Convention signed at Paris December 3, 1903 (2 Malloy, *Treaties, etc.*, p. 2122), which recorded certain agreements and understandings among the parties. Instruments of this form employed for the purpose of recording inter-state obligations have the juridical force of a treaty, and therefore fall within the purview of this Convention.

The term "arrangement", less frequently used than "agreement", does not indicate an instrument which differs in any essential juridical respect from instruments designated by the latter term, although it may and often does deal with matters of less importance. Genet (3 *op. cit.*, p. 489), refers to it as a type of international engagement having a character *extrêmement modeste*. This may be true generally, but it is not necessarily so. Sometimes the parties to "arrangements" are designated as governments or "representatives" of governments rather than States, but this does not alter their juridical character, nor does the fact that they are often effected by an exchange of notes. *League of Nations Treaty Series*, Nos. 74, 160, 201, 202, 214, and 2 Satow, *op. cit.*, p. 232 ff; others are cited by Genet (3 *op. cit.*, p. 489 ff). Fifty-five "arrangements" to which the United States was a party in 1931 are listed in *United States Treaty Information Bulletin*, Supplement to Bulletin No. 32, December, 1932.

The term "statute" is sometimes employed to designate certain types of multipartite instruments in the nature of organic acts dealing with the constitution and competence of some international organ, but it is not always so limited. Examples of important statutes which may be mentioned are the Statute of the Permanent Court of International Justice (on the choice of the term "statute", see Hudson, *The Permanent Court of International Justice*, 1934, p. 114); the organic Statute of the International Bureau of Intelligence on Locusts, signed May 20, 1926 (3 Hudson, *International Legislation*, 1931, p. 1891), which was annexed to an "agreement" on the same

subject, signed on the same date; the organic Statutes of the International Office for Dealing with Contagious Diseases, annexed to the convention of January 25, 1924, for the creation of that office (2 *ibid.*, p. 1242); the Statute on the Freedom of Transit which was annexed to the Barcelona Convention on the same subject, signed April 20, 1921 (1 *ibid.*, p. 631); the Statute on the Régime of Navigable Waterways of International Concern, annexed to the Barcelona Convention on the same subject, signed April 20, 1921 (1 *ibid.*, p. 645); the Statute on the International Régime of Maritime Ports, annexed to the convention of December 9, 1923 (2 *ibid.*, p. 1191); the Statute of the International Relief Union, annexed to the convention of July 12, 1927, for the establishment of the Union (3 *ibid.*, p. 2100); and the Statute Concerning the Territory of Memel (2 *ibid.*, p. 1272), which the Permanent Court of International Justice said was "a conventional arrangement binding upon Lithuania," since it was an annex to the convention of May 18, 1924, and was referred to in Article 16 of that convention. Series A/B, No. 49, p. 300.

Some of these statutes were annexed or attached to the treaties or conventions of which they were declared to be an integral part and which they supplemented or completed. Others were independent instruments standing by themselves. In either case the statute establishes binding obligations for the parties and therefore possesses the juridical characteristics and force of a "treaty" as the term is used in this Convention.

The term *modus-vivendi* is often employed to designate an instrument recording an international engagement of a temporary or provisional nature which is usually intended to be replaced by an agreement of a more permanent and detailed character. Juridically speaking, a *modus-vivendi* does not differ from other types of instruments recording international engagements, its character in this respect not being affected by its temporary or provisional quality. If it establishes relations under international law for one or more of the parties, it has the juridical force of a treaty as the term is employed in this Convention, regardless of the name by which it is designated. Examples of *modi vivendi* which may be mentioned and which by their own terms were so named, are: that between Great Britain and the United States of June 15, 1891, respecting the fur seal fisheries in the Behring Sea pending the conclusion of a treaty of arbitration (1 Malloy, *Treaties, etc.*, p. 743); that of April 4, 1925, between the Economic Union of Belgium and Luxemburg, on the one hand, and France on the other (44 *League of Nations Treaty Series*, p. 223), relative to commercial relations; and that of June 19/20, 1921, between the Spanish and Swedish Governments relative to commercial relations between the two countries (5 *ibid.*, p. 388).

The term "regulations" (*règlements*) is frequently applied to an instrument annexed to a treaty, and consisting of a series of rules and provisions supplementary to or designed to insure the execution of the treaty to which it is annexed. Numerous examples may be found in the treaty collections. A *règlement* may be a part of a treaty, or it may be in the form of a separate

and independent instrument. Where regulations are annexed to a treaty and declared to be an integral part thereof, they obviously have the juridical effect and force of the treaty of which they are a part. The termination of the treaty carries with it the termination of the regulations. In case they are separate and independent instruments instead of annexes, they must be regarded as having the character of treaties in the sense of this Convention if, in accordance with Article 1, they establish or seek to establish a relation under international law between the parties thereto.

A "declaration" is an instrument which serves various purposes. Sometimes the term is applied to certain instruments recording international engagements and which might with equal propriety be styled a treaty or convention, since they have the juridical force and effect of a treaty or convention. Examples are afforded by the declarations of Paris of 1856 respecting maritime law (Seott, *Texts of Peace Conferences at the Hague, 1899 and 1907*, App., p. 349); of St. Petersburg of 1868, renouncing the use in time of war of certain explosive projectiles (*ibid.*, p. 379); of London of 1909 concerning maritime war (104 *British and Foreign State Papers*, p. 242); of Barcelona of April 20, 1921, recognizing the right to a flag of States having no sea coast (1 Hudson, *International Legislation*, 1931, p. 662); and the declaration of September 29, 1923, relating to the settlement of refugees in Greece (2 *ibid.*, p. 1079). A good example of a bipartite "declaration" having the force and effect of a treaty was that concluded October 24, 1877, between Great Britain and the United States for the reciprocal protection of trademarks. 1 Malloy, *Treaties, etc.*, p. 737. Occasionally a declaration is purely interpretative of a treaty in which the parties have signed. Such was the declaration signed at Brussels March 10, 1879, between Belgium and Italy relative to Article 16 of the Extradition Convention of January 15, 1875; that signed at Washington on December 13, 1921, by the United States, Great Britain, France, and Japan concerning a treaty of the same date relating to the insular possessions of the parties in the Pacific Ocean (1 Hudson, *op. cit.*, p. 781); and that respecting the interpretation of Articles 2 and 4 of the Convention of March 4, 1884, for the protection of submarine cables (77 *British and Foreign State Papers*, p. 1140). Sometimes the purpose of a declaration is the putting into force of a convention which the parties have signed. Such was the declaration of March 3, 1927, concerning the putting into force of the convention signed at Brussels on November 27, 1925, relating to the measurement of vessels employed in inland navigation. 3 Hudson, *op. cit.*, p. 2076. Sometimes its purpose is to amend an existing convention; for example, the declaration signed at Copenhagen on June 11, 1928, by certain Powers for the amendment of the Convention of January 28, 1926 on the seaworthiness and equipment of ships. 3 *Ibid.*, p. 1834. Others which may be mentioned are the several declarations of the two Hague Peace Conferences of 1899 and 1907 (Seott, *Texts of the Peace Conferences at the Hague*, pp. 79 ff and 332). See also the Anglo-Japanese declaration of July 8, 1920, relative

to the modification of the agreement of July 13, 1911, to bring it into harmony with the Covenant of the League of Nations (1 *League of Nations Treaty Series*, p. 24); and the declaration of the British and French Governments, signed at Paris September 29, 1923, respecting oyster fisheries outside the territorial waters in the seas lying between the coasts of Great Britain and France (21 *ibid.*, p. 138). Unilateral declarations of States, such as those of Albania of October 2, 1921, and of Bulgaria of September, 1924, concerning the protection of minorities (9 and 29 *League of Nations Treaty Series*, pp. 174 and 118 respectively), are excluded from the list given above because they do not fall within the category of treaties as the term "treaty" is used in this Convention. See Article 1 and the comment thereon. But declarations which create rights or obligations or which establish relations under international law between two or more states, are clearly treaties in the sense of this Convention. As to the general character of declarations, see Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), p. 280 ff; 2 Oppenheim, *International Law* (4th ed.), p. 697 ff and p. 716, and 2 Satow, *Guide to Diplomatic Practice* (1917), p. 215 ff.

The term "provisions" (in French *dispositions*) is sometimes applied to certain instruments recording supplementary engagements of an interpretative or regulatory character annexed to treaties or conventions. Like declarations, they also sometimes take the form of separate and independent instruments not juridically distinguishable from a treaty, convention, or other instrument designated by other names. They may or may not be subject to ratification, but they may be registered with the Secretariat of the League of Nations. Among examples which may be mentioned here were the "provisions" for the transport of postal letters and parcels by air adopted at the Hague September 10, 1927 (3 Hudson, *International Legislation*, 1931, pp. 2117 and 2133); it was provided in the final protocol to the Universal Postal Convention of June 28, 1929, that the "provisions" supplementary to that convention should form an integral part of it. 4 Hudson, *op. cit.*, p. 2914. The instruments containing the provisions were submitted to ratification and were registered with the Secretariat of the League; clearly, they fall within the category of treaties as the term is used in this Convention, and their juridical character is in no way affected by the fact that they are called "provisions" instead of "treaties".

The term "Final Act" is usually applied to an instrument which contains a summary of the conclusions of a diplomatic conference, including an enumeration or reproduction of the texts of the treaties, conventions, *vœux*, recommendations, or other acts agreed upon and signed by the plenipotentiaries. The recent practice (*e.g.*, of the Sixth International Conference of American States at Havana, 1928) of incorporating in the Final Act the texts of all instruments or resolutions adopted by the conference has been criticized as unnecessary. 1 Hudson, *op. cit.*, p. xl. But whatever the objections to this practice may be, it is a matter of policy rather than of juridical interest and

need not be discussed here. In so far as a Final Act is merely a *procès-verbal*, that is, a record or summary of the conclusions of a conference or a reproduction of the texts of the instruments adopted, it can hardly be regarded as a treaty. It may contain, in addition, stipulations creating obligations for the parties which would give it the force and effect of a treaty.

Instruments recording international engagements are sometimes styled "general acts". Among examples may be mentioned that of the Conference of Berlin of February 26, 1885, relative to the Congo (which was also a "final act") (76 *British and Foreign State Papers*, p. 4); that of the Conference of Brussels of July 2, 1890, relative to the suppression of the African slave trade (82 *ibid.*, p. 55); that of the Algeciras Conference of 1906 (99 *ibid.*, p. 141); the General Act of September 26, 1928, for the Pacific Settlement of International Disputes (4 Hudson, *International Legislation*, 1931, p. 2529); and that relating to conciliation, arbitration, and judicial settlement, signed at Belgrade May 21, 1929 (4 Hudson *op. cit.*, p. 2710). Juridically, a "general act" is not distinguishable from a "treaty" or "convention", and therefore the rules of this Convention are applicable to all such instruments. Genet (3 *Traité de Diplomatie et de Droit Diplomatique*, 1932, p. 483), remarks that the difference between a "general act" and a "treaty" (or "convention") is only a difference of degree and not of kind. "As a rule the former is negotiated, drafted and concluded in the same way as treaties and conventions are; if it is decorated by a more ambitious name, it is because the object is sought to be accomplished by a great number of common wills." An attempt was made by the reporter of the Committee on Foreign Affairs of the French Chamber of Deputies, to which the General Act of Arbitration of September 26, 1928, was presented for consideration, to show that the Act was superior to and could be differentiated from a convention; but the attempt was not successful. See the argument of the French reporter, in 3 Genet, *op. cit.*, p. 484. When the General Act of 1928 was under consideration in the First Committee of the Assembly of the League of Nations, there was some discussion of the question as to why the proposed instrument should be called a General Act rather than a treaty or convention. It is stated in the minutes that:

It has been asked what was the significance of that Act. The word signified an instrument and nothing more, *i.e.*, a Convention *in spe*, which would become a Convention when two States had adhered to it. The word "convention" would therefore be inaccurate and premature, whereas the word "act" appeared to be appropriate. It involved no idea of a special solemnity. It had seemed that this was the only suitable technical word apart from the word "model" which had been discarded as it might give rise to ambiguity. *League of Nations, Records of Ninth Assembly, First Committee*, p. 70.

It is to be noted that this General Act was not signed, and was opened only to accession.

An "additional act" is an instrument intended to correct, amplify or supplement an earlier one. If the earlier instrument has the force and effect of a treaty, the "additional act" partakes equally of that character.

Bipartite instruments for the arbitration of disputes are frequently styled "*compromis*."

Various instruments have been designated by their own provisions as "pacts"; for example, the "Pact of Friendship between Albania and Italy" signed November 27, 1926 (60 *League of Nations Treaty Series*, p. 19); the "Pact of Friendship and Cordial Collaboration" between Italy and Rumania, signed September 16, 1926 (67 *ibid.*, p. 394); an instrument with the same title between Poland and Yugoslavia, signed September 18, 1926 (78 *ibid.*, p. 414); the "Pact of Non-Aggression and Arbitration" between Greece and Rumania, signed March 21, 1928 (108 *ibid.*, p. 188); the "Pact of Friendship, Conciliation, and Judicial Settlement" between Greece and Yugoslavia, signed March 27, 1929 (108 *ibid.*, p. 202). In form and juridical effect these "pacts" cannot be distinguished from treaties or other instruments recording international engagements. Genet (3 *op. cit.*, p. 523), however, considers that a pact is in effect something more than a treaty; it is a treaty surrounded by a special atmosphere, formed in part of a mystic sentiment and an intention of guaranty. "Le pacte baigne dans un océan de sentiments supraterrrestres, résolument placés au dessus des habitudes diplomatiques interétatiques et appartenant par leur transcendance voulue ou espérée, au promesses sérapiques." If this distinction has some moral foundation, it imparts to a "pact" no special juridical quality.

Regret has often been expressed that instruments recording international engagements whose objects are identical or similar in nature, whose juridical character is the same, and whose status is governed by the same rules of international law, should be designated by so great a variety of terms. Manifestly, a simplification of the existing and increasingly unstable and unscientific terminology is desirable. Genet remarks that it would be a considerable advantage "if all the manifestations of the contractual life of states could be reduced to a very small number of forms, instead of constantly increasing them as has been the case in recent years." 3 *op. cit.*, p. 476.

M. Basdevant (15 *Recueil des Cours*, p. 616), has suggested that the present long list of international instruments should be reduced to two, namely "treaties" and "declarations", the latter category embracing all types of instruments other than treaties whatever the terms by which they are at present designated, but which have the juridical effect and force of treaties. Bittner (*op. cit.*, p. 39), likewise proposes a twofold classification. In the first category he would place all international engagements which are subject to ratification, and in the second those which may be concluded by ministers, governments, or agents without ratification. For the purposes of this Convention, such a classification would be of little value, since it would be based on a procedural and not a juridical distinction. The rules here laid down

apply equally to both classes of instruments when they conform to the definition of a treaty laid down in Article 1. Mastny and Rundstein in their report for the Committee on the Progressive Codification of International Law (20 *American Journal of International Law*, Spl. Supp., 1926, p. 215), observe that the classifications of treaties "are as numerous as the writers who have dealt with them and vary with the individual point of view" and that "most of them are of little practical value." Rapisardi-Mirabelli, in his study of the classification of treaties ("*La Classification des Traitéés Internationaux*," *Revue de Droit International et de Législation Comparée*, 1923, p. 653), reaches the same conclusion.

Whatever the merits of these and other proposals looking toward simplification of the existing nomenclature, they are, in the main, matters of diplomatic procedure and policy rather than of international law. The rules of international law governing the validity, obligatory force, interpretation, application, and termination of treaties or other international engagements are not dependent upon the formulas and nomenclature of diplomatic practice. The names which conferences choose to give to the instruments recording their engagements, signify little or nothing. It is not the label but the character of the instrument, and especially its object or purpose, and the nature of the relationship which it establishes, that is of significance. It is this principle which Article 4 of the present Convention is intended to affirm.

ARTICLE 5. FORM OF A TREATY

(a) Although a treaty, as the term is used in this Convention, must be a formal instrument, no particular form is required.

COMMENT

While a treaty, as the term is explained in Article 1, paragraph (a), of this Convention, must be a "formal instrument," the present article is intended to negative the idea that any particular form is essential. As to what is meant by a "formal" instrument, see the comment on Article 1. The term "form" as here used has reference to the structural organization of the treaty-instrument, the arrangement of the different parts of which it is composed, and similar matters relative to its framework. The doctrine, the practice and the jurisprudence are all in accord with the view that these are matters which do not affect in any way the juridical character of a treaty or condition in any degree its validity as an instrument recording a binding engagement between the parties.

Bittner (*Die Lehre von den völkerrechtlichen Vertragsurkunden*, 1924, sec. 1) remarks, quite correctly, that States when making a treaty may choose by common agreement any form which appears suitable to them, and he adds that neither foreign offices nor negotiators follow any consistent principle in the choice of the forms which they employ. See also Pradier-Fodéré

(*Traité de Droit International*, 1885, secs. 1071 and 1084), who observes that treaties may be concluded in any form which serves to express the intentions of the contracting States, and who even goes to the length of asserting that this intention may be indicated by words or signs, or may result tacitly from acts which presuppose or indicate their intention in an unequivocal manner.

It is true that there has evolved through the course of time a customary general form in which treaties are usually drafted and their provisions arranged, but this form is not obligatory and in fact deviations from it are by no means lacking. Thus treaties usually begin with a preamble which refers to the objects or purposes sought to be accomplished, and which enumerates the contracting parties and the names and titles of their plenipotentiaries. Sometimes, however, the preamble contains no enumeration of the contracting parties, that information being relegated to the end of the treaty in connection with the signatures. Earlier treaties frequently began with an invocation of the Divinity, the Holy and Indivisible Trinity, the All Powerful God, God the Author and Legislator of the Universe, etc., but such invocations are now rarely found in treaty preambles. See 2 Pradier-Fodéré, *Traité de Droit International Public* (1885), sec. 1086; 1 Fauchille, *Traité de Droit International Public*, pt. 2 (1925), p. 307; 2 Rivier, *Droit des Gens* (1896), p. 67; Basdevant, "La Conclusion et Rédaction des Traités," 15 *Recueil des Cours* (1926), p. 562; and 3 Genet, *Traité de Diplomatie et de Droit Diplomatique* (1932), p. 385 ff, where numerous texts of preambles are reproduced. Finally, it may be noted that treaties without preambles are by no means lacking.

Where there is a preamble, its form and character frequently vary. The enumeration of the contracting parties in the preamble, when they are enumerated, sometimes takes the form of a list of the contracting States, sometimes a list of the heads of the States, and sometimes a list of the governments. As to this usage, see the comment on Article 1. In fact, as Basdevant points out, the preambles to treaties often indiscriminately enumerate States, heads of States and governments as parties, sometimes, indeed, confusing one with the others in the same preamble. See the examples cited by him (*op. cit.*, 15 *Recueil des Cours*, 1926, p. 563, n. 3). In the Treaty of Frankfort of May 10, 1871, the preamble mentioned that the plenipotentiaries on the one hand stipulated in the name of the French Republic, and on the other, in the name of the German Emperor.

In this connection it may be stated that there is no rule of international law and no uniformity of practice as to who shall be named as the parties to a treaty, whether heads of States, States themselves, or their governments. All three forms are used, and it is not always clear why one or another is employed. Although in the treaties between the United States and Latin American Republics their governments are frequently named as the parties, exceptions are by no means lacking; *e. g.*, the Extradition Treaty of March

11, 1905, between Uruguay and the United States, which named their respective Presidents as the parties. 2 Malloy, *Treaties, etc.*, p. 1825. The Pan American Convention of 1902 on Literary and Artistic Copyrights named the heads of States as the parties, although all the American States are republics. *Ibid.*, p. 2058. The same was true of the Pan American Convention of 1902 for the Arbitration of Pecuniary Claims. *Ibid.*, p. 2062. In the Consular Convention of October 14, 1881, between the United States and Serbia, the heads of both States were named as the parties, but in the Extradition Treaty of October 25, 1901, between the same countries, the United States and the King of Serbia were named as the parties. *Ibid.*, pp. 1618 and 1622. The Submarine Cable Convention of 1884 (*ibid.*, p. 1950), and the Hague Conventions of 1899 and 1907 named the heads of States as the parties. So did the Convention of January 23, 1912, for the suppression of the abuse of opium and other drugs. 3 *Treaties, etc. of the United States*, p. 3026. So did the International Sanitary Convention of January 17, 1912. *Ibid.*, p. 2972. But the Convention of July 5, 1890, concerning the formation of an International Customs Union named the governments as parties. 2 Malloy, *Treaties, etc.*, p. 1996. Likewise the conventions concluded by the Central American Peace Conference of 1907 and by the Conferences of American States at Havana in 1928 and at Montevideo in 1933 were concluded in the names of the governments. Treaties between the United States and monarchical countries are generally concluded in the name of the President and the head of the other State. Such were the Bryan treaties for the advancement of peace. 3 *Treaties, etc. of the United States*, p. 2642. But the convention of August 16, 1916, for the Protection of Migratory Birds was concluded between the United States and His Britannic Majesty. *Ibid.*, p. 2646. The Convention of June 3, 1918, for the Reciprocal Military Service of American Citizens in Great Britain and of British subjects in the United States was concluded between the President and his Britannic Majesty. *Ibid.*, p. 2650. An examination of the first 140 treaties, conventions and other instruments in the *League of Nations Treaty Series* shows that, while many of them still follow the early practice of naming the heads of States as the parties, the majority name the governments as parties. The majority of those which name the heads of States as parties are styled "conventions"; those which are designated as "treaties" sometimes name the heads of States, sometimes governments as parties; a large majority of instruments designated by other names, such as agreements, protocols, etc., designate governments as the parties. Not infrequently there is, as stated above, confusion and inconsistency of usage in a particular instrument, the preamble naming the heads of States or governments as the parties while in the body of the instrument the parties are referred to as States. Thus Hudson (1 *International Legislation* 1931, p. xli) observes that:

The parties may be heads of States, or States or governments. On the basis of existing practice, no clear principle can be laid down that an

agreement must be given a particular denomination because of the nature of the parties, though there would seem to be some disposition to say that a treaty can be concluded only by heads of States. The Treaty of Versailles of June 28, 1919, seems to have been concluded between States and following it there was a disposition to draft multipartite conventions as inter-state engagements; but the more recent tendency, largely due to the desire of the members of the British Commonwealth of Nations to avoid certain commitments *inter se* as a result of their being parties, has been to draft more formal instruments, particularly treaties and conventions, as agreements between heads of States. Perhaps there is little difference in legal effect for most States, though the instrument to which heads of states are parties seems to revert to a form which was more appropriate before modern democratic movements began.

As regards the order in which the parties are mentioned in the preamble of a treaty, while it is the usual practice today in the case of multipartite treaties to name the parties in alphabetical order according to the language in which the treaty is drafted, this order is not always strictly followed. Thus in the treaties of peace at the close of the World War, the Allied and Associated Powers, instead of being mentioned in alphabetical order, were divided into two groups:—the “Principal Allied and Associated Powers”—the United States, the British Empire, France, Italy and Japan—constituting the first group, the other Allied and Associated Powers constituting the second group. Within each group the States were named in alphabetical order according to the French language. In the Convention concerning the Régime of the Straits of Bosphorus and the Dardanelles, signed at Lausanne July 24, 1923, the alphabetical order was not strictly followed, the British Empire, France, Italy, and Japan being mentioned before Bulgaria and the other parties, which were enumerated in alphabetical order. 2 Hudson, *op. cit.*, p. 1028. In the Hague Conventions of 1899 the United States appeared under the letter E (*États-Unis*); in those of 1907 it was placed under the letter A (*Amérique*), as it was in the Treaty of Versailles.

In bipartite instruments, the *alternat* is commonly observed; i.e., one State is named first in one original of the instrument, and the other States are named first in another original.

Generally, the preamble mentions the fact that the full powers of the plenipotentiaries have been communicated, exchanged, or deposited, and that they have been found to be in good and due form, but sometimes it limits itself to stating that the plenipotentiaries have been duly authorized to conclude the treaty.

Ordinarily, the preamble contains merely a statement of the reasons which led to the conclusion of the treaty or the objects sought to be accomplished by it. Usually such statements have no juridical significance, but occasionally they do. Thus the preambles to the Hague Conventions of July 29, 1899, and October 18, 1907, concerning the Laws and Customs of War on Land, after having stated that it had not been found possible to agree upon

regulations concerning all the circumstances which might arise in practice, added:

Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rules of the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. They declare that it is in this sense especially that Articles 1 and 2 of the regulations adopted must be understood.

This declaration in the preamble was relied upon by those who saw a violation of the convention in the deportation of inhabitants from Belgium and France during the World War. Basdevant, *Les déportations du nord de la France et de la Belgique en vue de travail forcé et le Droit International* (1917), p. 41 ff; and 2 Garner, *International Law and the World War* (1920), p. 165 ff. See also the preamble to the treaty of arbitration between Germany and Poland, signed at Locarno December 1, 1925. See, likewise, the preamble to the sixth Hague Convention of October 18, 1907, relative to the status of enemy merchant vessels found in port at the outbreak of hostilities, which declared the object of the convention to be to "insure the security of international commerce against the surprises of war" and "to protect as far as possible operations undertaken in good faith and in process of being carried out before the outbreak of hostilities." It was mainly on the basis of this declaration in the preamble that the British prize courts during the World War held that enemy pleasure yachts were not entitled to immunity from capture. The *Oriental*, 1 Lloyd's Reports of Prize Cases, 355, and the *Germania*, 4 *ibid.*, p. 237. Reference may also be made in this connection to the preamble to the treaty of August 27, 1928, for the Renunciation of War (the Briand-Kellogg Pact), which contained the statement that "any signatory Power which shall hereafter seek to promote its national interests by resort to war, should be denied the benefits furnished by the treaty." In other words, if one of the parties should contravene the treaty, the other parties would be released from their obligations to the offending party.

But whatever may be the form of a preamble, if there be one, whatever may be its content, these are matters which rarely have any relevance to the juridical force and effect of a treaty. The preamble may, as indicated above, throw light on the meaning of the treaty and thus assist in its interpretation, but a preamble is not necessary to the validity of a treaty, and if there is one, no particular form or content is required. Genet hardly exaggerates the matter when he says there are almost as many kinds of preambles as there are sorts of treaties. 3 *Traité de Diplomatie et de Droit Diplomatique* (1932), p. 390.

In form and arrangement, a typical treaty contains, in addition to the preamble, a series of articles embodying various stipulations which define

the relations to be established between the parties, the rights, if any, which are conceded, and the obligations, if any, which are to be assumed. Usually, the general stipulations are placed first and are followed by those of a particular character, if there be such. The latter are usually followed by any stipulations which the treaty may contain relative to the means of executing it. If the duration of the treaty is limited to a fixed number of years, there will be an article dealing with this matter, sometimes providing also for the tacit renewal or prolongation of the treaty. If the right of denunciation is allowed, there will be an article stipulating for the exercise of this right, defining the conditions, if any, under which it may be exercised, specifying the period within which notice of denunciation may be given and fixing the date when the denunciation shall take effect. There are also often articles or clauses near the end of the treaty which relate to such matters as the date when it is to come into force, providing for the accession of non-signatory States, providing for ratification and for the exchange or deposit of ratifications, the language which shall be regarded as official when the treaty is concluded in more than one language, provision for registration in the case of treaties to which members of the League of Nations are parties, and sometimes provisions relative to revision of the treaty and the arbitration or judicial settlement of disputes arising out of its interpretation or application. Finally, at the end of the instrument are usually the signatures and seals of the plenipotentiaries with a statement of the place at which and the date on which the treaty was drawn up and signed.

Treaties are sometimes accompanied by annexes, regulations, statutes, or other instruments with varying names, which are not infrequently declared to be an integral part of the treaties to which they are annexed or which they supplement. See as to this the comment on Article 1, and the examples mentioned by 2 Rivier, *Droit des Gens*, p. 67 ff. Sometimes they contain the principal stipulations of the agreement, the treaty proper being limited to formal matters such as provisions relative to ratification, the execution of the treaty, its period of duration, etc.

While this outline indicates the general form in which treaty-instruments are now usually drafted and their parts arranged, it is a result of usage based on convenience or a sense of orderly arrangement and not upon any rule of international law requiring such form or arrangement as an essential condition of their binding force. In fact, important deviations from this form are not uncommon in practice.

As to form and arrangement, see Pradier-Fodéré's detailed discussion of the various parts of a treaty (2 *Traité de Droit International Public*, sec. 1086 ff); Crandall, *Treaties, Their Making and Enforcement* (2nd ed. 1916), sec. 6; and the analysis by Genet, 3 *Traité de Diplomatie et Droit Diplomatique* (1932), p. 375, and by Satow, 2 *Guide to Diplomatic Practice* (1917), p. 175.

In earlier times treaties were written out by hand and usually on parchment, but since the invention of the printing press and the typewriter this

practice has become rare. The treaty of Berlin of July 13, 1878, is said to have been the first to be recorded in the form of a typewritten instrument. 3 Genet, *op. cit.*, p. 381. Today the originals of multipartite as well as bipartite treaties are frequently in the form of a printed instrument—the Treaty of Versailles for example. 1 Hoijer, *Les Traités Internationaux* (1928), p. 41. See also Basdevant's lecture on "*La Contexture des Traités*," 15 *Recueil des Cours*, p. 553 ff, and Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), sec. 62.

While there is no rule of international law which requires a treaty to be concluded in a particular form, any State is manifestly free to insist that the treaties which it enters into with other States shall be cast in a prescribed form, and if it is able to obtain the consent of the other State, no question could be raised as to its validity on the ground that it was not in accord with the customary form. See, for example, the successful insistence of the Minister of Foreign Affairs of Norway and Sweden upon the insertion in the preamble of the treaty of June 1, 1827, between those countries and the United States, of the invocation "In the name of the Most Holy and Indivisible Trinity." 3 Miller, *Treaties, etc. of the United States* (1933), p. 305.

Doubtless there would be some advantage in the adoption of a uniform type of instrument, drafted and arranged according to a prescribed form, for all treaties, or at least certain classes of treaties. See, in this connection, the following resolution adopted by the League of Nations Advisory and Technical Committee on Communications and Transit at its session of September 4-6, 1930:

The Advisory and Technical Committee desires, for purposes of information and action, to direct the attention of the Secretary-General of the League to the following observation which was submitted to it by the Permanent Legal Committee during the latter's examination of the problem of the codification of international law in matters of communications:

"The Committee takes the opportunity of emphasizing the desirability, when drawing up Conventions concluded under League auspices, including those framed by the International Labor Organization, of always trying to draft texts as uniformly as the varied nature of the subject dealt with permits." *League of Nations Official Journal*, 1930, p. 1856.

This suggestion involves a matter of policy or expediency rather than of law. Until there is an agreement upon a particular form, the members of the League are free to conclude their treaties in whatever form they may choose to adopt, and the binding force of an instrument will in no way be dependent upon the observance of any particular form.

Is it necessary to the validity of a treaty that it should be concluded in the form of a written instrument? Oral agreements having the force of treaties have not been lacking in the past. Holtzendorff (3 *Handbuch des Völkerrechts*, 1885-1889, p. 86), mentions one concluded in 870 between

Kings Ludwig and Charles the Bald. F. de Martens (1 *Traité de Droit International*, Léo trans. 1883, p. 541), refers to an oral agreement in the nature of an alliance concluded in 1697 between Peter the Great of Russia and Frederick III, elector of Brandenburg. There was no juridical reason, said Martens, why such agreements were not valid and binding on the parties. Bittner (*op. cit.*, p. 2, n. 5), refers to an oral agreement in 1883 between the French Minister of Foreign Affairs and the Austro-Hungarian *chargé d'affaires*, by which a commercial treaty concluded in the previous year was to be continued in force for another year. As to agreements in the form of letters, telegrams and radio messages, see the comment on Article 1.

One of the questions involved in the *Eastern Greenland Case*, recently decided by the Permanent Court of International Justice (Series A/B, No. 52), was whether an oral declaration made by the Minister of Foreign Affairs of Norway (M. Ihlen), on July 22, 1919, to the Danish Minister of Foreign Affairs, to the effect that "the plans of the Danish Government respecting Danish sovereignty over Eastern Greenland would meet with no difficulties on the part of Norway," was binding upon the Norwegian Government. (Text of the declaration, Series A/B, No. 52, p. 69). A minute of the declaration had been prepared and initialled by the Norwegian Minister. The Government of Denmark relied upon the declaration as an agreement binding upon Norway, by which the latter State waived its objection to the extension of Danish sovereignty over Eastern Greenland. The Norwegian Government admitted the facts as to the declaration, but contended that it was merely a diplomatic assurance of a benevolent attitude which Norway would adopt in future negotiations—a *démarche* to obtain an orientation and not a promise; it did not therefore have the force of a treaty and did not and could not have any internationally binding effect, especially in a case such as this, where, if it were recognized as binding, it would have involved a renunciation by Norway of important national interests. It was contended, moreover, that the Norwegian Minister was not competent to bind his State by such a declaration, since international law attributes legal force only to those acts of a foreign minister which fall within his constitutional competence. See the argument of the Norwegian Government in Series C, No. 63, p. 876 ff. [This case, in so far as it involved the competence of the Norwegian Minister of Foreign Affairs to make the declaration, is discussed at length in the comment on Article 21].

The court upheld the Danish contention. In its opinion (Series A/B, No. 52, p. 71) it said:

The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

Judge Anzilotti, while dissenting on other grounds from the decision

of the majority, admitted that the declaration, although a "verbal" one, was nevertheless a valid agreement and as such was binding upon Norway, especially since both parties were agreed as to its existence and tenor (*ibid.*, pp. 91 and 92). In conclusion he said:

The outcome of all this is therefore an agreement, concluded between the Danish Minister at Christiania, on behalf of the Danish Government, and the Norwegian Minister for Foreign Affairs, on behalf of the Norwegian Government, by means of purely verbal declarations. The validity of this agreement has been questioned, having regard, in the first place, to its verbal form, and to the competence of the Minister for Foreign Affairs.

As regards the form, it should be noted, to begin with, that as both Parties are agreed as to the existence and tenor of these declarations, the question of proof does not arise. Moreover, there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid.

The conclusion which may be drawn from this case is, that a unilateral declaration in the nature of a promise made orally by the Minister of Foreign Affairs of one country to the minister of another, especially when it has been recorded in a minute drafted and initialled by the minister making it, and when the authenticity and correctness of which are admitted by the government whose minister made it, is internationally binding upon such government.

The Permanent Court, it may be added, has in several cases affirmed that an oral declaration of the agent of a State made before the court may constitute an engagement which is binding on his State. Such was the declaration made by the agent of Great Britain in the *Mavrommatis Case*, relative to the willingness of the British Government to carry out the Jerusalem concession. Series A, No. 5, p. 37. In the *Upper Silesia Case* the agent of Poland made various declarations regarding the intention of his Government not to appropriate certain German properties, and these declarations the court considered as binding "beyond all doubt" upon Poland. Series A, No. 7, p. 13. In the *Free Zones Case* the Swiss agent made a declaration in the course of the oral proceedings which was incorporated in the judgment of the court and was placed on record in the operative part of the judgment. Series A/B, No. 44, pp. 170 and 172, and No. 48, p. 287.

Since Article 18 of the Covenant of the League of Nations requires of its members the registration of their "treaties" and "international engagements" and requires publication by the Secretariat, it is doubtful if an oral treaty entered into by them would be binding, since it is not easy to see how it could be registered and published. The Havana Convention on Treaties, of February 20, 1928 (Article 2), expressly affirms that "the written form is an essential condition of treaties." Likewise, most of the draft codes dealing with treaties lay it down as an essential condition that they must be in writing. See Fiore's draft, Art. 744 (Appendix 4); Field's draft, Art. 188 (Ap-

pendix 2); Liszt's draft (*Le Droit International*, Gidel trans.), p. 177, the draft of the International Commission of American Jurists, Art. 2 (Appendix 5), and Pessoa's draft, Art. 200. Fiore, however, recognizes the validity of agreements relating to particular matters concluded by persons competent to contract international obligations even though they are not drawn up in writing, on condition that they are "capable of being proved without difficulty" and that "evidence therefore may be readily adduced." But as Bluntshli (*Droit International Codifié*, Lardy trans., p. 251), and Cavaglieri (26 *Recueil des Cours*, 1929, p. 512), point out, oral agreements are particularly susceptible to dispute as to their precise content, and it would be difficult to establish by proof, especially after the lapse of time, what the stipulations actually were.

Most modern writers on international law, while laying it down that oral agreements are not to be excluded from the category of treaties and that there is no rule of international law which denies their binding force, declare that it is desirable for practical reasons that all international engagements should be recorded in writing. See in this sense Bulmerincq, *Das Völkerrecht* (1887), p. 151; 3 Calvo, *Le Droit International* (1897), sec. 1575; Klüber, *Droit des Gens Moderne de l'Europe* (1831), sec. 142; 2 Hyde, *International Law* (1922), p. 33, who calls attention to the fact that the Root-Takahira understanding of 1907 relative to the restriction of Japanese immigrants to the United States was "perfected without the aid of an exchange of notes or the execution of a protocol"; 2 Phillimore, *International Law* (1882), pp. 64, 78; 3 Genet, *Traité de Diplomatie et de Droit Diplomatique* (1932), p. 376; and Cavaglieri, 26 *Recueil des Cours* (1929), p. 512. Some writers hold that a treaty made even with signs or symbols may be valid and binding on the parties. Grotius, *De Jure Belli ac Pacis*, bk. III, ch. 24, sec. 5; Vattel, *Droit des Gens*, bk. II, ch. 15, sec. 234; G. F. de Martens, *Précis du Droit des Gens* (1864), sec. 65; Pradier-Fodéré, 2 *Traité de Droit International Public* (1885), secs. 1071 and 1084; Hall, *International Law* (6th ed., 1909), p. 321; Heffter, *Droit International* (Geffcken ed., 1883), sec. 87; 2 Rivier, *Droit des Gens* (1896), p. 142; Despagnet, *Cours de Droit International* (1910), sec. 439; Hoijer, *Les Traités Internationaux* (1928), p. 40; Strupp, *Eléments du Droit International Public* (Bloesizewski trans., 1927), p. 176; 1 Oppenheim, *International Law* (4th ed., 1928), sec. 507; 1 F. de Martens, *Traité de Droit International* (Léo trans., 1883-1887), sec. 111; and 1 Fauchille *Traité de Droit International Public*, pt. 3 (1926), p. 306. It may also be remarked in this connection that Baron Lambermont, arbitrator of the dispute between Great Britain and Germany concerning the Island of Lamu, which involved the validity of an agreement between a German company in South Africa and the Sultan of Zanzibar, held that, although international law requires no special form for treaties between independent States, those made with backward nations (*nations peu civilisées*) should be in writing, since such people often regard as obligatory only promises which are made in solemn form or in writing.

Text of the award, which was rendered August 17, 1889, in 22 *Revue de Droit International* (1890), p. 351 ff. Baron Lambermont's award contained the following propositions:

Attendu que, si aucune loi ne préserit une forme spéciale pour les conventions entre États indépendants, il n'en est pas moins contraire aux usages internationaux de contracter verbalement des engagements de cette nature et de cette importance;

Que l'adoption de la forme écrite s'impose particulièrement dans les rapports avec les gouvernements de nations peu civilisées, qui souvent n'attachent la force obligatoire qu'aux promesses faites en une forme solennelle ou par écrit.

See also an article (*ibid.*, p. 351 ff) by Rolin-Jacquemyns in which the question in this case is discussed and, for the most part, the award approved. As to the practice of the representatives of civilized States of concluding oral agreements with the chiefs of semi-barbarous peoples, Rolin-Jacquemyns said:

Il faut réagir contre la tendance des agents consulaires des nations civilisées à se prévaloir de simples promesses verbales, inspirées ou arrachées aux chefs de gouvernement semi-barbares, dans des audiences ou les conversations se font par voie d'interprètes.

But whatever may be the correct view as to the binding force of oral agreements, they are excluded by Article 1 of this Convention from the category of treaties as the term is here used, by the requirement that a treaty must be a formal instrument. [See the comment on Article 1]. This is not denying, however, that such agreements may be binding on the parties; it is merely saying that, for the purposes of this Convention, they are not regarded as treaties.

(b) In the absence of agreement upon a procedure which dispenses with the necessity of signature, a treaty must be signed on behalf of each of the States concluding it.

COMMENT

The word "concluding" as used in this paragraph has reference to the totality of acts which are necessary to bring a treaty into force. A treaty is "concluded" not when it has been "negotiated," but only when such further steps are taken as may be necessary to bring it into force. When therefore it is said in paragraph (b) that a treaty must be signed on behalf of each of the States concluding it, it is meant that the treaty must at least be signed by each State participating in the conference of plenipotentiaries which formulated it and which ultimately becomes a party. It is not intended to mean, however, that an acceding State must sign it, because it can hardly be said that such a State "concludes" the treaty to which it becomes a party.

The only formality which this Convention prescribes in the making of a

treaty, apart from the requirement that its stipulations shall be embodied in a "formal instrument," is that, in the absence of an agreement to the contrary between the States concluding it, the treaty shall be signed on behalf of each such State. Since under this paragraph States concluding a treaty will always be free by mutual agreement to dispense with the formality of signature, it cannot be said that the rule here laid down imposes an absolute obligation upon States, or upon the plenipotentiaries who act in their behalf, to sign the treaties which they conclude. Signing is therefore entirely a matter of choice. But unless there is an agreement to dispense with signature, it is essential. This agreement may take any form which indicates an intention on the part of the States concluding the treaty to waive the formality of signature. There is no existing rule of international law, conventional or customary, which requires treaties to be signed, or which makes their binding force in any degree dependent upon their being signed. This Convention requires it only in case the States concluding a treaty do not agree to dispense with it.

The present article does not specify the persons who shall sign, in the absence of an agreement dispensing with signature. Signature by any one who is authorized to sign on behalf of a State is sufficient. Ordinarily, it is the negotiating plenipotentiaries who sign on behalf of the States which they represent. But instances are not lacking in which treaties have been signed by the heads of States. Thus the treaty of the Holy Alliance of September 26, 1815, was personally concluded and signed by the Emperors of Austria and Russia, and the King of Prussia. 1 Descamps et Renault, *Recueil International des Traités du XIX^e Siècle*, p. 514. Similarly, the preliminary treaty of peace which ended the war of 1859 between Austria and France was concluded and signed at Villafranca, July 11, 1859, by the heads of the two States. 7 DeClercq, *Recueil des Traités de la France* (Paris, 1864-1872), p. 617. A more recent example was the agreement of February, 1903, between the United States and Cuba for the lease to the United States of certain lands in Cuba for coaling and naval stations, which was signed on July 16 of that year by the President of the Republic of Cuba, and on July 23 by the President of the United States. 1 Malloy, *Treaties, etc.*, p. 358. As is well known, President Wilson signed the Treaty of Versailles, June 28, 1919, the preamble to which mentioned that he "acted in his own name and by his own proper authority." On the same day he signed a treaty with France concerning aid to be given her in case of unprovoked German aggression. The preamble to this latter treaty made it appear clearly that he was acting in virtue of his constitutional powers, since it declared as the negotiator on the American side "Woodrow Wilson, President of the United States of America," without adding for him any other qualification, whereas in the case of the other American negotiator, Robert Lansing, it was added that he was especially authorized by the President of the United States. On the contrary, the arrangement concerning the military occupation of the Rhineland,

signed by President Wilson on the same day on which he signed the Treaty of Versailles, made no special mention of his qualification or status. See Basdevant, "*La Conclusion et la Rédaction des Traités, etc.*", 15 *Recueil des Cours* (1926), p. 547.

Usually the signatures to a treaty are affixed at the same time and place and by the plenipotentiaries in the presence of each other; but there have been exceptions. The agreement between the United States and Cuba, just referred to, was an example. The treaty of 1785 between the United States and Prussia was signed by Franklin at Passy on July 9, by Jefferson at Paris on July 28, by Adams at London on August 5, and by Thulemeier, the Prussian plenipotentiary, at The Hague on September 10. 2 Miller, *Treaties, etc. of the United States* (1933), p. 103.

While the affixing of the signature at the end of a treaty is usually considered sufficient, in former times additional precautions were sometimes taken. Thus Joel Barlow, the American negotiator, not only affixed his signature to the treaty of 1796-97 between the United States and Tripoli, but wrote his initials on each of its fourteen pages. 2 Miller, *op. cit.*, p. 383. Likewise, each written page of the French text of the convention of April 30, 1803, between the United States and France was initialled by Marbois and Livingston, 2 *ibid.*, p. 523.

Where treaties are to be signed, the text usually mentions that the treaty "will be signed", or, what is more common, it contains the statement: "in witness whereof the respective plenipotentiaries have signed the present treaty." Such statement is sometimes lacking, however.

As to the practice in regard to the signing of treaties, it may be stated that in recent times treaties have usually borne the signature of the plenipotentiaries on behalf of the States which entered into them or those of the heads of such States, although, as stated above, there has never been any rule of international law or practice which made the observance of this formality obligatory. The exceptions to this practice in recent times, at any rate, have been rare. The best known examples of treaties which were never signed, either by heads of States or their plenipotentiaries, are the International Labor Conventions, formulated and adopted by the International Labor Conference of the International Labor Organization. Article 405 of the Treaty of Versailles, which deals with the treaty-making procedure of the International Labor Conference, provides that copies of its recommendations or draft conventions shall be authenticated by the signatures of the President of the Conference and of the Director of the International Labor Office. They are not required to be signed by the delegates of the States participating in the conference. Hudson (1 *International Legislation*, 1931, p. xliv), points out that the "innovation was not universally welcomed," that "it has not been extended to other fields" and that "it led to serious protest on the part of certain governments" and to efforts on their part to circumvent the innovation.

The conventions adopted by the Sixth International Conference of American States at Havana in 1928 were not signed by the delegates who participated in the conference. Texts of the conventions in 4 Hudson, *op. cit.*, Nos. 186-196. It should be said, however, that the texts of all of them were embodied in the Final Act of the Conference, the Spanish version of which was signed by the representatives of the 21 States participating in the conference; it would seem that the signature of the Final Act may be considered as equivalent to a signature of each of the instruments reproduced therein. But the signature of the Final Act by Salvador cannot be regarded as a signature of the Convention on Treaties, because of its reservation which stated that "the delegation of Salvador . . . votes against the Convention, and does not sign it." Final Act (English version), p. 142. Likewise, the General Act for the Pacific Settlement of International Disputes adopted by the Assembly of the League of Nations in 1928 was signed only by the President of the Assembly and the Secretary-General of the League. Text in 4 Hudson, *op. cit.*, p. 2529. The Act itself provided for accession, so that none of the parties to this Act are signatories, all of them being acceding States.

Recently, the practice has been adopted of opening treaties for signature within a fixed or indefinite period following the close of the conference, this privilege sometimes being extended to States which did not participate in the conference. See, for example, the Convention on the Regulation of Air Navigation (1 Hudson, *op. cit.*, p. 359), which was opened for signature at Paris October 13, 1919, and which could be signed until April 12, 1920, inclusively; and the Protocol of Signature of the Statute of the Permanent Court of International Justice, opened for signature at Geneva December 16, 1920, which appears to be open for signature by the members of the League of Nations and the States mentioned in the annex to the Covenant of the League for an indefinite period. Many other examples could be given. This procedure has been criticized on the ground that it is useless, and because, moreover, the more normal method by which a State not participating in the conclusion of a treaty becomes a party is by accession. Eagleton, "Problems of International Legislation," 7 *Temple Law Quarterly* (1934), p. 377. There are both advantages and disadvantages in such a procedure (see 1 Hudson, *op. cit.*, p. xlv, and Hoiyer, *Les Traités Internationaux* (1928), p. 43), but no purpose would be subserved here by a discussion of them.

As to the effect of signature, it may be pointed out that in earlier times, when duly authorised plenipotentiaries were generally competent to conclude binding treaties which did not need to be subsequently ratified or approved by a legislative organ, the importance of signature was necessarily greater than it is today when ratification or legislative approval is generally required. Today, since treaties not subject to ratification usually come into force from the date of signing, signature serves the purpose of fixing this date. This rule as to the date of the coming into force of a signed treaty not subject to ratification is laid down by Article 10 (a) of this Convention.

If, however, the treaty is subject to ratification or legislative approval, which is generally the case (see the comment on Article 7), the rôle and effect of signature are less important. Thus the effect of signature depends mainly on whether the treaty is or is not subject to ratification, or approval in some other form by the governments, or certain organs thereof, of the States whose plenipotentiaries concluded it. If it is one which does not require ratification or approval, obviously the effect of the signature, if the plenipotentiaries were duly authorized to sign it, is to bind their States. On the other hand, if ratification or other form of approval by governments is necessary, the signature means nothing more than that the plenipotentiaries who sign it have agreed upon a text and that they are willing to accept it and to refer it to their governments for such action as they may choose to take in regard to its acceptance or rejection. See the observations of the League of Nations Committee of Experts on the Progressive Codification of International Law, *League of Nations Document C. 357. M. 130. 1927. V.* See also 1 Hudson, *International Legislation*, 1931, p. xlii, where it is said:

When an instrument drawn up at a conference is signed by the representative of a State, duly authorized to sign it, it would seem to involve an expression of the State's consent to be bound by the instrument signed; but if the instrument is one which expressly requires ratification, the signature serves as only a preliminary expression of the will of the State to be bound, and it would seem to express the State's willingness to accept the obligations in the instrument on the condition that it later proceeds to ratification.

A committee of the Council of the League of Nations, appointed to consider the question of ratification and signature of conventions concluded under the auspices of the League of Nations (A. 10, 1930. V., p. 2), expressed the opinion that "it is justifiable to assume that the signature of an international convention by a delegate fully authorized on behalf of a country, indicates an intention on the part of the government of that country to make a fresh examination of the question with a view to putting the convention into force so far as it is concerned." But obviously the committee did not mean to suggest that the effect of the signature was to bind a government to do anything more than to examine the question with a view to the acceptance and ratification of the treaty.

Apart from the requirement of Article 10, which makes the date of signature the date of the coming into force of treaties not subject to ratification, signature is clearly desirable because it furnishes authentic evidence that an instrument concluded by plenipotentiaries and which is binding upon their States without further action on the part of their governments, is really the instrument which was concluded. With regard to treaties which are subject to ratification, signature, as stated above, is less essential, since in that case there is an opportunity for subsequent consideration of the treaty and verification of the text of that instrument before it comes into force. Neverthe-

less, signature is desirable even in such cases because when governments are asked to ratify an international instrument which purports to have been negotiated by their representatives the best evidence that it is such is found in the attached signatures or seals.

This Convention contains no requirement respecting the sealing of treaties, nor does it authorize the optional use of a seal in the place of signature; it does not seem that any useful purpose would be served either by such a requirement or by permitting an optional substitution of a seal for signature. In practice, unsigned treaties are rarely if ever sealed, except that there may be instances in certain Oriental countries in which seals are substituted for signatures.

As regards treaties which are signed on behalf of the States negotiating them, practice in respect to sealing is, as stated above, not invariable. In this respect a distinction may be drawn between instruments designated as "treaties" or "conventions" and instruments which are otherwise designated, such as "arrangements," "agreements," "protocols," etc., the former nearly always being sealed, whereas the latter are frequently not. Yet examples of signed treaties and conventions to which seals were not affixed have not been lacking. Thus the General Act of Berlin of June 14, 1889, providing for the neutrality and autonomous government of the Samoan Islands, concluded between the President of the United States, the German Emperor, and the Queen of Great Britain, and signed by their plenipotentiaries, does not appear to have been sealed (2 Malloy, *Treaties, etc.*, p. 1576); nor was the additional Act concluded at Brussels December 14, 1900, for the Protection of Industrial Property and signed by the plenipotentiaries of 16 States (2 *ibid.*, p. 1945); nor was the Convention of February 8, 1907, between the United States and the Dominican Republic, providing for the assistance of the United States in the collection and application of the customs revenues of the Dominican Republic (1 *ibid.*, p. 418).

An examination of Volume I of Basdevant's *Traité et Conventions en vigueur entre la France et les puissances étrangères* shows that all the instruments contained therein (19) which were designated as "treaties" were both signed and sealed. Of the 110 instruments designated as "conventions," all except seven were sealed. Of 41 instruments reproduced in Volume I of Basdevant's collection and designated as "declarations," 31 are indicated as having been sealed. Of 24 designated as "arrangements," 15 appear to have been sealed.

Signed instruments, other than "treaties" or "conventions," recording international engagements are, however, as stated above, frequently not sealed; or at least the texts as printed in the treaty collections do not indicate that they were sealed. Among them may be mentioned the agreement between Richard Olney, Secretary of State of the United States, and Matias Romero, Minister of Mexico, concerning the right to pursue Indians across the boundary line, signed at Washington June 4, 1896 (1 Malloy, *Treaties*,

etc., p. 1177), and the commercial agreement between the United States and Spain signed at San Sebastian August 1, 1906, by William M. Collier, Minister of the United States, and Señor Pio Gullán, Minister of Spain (2 *ibid.*, p. 1718). For other examples, see 1 Malloy, *op. cit.*, pp. 770 and 936, and 2 *ibid.*, *cit.*, pp. 1532, 1568, 1669, 1722, and 1842.

Bittner is one of the few writers who has discussed the matter of sealing treaties, and he has confined himself mainly to a description of the procedure. As to this he says (*Die Lehre von den völkerrechtlichen Vertragsurkunden*, 1924, pp. 189-190):

Unter oder neben den Unterschriften folgen die Siegel der Unterhändler. Wir finden hier ohne erkennbare Regel die Privatsiegel der Unterhändler neben amtlichen Siegeln in Gebrauch, mitunter in ein und derselben Urkunde. Die aus Fachkreisen genommenen Unterhändler siegeln meist mit ihren Privatsiegeln, die Diplomaten benützen bald ihre Privatsiegel, bald die Amtssiegel der betreffenden Missionen. Mitunter werden neben dem Privatsiegel auch noch die Amtssiegel aufgedrückt, in anderen Fällen begnügt man sich bei mehrgliedrigen Abordnungen mit dem Aufdruck eines einzigen Siegels, meist eines Amtssiegels. Manche Urkunden weisen nur das Amtssiegel einer der vertragschliessenden Regierungen auf. Wir finden auch Unterhändlerurkunden, die überhaupt nicht besiegelt sind.

Als Siegelstoff wird fast immer Siegellack, meist in roter Farbe, seltener in schwarzer, verwendet. In Ausnahmefällen findet sich auch Stampiglienaufdruck.

Die Siegel sind in der Regel unter oder neben den Unterschriften aufgedrückt, nur ausnahmsweise an der Heftschnur frei hängend angebracht. Besteht die Urkunde aus mehreren Bogen, so wird sie mit einer Heftschnur geheftet. In der Regel werden die Enden der Heftschnur neben die Unterschriften geführt und dort durch Aufdruck der Siegel befestigt. Die Heftschnur wird in den Landesfarben des Staates gehalten, für den die Ausfertigung bestimmt ist, bisweilen erscheinen auch die Landesfarben beider vertragschliessenden Staaten. Es finden sich auch Ausfertigungen, deren Heftschnüre lediglich die Landesfarben des Vertragsgegners zeigen oder deren Farben überhaupt keine Beziehungen zu den vertragschliessenden Staaten aufweisen.

The treaty of May 7, 1830, between the United States and Turkey was written on a single sheet of heavy paper and sealed on the reverse side, directly back of the signature. 3 Miller, *Treaties, etc. of the United States* (1933), p. 563. It may be remarked, that in the case of the General Inter-American Arbitration and Conciliation Treaties of January 5, 1929, the seals of the delegates were affixed by the Secretary-General of the conference sometime in advance of signature and not in the presence of the delegates—this in order to save time. *Proceedings of the International Conference of American States on Arbitration and Conciliation*, p. 172. See also Holls, *The Peace Conference at the Hague* (1900), p. 35, for a statement relative to a similar procedure followed at the Hague Conference of 1899.

As the rôle of the seal in the law of private contracts has lost most of its

earlier importance (See *Williston on Contracts*, §218), so in the redaction of treaty-instruments its use has ceased to be regarded as essential to the validity of an international agreement, although, as stated above, it is still generally employed in the case of those instruments designated as "treaties" and "conventions." Its chief value is that it serves to authenticate the signature of the plenipotentiary and thus provides an additional safeguard against falsification or forgery. Under the rule proposed by this Convention, the affixing of a seal is not required, signature alone being sufficient. In view of the practice under which treaty-instruments are frequently not sealed, it does not seem desirable to lay down an obligatory rule which would be contrary to so extensive a usage. Moreover, it is not believed that the utility of sealing is sufficiently important under modern conditions to justify its use being made obligatory.

ARTICLE 6. RATIFICATION

(a) As the term is used in this Convention, a ratification of a treaty is an act by which the provisions of the treaty are formally confirmed and approved by a State.

COMMENT

Ratification may be said to be the confirmation and approval of a treaty by a State, usually subsequent to its signature on behalf of that State. The confirmation and approval must be evidenced in some substantial way. This is usually done by embodying or recording it formally in an act—*i.e.*, instrument—which can be, if such procedure is provided for, exchanged for a similar act executed by the other contracting State or States, or deposited with the government of some specified State or agency acting as depository. Such an act is, in practice, commonly called an "instrument of ratification," or simply "a ratification." It is to refer to such an act that the expression "a ratification" of a treaty is here used.

THE INSTRUMENT OF RATIFICATION

A ratification is usually a highly formal document. Most States have stereotyped formulæ which they use regularly and which are rarely changed. In a general way, these formulæ are much alike; so much so that Bittner, after careful examination of many original instruments, asserts: "Bei den inneren Merkmalen tritt die Angleichung an einen internationalen Urkundentypus . . . besonders klar zutage . . ." And again, after describing in detail the type-form of a ratification, he adds: "Die in vorhergehenden Paragraphen geschilderten Merkmale sind fast bei allen Ratifikationen nahezu sämtlicher Staaten zu beobachten. Wesentliche Abweichungen von dieser Normalform finden wir nur selten." Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), pp. 246, 249. See also p. 240.

The name and title of the head of State or person executing it generally

appears at the beginning of a ratification. A salutation sometimes follows. Next an introductory clause recites that a treaty on a certain subject was concluded between certain named States on a certain date. This clause is usually worded so as to be introductory to a reference to, or to the insertion of the complete text of, the treaty in question. Then, following the reference to or the insertion *in extenso* of the treaty, there is a statement that the said treaty has been seen and approved by the proper authorities and is therefore ratified by the person executing the instrument. Lastly there is a statement of corroboration, followed by the signature of the person whose name appears at the beginning of the instrument. There is also usually a countersignature by the Minister of Foreign Affairs or some other official of the government, and, normally, the State seal. See the several examples of instruments of ratification appended at the end of the comment to this article. See also Bittner, *op. cit.*, pp. 246-249; 2 Satow, *Guide to Diplomatic Practice* (1917), pp. 276-280; and a volume entitled *Treaty for the Renunciation of War*, Publication No. 468 of the U. S. Department of State, 1933.

Externally, too, ratifications are frequently very formal and elegant in appearance. They are sometimes bound or enclosed in handsome covers of silk, velvet or leather, richly embroidered or tooled, or they may even be encased in fine wooden or metal boxes or chests. See Bittner, *op. cit.*, pp. 240-245.

But, whatever the practice of a particular State, or of States generally, with regard to either the internal or external form of ratifications, it can hardly be said that international law requires that any particular form or degree of formality be observed. All that is necessary is a written instrument setting forth the essential facts of confirmation and approval. [Oppenheim remarks that there might even be an oral ratification, but adds that he is "not aware of any case in which ratification was given orally." 1 *International Law* (4th ed., 1928), p. 723.] Hudson observes that "accessions are frequently less formal than ratifications, and even for the latter it would be difficult to say that any particular formality is required, apart from special stipulations." ("The Argentine Republic and the League of Nations," 28 *American Journal of International Law*, 1934, p. 125 ff, p. 131.) There are variations in detail in the ratifications of different States, and some instruments regarded as ratifications, notably in the case of international labor conventions, differ widely from the typical forms; see examples of ratifications of international labor conventions appended at the end of the comment to this article.

Normally the ratification of a treaty by a State is subsequent to a previous signature of the treaty by representatives of the State. A ratification is not, however, a confirmation of such previous signature; it is, rather, a confirmation and acceptance of the instrument previously signed by the plenipotentiary—or, in the words of the above definition, it is an act by which "the provisions of the treaty" are confirmed and approved. This might be

regarded as being implicit in the wording of the usual instrument of ratification, and it might well be implied also from the fact that the provisions of the treaty are quite generally set forth *in extenso* in instruments of ratification. [A clear incorporation by reference will undoubtedly suffice, but the more usual practice is to reproduce the entire text of the treaty. See 1 Hudson, *International Legislation* (1931), p. xlvii, and Bittner, *op. cit.*, p. 252.] In any event, it would not accord with modern conceptions of the office served by ratification to regard it as the confirmation and approval of a signature rather than of a treaty. In the 18th century, when treaties were regarded as in the nature of contracts between sovereign monarchs, and when full powers carried a definite promise by the king to ratify whatever his plenipotentiary, acting within the limits of his powers, concluded and signed, it may have been entirely logical to regard ratification as mere approval of a signature already given—the confirmation by a principal of something already done by an agent. Today, however, ratification plays a more important rôle, and the change cannot be ignored. Today it is the ratification of a State, and not its signature, which is usually regarded as the real and effective expression of its will to be bound.

Ratification may be given or withheld at will, and it is an essential step in the bringing into force of a treaty, unless there is an express provision or intention to dispense with it. (See Articles 7 and 8 and comment thereon.) Under such circumstances, signature of a treaty by the representatives of a State can generally be regarded as indicating little more than that those representatives certify that the text signed is the one which they have examined or helped to draft, and which they proposed to submit to the proper organs of their State for acceptance or rejection. If, therefore, the State decides to accept the treaty, it ratifies *it*, and not the signatures, since to confirm the latter would be but to confirm an act of certification or authentication. As expressed by Professor Hudson:

If a State's representative is authorized to sign a treaty . . . his signature does not need ratification; it is effective as a signature immediately, and it acquires no greater efficacy as a signature when followed by ratification. It would seem to be more in accordance with conditions prevailing to speak of the ratification of the instrument itself, and to look upon it as a stage in the process of bringing the instrument into force. 1 *op. cit.*, p. xlvii.

It must be noted, however, that there have been some recent expressions of the notion that ratification is of signatures rather than of texts. Thus the Report of the committee appointed to consider the question of ratification and signature of conventions concluded under the auspices of the League of Nations (*League of Nations Document A. 10, 1930. V.*) refers to "ratification of signatures." Likewise one of the columns in the periodic reports of the Secretariat relative to the status of treaties concluded under League auspices is regularly headed: "Signatures or accessions not yet perfected by

ratification.” (See, *e.g.*, *League of Nations Document A. 6. (a)*. 1932. V. Annex.) Finally, the doctrine of the retroactive effect of ratification still asserted by American courts and by some writers must be regarded as resulting from, and as tending to support, the out-worn theory that ratification is a confirmation of an act already performed by the plenipotentiary in signing a treaty—and hence a confirmation of his signature—rather than an approval of an authenticated text submitted by him.

Since, as indicated above, when ratification is required, it is ratification and not signature which is the effective expression of the will of the State to contract, and since ratification amounts to adoption of a text prepared by plenipotentiaries rather than the confirmation of a contractual act performed by those plenipotentiaries when they signed the text, it can be said that ratification is not, in one sense, a confirmatory act at all. Thus, Anzilotti remarks that the term “ratification” must be understood in a sense different from that generally attached to it in jurisprudence; “il n’exprime pas un acte confirmatif,” he says, “mais la véritable déclaration de volonté de stipuler; il ne valide pas un acte déjà existant, mais il donne existence à un acte nouveau.” 1 *Cours de Droit International* (Gidel trans., 1929), p. 370. Consequently the question may arise why the definition given above should speak of a ratification as an act by which the provisions of a treaty are “confirmed and approved” by a State.

These words are used for two reasons. They are used, in the first place, because ratification usually occurs with respect to a treaty which was negotiated and signed by representatives of the ratifying State, acting, nowadays at least, in accordance with detailed instructions and under close supervision of the government which they represent. It would be to ignore the facts to say that the ratification of a text so drafted contained no element of confirmation, even though it be admitted that ratification is not a confirmation in the sense of being an approval by the principal of a contractual act already performed by an agent. When the representatives of a State, acting under its authority and direction, participate in the elaboration of a treaty, certainly a ratification of the treaty can be said to be a confirmation and approval of the text which they have drafted, as contradistinguished, for example, from an accession which, normally, indicates the acceptance of a treaty by a State which had no share whatsoever in the direction of its preparation, which did not sign it, and which consequently has nothing to “confirm.” The second reason for using the words “confirmed and approved” is because those words themselves appear quite frequently in instruments of ratification, and because they are a convenient summation of other similar expressions used to indicate the willingness of the ratifying State to accept and observe the terms of the treaty ratified. Any expressions serving to convey such information are satisfactory, a ratification simply being an instrument recording “an expression of a willingness to become bound by the provisions of the [treaty ratified].” 1 Hudson, *International Legislation* (1931), p. xlvi.

In this article the words "confirmed and approved" do not refer to confirmation and approval internationally, as evidenced by deposit or exchange of ratification, but rather to the final and complete national confirmation and approval which is evidenced by a written instrument—a "ratification." Ordinarily a ratification of a treaty has no effect internationally if not exchanged or deposited. Such exchange or deposit is sometimes referred to as "ratification" and as being the real confirmation and approval of the treaty. Nevertheless, a State may give its confirmation and approval to a treaty and record that confirmation and approval in an instrument, and then, for reasons of its own, not proceed to the exchange or deposit. The instrument referred to would nonetheless be "a ratification."

Until comparatively recent years, the explanation given in this article might have been worded as follows: "A ratification of a treaty is an act by which the provisions of the treaty are formally confirmed and approved by a State *on behalf of which the treaty was previously signed.*" Ratification was (and normally still is) the process by which a State which had signed a treaty subsequently approved and accepted it; a State which had not signed a treaty, on the other hand, became a party to the treaty by means of accession, not ratification. In short, ratification was for signatories, not non-signatories. See 1 Hudson, *op. cit.*, p. xliii. In recent years, however, there have been developments which cannot be ignored, and which make it impossible to perpetuate the old idea that signature is a necessary condition precedent to ratification. As is well known, the draft conventions adopted by the International Labor Conference are not signed on behalf of the States members of the International Labor Organization represented in the Conference; they are, instead, simply "authenticated by the signature of the President of the Conference and of the Director." (Article 405 of the Treaty of Versailles.) The propriety of such an arrangement for dispensing with signature is recognized in Article 5, paragraph (b), of this Convention. See the comment thereon. Nevertheless, although unsigned, international labor conventions are, both by Article 405 of the Treaty of Versailles, and by their own terms, subject to "ratification." This innovation did not, to be sure, meet with universal approval. In 1920 the French Government proposed that a protocol should be drawn up, to be signed by the States desiring to ratify a labor convention, and in 1921 the French and Belgian Governments sought to perpetuate the older practice by incorporating the precise text of "draft conventions" adopted by the International Labor Conference in 1919 in conventions drawn up in the usual form, with provision for ratification to follow signature and for accession by non-signatory States. 2 *International Labour Office Official Bulletin* No. 10, p. 7; 3 *ibid.* (1921), p. 655; 1 Hudson, *op. cit.*, p. xliv. Likewise, the League of Nations Committee for the Progressive Codification of International Law has said that "'ratification' does not appear to be an appropriate term" to use in connection with the international labor conventions. *League of Nations Document C. 357. M. 130. 1927. V.*, p. 3. The innovation has not been extended to other con-

ventions; in the case of the General Act of 1928 for the Pacific Settlement of International Disputes (4 Hudson, *op. cit.*, p. 2529), which, like international labor conventions, was also not signed, provision was made for "accession" of States rather than for "ratification." Nevertheless, the French Government has abandoned its efforts to evade compliance with the procedure relative to labor conventions provided for in the constitution of the International Labor Organization (10 *International Labour Office Official Bulletin* (1925), pp. 75-85; 1 Hudson, *op. cit.*, p. xliv and n. 5), and the fact cannot be ignored that there are today a great number of important conventions adopted by the International Labor Conference which are not signed but which are nevertheless ratified. Some of the ratifications of international labor conventions have, indeed, differed from the usual form; others, however, have not, and all are regarded as "ratifications." See the examples of ratifications of international labor conventions appended at the end of this comment; also 1 Hudson, *op. cit.*, p. xliv, n. 1.

Again, in recent years, there has developed a practice of "ratifying" so-called "accessions" to treaties. See comment to Article 12. Whatever may be said for the desirability of permitting so-called "accessions" to treaties subject to ratification, the fact remains that, when such an "accession" is given, the subsequent ratification is a ratification by a State which is not a signatory of the treaty. Thus a number of non-signatory States deposited what really were ratifications of the Treaty of August 27, 1928, for the Renunciation of War, after having "acceded" or "adhered" thereto subject to ratification. See *Treaty for the Renunciation of War* (Washington, 1933), p. 121 (Albania), p. 132 (Bulgaria), p. 134 (Chile), p. 154 (Cuba), for examples of such ratifications (referred to as "instruments of adherence").

In recognition of these special cases, and of others which may arise under Article 5, paragraph (b), of this Convention, the above definition of a ratification has been phrased so as not to make signature a necessary prerequisite to ratification. It is to be emphasized again, however, that normally, and in the majority of cases, ratification follows signature.

(b) A treaty may designate the organ of a State by which a ratification should be executed by that State; in the absence of such a designation, a ratification may be executed by the head of State or by any other authorized organ of the State.

COMMENT

Occasionally a treaty specifically provides that a State's ratification thereof shall be executed by a named organ of the State—the head of State, for example. Thus the Treaty for the Advancement of Peace of February 3, 1914, between the United States and Costa Rica (3 *Treaties, etc. between the United States and Other Powers*, p. 2544), provided in Article 4:

The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; and by the President of Costa Rica, with the approval of the Congress thereof. . . .

And the Treaty for the Advancement of Peace between the United States and Denmark (*ibid.*, p. 2556), provided in Article 5:

The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Majesty, the King of Denmark.

Cf. also the following provision (Article 4) in the Treaty of Mutual Assistance signed by France and Great Britain on June 28, 1919 (*ibid.*, p. 3711):

The present treaty shall before ratification by his Majesty be submitted to Parliament for approval.

It shall before ratification by the President of the French Republic be submitted to the French Chambers for approval.

In such cases, the ratification, if it is to be effective, must be executed by the organ named. It is conceivable, too, that a treaty might specify that a particular State's ratification thereof should be executed by some organ or official other than the head of State—for example, the Minister for Foreign Affairs. In such a case the only ratification which would be effective internationally would be that executed by the Foreign Minister. If, as is sometimes the case, that State's constitution provided that its treaties should be ratified by the head of State, there probably would have to be two ratifications—that of the Foreign Minister to satisfy the requirement of the treaty, and that of the head of State to satisfy the municipal law requirement. No such case is known, however.

As the excerpts from treaties quoted above indicate, treaties may specifically require *approval* by certain organs of the State in addition to *ratification* by the head of State or other indicated organ. Such approval is then, of course, essential, and it would seem that the fact of its having been given should be expressly recorded in the ratification, or at least, failing that, in the *procès-verbal* of exchange or deposit of ratifications.

The *approval* referred to in the previous paragraph is sometimes erroneously referred to as "ratification." See Fitzmaurice, "Do Treaties Need Ratification," 15 *British Year Book of International Law* (1934), pp. 114–116. As is well known, it is the President of the United States who ratifies treaties, yet it is not uncommon to hear the advice and consent (*i.e.*, *approval*) of the Senate which the President is constitutionally required to secure before proceeding to ratification, itself referred to as "ratification." Mathews (*American Foreign Relations*, 1928, p. 398), says:

The function of the Senate in treaty-making is popularly spoken of as ratification. But this is an error. The advice and consent of the Senate is a necessary prerequisite to the ratification of a treaty; the act of

ratification itself is performed by the President (or his agents), as is also the exchange of ratifications with representatives of the foreign government.

Treaties, too, sometimes provide for "ratification" by a certain organ when it would seem that what is actually intended is that the treaty shall simply be "approved" by the designated organ prior to ratification properly so-called. Thus, as an example, the treaty of peace between Germany and France signed at Frankfurt May 10, 1871 (19 Martens, *Nouveau Recueil Général de Traités*, p. 688), provided in Article 18:

Les ratifications du présent traité par Sa Majesté l'Empereur d'Allemagne d'un côté et de l'autre par l'Assemblée nationale et par le Chef du Pouvoir exécutif de la République française seront, échangées à Francfort dans le délai de dix jours ou plus tôt si faire se peut.

That provision, on its face, required "ratification" by the French National Assembly as well as by the Chief of the Executive Power. Yet it seems that what was desired was that, in addition to ratification by the Chief of the Executive Power, the treaty should have the "approval" of the National Assembly. Although the ratifications of the treaty have not been available, the following documents seem to indicate that in fact there was only one "ratification," and that the National Assembly simply approved the treaty and authorized its ratification by the Chief of the Executive Power. The law purporting to "ratify" the treaty was passed by the National Assembly on May 14, 1871 in the following form:

L'Assemblée Nationale a adopté, Le Président du Conseil, Chef du Pouvoir Exécutif de la République française promulgue la loi dont la teneur suit:

Art. 1^{er}. L'Assemblée nationale ratifie le Traité définitif de paix dont le texte est ci-après annexé, et qui a été signé à Francfort, le 10 mai 1871, par . . . et autorise le Chef du Pouvoir exécutif et le ministre des affaires étrangères à échanger les ratifications.

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Délibéré en séance publique, à Versailles le 18 mai 1871.

[Signed by the President of the National Assembly, the Secretaries, the Chief of the Executive Power, and the Minister for Foreign Affairs.]
1 *Recueil des Traités, Conventions, Lois, Décrets et Autres Actes relatifs à la Paix avec l'Allemagne* (Paris, 1872), p. 328.

And the *procès-verbal* of the exchange of ratifications (*ibid.*, p. 76), reads, in part, as follows:

Les soussignés [the French representatives] d'un côté:

De l'autre [the German representatives]

Se sont réunis aujourd'hui pour procéder à l'échange des ratifications du Traité définitif de paix entre la République française et l'Empire germanique, signé dans cette ville, le 10 mai de l'année courante.

M. Jules Favre et M. Pouyer-Quertier présentèrent l'instrument de ratification signé par le Chef du Pouvoir exécutif de la République fran-

gaise le 18 mai, ainsi qu'une expédition en due forme de la loi ratificative du Traité voté par l'Assemblée nationale le 18 mai, . . .

Le prince de Bismarck et le comte d'Arnim présentèrent, de leur côté, l'instrument de ratification signé par Sa Majesté l'Empereur d'Allemagne et Roi de Prusse, le 16 du mois courant. . . .

Lecture ayant été donnée de ces documents, les Plénipotentiaires français ont pris acte [of a protocol inserted in the German ratification by virtue of which Bavaria, Wurtemberg and Baden acceded to the treaty.]

Les plénipotentiaires allemands, de la loi susindiquée votée par l'Assemblée nationale.

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L'échange des lettres de ratification a eu lieu ensuite, de manière que l'instrument allemand a été délivré aux Plénipotentiaires français, et l'instrument français, aux Plénipotentiaires allemands.

As indicated above, a record of the National Assembly's approval of the treaty was properly inserted in the *procès-verbal* of the exchange of ratifications, such approval having been expressly required by the treaty.

Compare, in connection with the type of case just discussed, the following provision in the protocol for putting into force the Treaty for the Renunciation of War, signed at Moscow, February 9, 1929 (4 Hudson, *International Legislation*, 1931, p. 2526):

Art. 3.—1. The present Protocol shall be ratified by the competent legislative bodies of the Contracting Parties, in conformity with the requirements of their respective constitutions.

2. The instruments of ratification shall be deposited by each of the Contracting Parties with the Government of the Union of Soviet Socialist Republics within one week of the ratification of the present Protocol by the respective Parties.

Treaties frequently contain stipulations such as the following:

The present convention shall be submitted to the approval and ratification of the respective appropriate authorities of each of the contracting parties. . . . (Naturalization Convention between Peru and the United States, October 15, 1907, 2 Malloy, *Treaties, etc.*, p. 1449.)

The present treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties. . . . (Treaty establishing friendly relations between the United States and Austria, 3 *Treaties, etc. between the United States and Other Powers*, p. 2493.)

The present Treaty shall be ratified by the Contracting Powers in accordance with their respective constitutional methods . . . (Treaty of February 6, 1922, between the United States, British Empire, France, Italy, and Japan limiting naval armament. *Ibid.*, p. 3100.)

The present treaty shall be approved and ratified by the High Contracting Parties in conformity with their respective laws. . . . (Treaty of April 6, 1914, between the United States and Colombia for the settlement of differences arising out of the events which took place in the Isthmus of Panama in November, 1903. *Ibid.*, p. 2538.)

This treaty must be submitted for approval in the form prescribed by the laws of the two countries and shall take effect from the day of the

exchange of the ratifications thereof. . . . (Treaty of extradition between the United States and Costa Rica, November 10, 1922. *Ibid.*, p. 2548.)

It would seem that the effect of such provisions is to establish a definite requirement in the treaty itself that a ratification thereof by a State shall be executed by the organ empowered by its own constitution or fundamental law to ratify treaties, such ratification to be by and with the approval of any other organ or organs whose approval is, by the same constitution or fundamental law, prescribed as a prerequisite to the ratification of treaties. A ratification executed by any other organ, or without the prescribed approval or authority would, therefore, be ineffective.

In the absence of any express requirement in a treaty regarding the organ of the State which shall execute ratification thereof, a ratification thereof may, under this article, be executed by the head of State or by any other authorized organ of the State. International law does not require that ratifications be effected by any particular organ; consequently, in the absence of specific requirements in a treaty, a ratification of the treaty can be executed by any organ of the State competent to do so—such competence flowing, of course, from the State's own law. [As regards the question of the effect of a ratification of a treaty executed by an organ or authority of the State not competent under its law to ratify such treaty, see Article 12 and the comment thereon.] "Any other authorized organ of the State," may be, for example, a collegial executive, such as the Federal Council of Switzerland, a Secretary of State or Minister for Foreign Affairs, or a diplomatic representative.

Ratifications are usually acts executed by heads of States. Indeed the constitutions of a number of States expressly give the authority to ratify treaties to the head of the State. See, for example, the constitutions of France (Constitutional law of July 16, 1875, Art. 8), Spain (Constitution of December 9, 1931, Art. 76), Greece (Constitution of June 2, 1927, Art. 82), Lithuania (Constitution of May 15, 1928, Art. 48), Netherlands (Constitution of November 30, 1887, modified November 30, 1922, Art. 58), Czechoslovakia (Constitution of February 29, 1920, Art. 64), and Bolivia (Constitution of October 17, 1880, Art. 89). The authority of the head of State to ratify treaties is clearly implied in many other constitutions. Execution of ratifications by the head of State is normally to be expected, of course, inasmuch as it is usually the head of State who speaks officially for the State in international relations.

However, ratifications have been and still are, occasionally, executed by persons other than the head of State—for example, by a minister for foreign affairs. Bittner (*Die Lehre von den völkerrechtlichen Vertragsurkunden*, 1924, p. 234, n. 921), refers to a number of cases in which instruments of ratification were executed by foreign ministers. In some cases, ratifications of international labor conventions take the form of communications signed by

foreign ministers; see, *e.g.*, the ratifications of China and Nicaragua quoted below. The French ratification of international labor conventions takes the form of a communication from the Minister for Foreign Affairs, containing a copy of an act of parliament signed by the President of the Republic and other ministers; the act authorizes the Minister of Foreign Affairs "to address to the Secretary-General of the League of Nations the communication provided for in Article 405 (seventh paragraph) of the Treaty of Versailles." The British ratification of international labor conventions is not, as is normally the case, an act executed by His Britannic Majesty, but instead is in the form of an Order of Council. (See below.) Likewise, the ratification of the Irish Free State is not an act executed in its behalf by His Majesty, but is instead an instrument drawn up in the name of the Executive Council of the Irish Free State and signed by the Secretary thereof.

Finally, it seems that ratifications have occasionally been executed by diplomatic representatives. Bittner (*op. cit.*, p. 235, n. 922, and n. 923), refers to a number of cases where one or more of the ratifications of treaties were effected by diplomatic officers. He also remarks that ratifications by diplomatic officers (and also foreign ministers) are frequently less formal than those of heads of States (pp. 250-251).

EXAMPLES OF RATIFICATIONS

RAYMOND POINCARÉ

Président de la République Française

A tous ceux qui ces présentes Lettres verront, Salut:

Une Convention Radiotélégraphique Internationale et ses Annexes ayant été arrêtées à Londres, le 5 juillet 1912, Convention et Annexes dont la teneur suit:

(Text of convention)

Ayant vu et examiné les dites Convention et Annexes, Nous les avons approuvées et approuvons en vertu des dispositions de la Loi votée par le Sénat et par la Chambre des Députés; Déclarons qu'elles seront acceptées, ratifiées et confirmées, et Promettons qu'elles seront inviolablement observées.

En Foi de Quoi, Nous avons donné les présentes, revêtues du Sceau de la République.

A Paris, le 22 janvier 1914.

(L. S.)

(Signed) POINCARÉ

Par Le Président de la République: Le Président du Conseil, Ministre des Affaires Etrangères.

(Signed)

[2 Satow, *Guide to Diplomatic Practice* (1917), p. 279.]

WILLIAM HOWARD TAFT

President of the United States of America

To all to Whom these Presents shall come, Greeting:

Know Ye, That whereas a Treaty between the United States of America and the United Kingdom of Great Britain and Ireland providing for the preservation and protection of the fur seals, was concluded and signed by their respective Plenipotentiaries at Washington on the seventh day of February, one thousand nine hundred and eleven, a true copy of which Treaty is word for word as follows:

(Text of treaty)

And Whereas, the Senate of the United States by their resolution of February 15, 1911 (two-thirds of the Senators present concurring therein) did advise and consent to the ratification of the said Treaty;

Now Therefore, be it known that I, William Howard Taft, President of the United States of America, having seen and considered the said Treaty, do hereby, in pursuance of the afore-said advice and consent of the Senate, ratify and confirm the same and every article and clause thereof.

In Testimony whereof, I have caused the seal of the United States to be hereunto affixed.

Given under my hand at the City of Washington this sixth day of March in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

(L.S.)

(Signed) WM. H. TAFT

By the President—

Huntington Wilson,

Acting-Secretary of State.[*Ibid.*, pp. 279-280.]

WARREN G. HARDING

President of the United States of America

To all to Whom these Presents shall come, Greeting:

Know Ye, that whereas a Treaty between the United States of America and Austria to restore the friendly relations existing between the two nations prior to the outbreak of war, was concluded and signed by their respective plenipotentiaries at Vienna on August 24, 1921, the original of which Treaty, in the English Language, is hereto annexed:

And whereas, the Senate of the United States, by their resolution of October 18, 1921 (two-thirds of the Senators present concurring therein) did advise and consent to the ratification of the said Treaty, subject to the understanding, made a part of the resolution of ratification, "that the United States shall not be represented or participate in any body, agency or commission, nor shall any person represent the United States as a member of any body, agency or commission in which the United States is authorized to participate by this Treaty, unless and until an Act of the Congress of the United States shall provide for such representation or participation"; and subject to the further understanding, made a part of the resolution of ratification, "that the rights and advantages which the United States is entitled to have and enjoy under this Treaty embrace the rights and advantages of nationals of the United States specified in the Joint Resolution or in the provisions of the Treaty of Germain-en-Leye [sic] to which this Treaty refers":

Now, therefore, be it known that I, Warren G. Harding, President of the United States of America, having seen and considered the said Treaty, do hereby, in pursuance of the afore-said advice and consent of the Senate, ratify and confirm the same and every article and clause thereof, subject to the understandings hereinabove recited.

IN TESTIMONY WHEREOF, I have caused the seal of the United States to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-first day of October,

[Seal] in the year of Our Lord one thousand nine hundred and twenty-one, and of the independence of the United States of America the one hundred and forty-sixth.

WARREN G. HARDING

By the President:

Charles E. Hughes

Secretary of State.[3 *Treaties, etc., between the United States and Other Powers*, p. 2496.]

The following are definitive instruments of accession following accessions *ad referendum* to the Treaty of August 27, 1928, for the Renunciation of War:

ZOG I, Par la volonté du Peuple, Roi des Albanais.

A tous ceux qui les présentes verront, salut:

Le Gouvernement Albanais a adhéré le 20 Octobre 1928 au Pacte général de renonciation à la guerre, signé à Paris le 27 Août 1928, Pacte dont le texte reproduit fidèlement est de la teneur suivante:

[Here follows the text of the treaty]

Nous, ayant vu le Pacte qui précède en toutes et chacune des dispositions qu'il renferme, déclarons qu'il est approuvé, accepté, ratifié et confirmé, et, par ces présentes, signées de Notre main, Nous l'approuvons, acceptons, ratifions et confirmons, promettant de l'observer et de le faire observer inviolablement.

En foi de quoi Nous avons signé les présentes lettres de ratification et y avons fait apposer le sceau de l'Etat.

Donné au Palais de Tirana, le 27 Décembre mil neuf cent vingt huit.

[Seal]

Zog

Par Sa Majesté le Roi

Le Ministre des Affaires Etrangères

Ilias Vrioni

[*Treaty for the Renunciation of War* (Washington, 1933), p. 121.]

CARLOS IBÁÑEZ DEL CAMPO, Presidente de la República de Chile.

Por Cuanto

se concluyó y firmó en Paris el día veintisiete de Agosto de mil novecientos veintiocho, un Tratado sobre proscripción de la guerra, al que ha adherido el Gobierno de Chile, y cuyo texto inglés y versión literal al español son como sigue:

[Here follows the text of the treaty]

Por Tanto,

y habiendo el Congreso Nacional prestado su aprobación al Tratado preinserto, en uso de la facultad que me confiere la Parte 16 del Artículo 72 de la Constitución Política del Estado, he venido en aceptarlo, aprobarlo y ratificarlo, teniéndolo como Ley de la República y comprometiendo para su observancia el Honor Nacional.

En Fé De Lo Cual,

firmo el presente Instrumento de Ratificación, sellado con el sello de las Armas de la República y refrendado por el Ministro de Estado en el Departamento de Relaciones Exteriores, en Santiago, en el Palacio de la Moneda, a los veintidos días del mes de Julio del año mil novecientos veintinueve.

CARLOS IBÁÑEZ C.

CONRADO RIOS GALLARDO

[Seal]

[*Ibid.*, p. 134. See also pp. 132, 154 for other examples.]

The following ratifications of international labor conventions are taken from the English edition of the *Official Bulletin of the International Labor Office*:

(Translation)

ARTURO ALESSANDRI

President of the Republic of Chile.

Whereas the Republic of Chile has adhered to the Convention concerning unemployment adopted by the International Labour Conference at its First Session held at Washington from 29 October to 29 November 1919:

Therefore, the National Congress having given its approval to the above-named Convention, under the powers which have been conferred on Us by paragraph 16 of Article 72 of the Political Constitution of the State, We have accepted, approved and ratified it, We take it as a Law of the Republic and We promise on the national Honour to observe it.

In faith whereof, this instrument of ratification shall be signed, sealed with the Seal of the Arms of the Republic and countersigned by the Minister of State for the Department of External Relations, at Santiago, this twentieth day of the month of April in the year one thousand nine hundred and thirty-three.

(Signed) ARTURO ALESSANDRI

(Countersigned) Miguel Cruchaga

[18 *International Labour Office Official Bulletin*, No. 5 (1933) p. 420.]

(Translation)

VITTORIO EMANUELE III

By the Grace of God and the Will of the Nation, King of Italy

To all who may see these presents, Greeting!

Whereas a Convention concerning the marking of the weight on heavy packages transported by vessels was concluded between Italy and other States in the terms of the draft adopted at Geneva on 21 June 1929 by the International Labour Conference, the tenor of which Convention is as follows:

(Here follows the text of the convention.)

We, having seen the said Convention and approving it in all and every particular, have accepted, ratified and confirmed it, as by these presents We accept, ratify and confirm it, promising to observe it and to cause it to be observed inviolate.

In faith, whereof, We have signed with Our own hand these present letters and have caused Our Royal Seal to be affixed thereto.

Done at San Rossore on 29 June 1933, Year XI and the thirty-third year of our Reign.

(Signed) VITTORIO EMANUELE.

By his Majesty the King:

(Signed) Mussolini,

Minister of Foreign Affairs.

[*Ibid.*, p. 422.]

(Translation)

In the Name of the Czechoslovak Republic:

At the Eighth

International Labour Conference

The Following Text was Agreed Upon:

(Here follows the text of the draft convention concerning the simplification of the inspection of emigrants on board ship)

Having examined this Draft Convention we accept it.

In Faith Whereof we have signed this document and caused the Seal of the Czechoslovak Republic to be affixed thereto.

At the Château of Prague, 29 March 1928.

(Signed) T. G. MASARYK,

President of the Czechoslovak Republic.

(Signed) Dr. Edward Beneš,

Minister for Foreign Affairs.

[13 *Ibid.*, No. 3 (1928), p. 113.]

(Translation)

ORDINANCE RESPECTING THE PUTTING INTO FORCE OF THE INTERNATIONAL LABOUR CONVENTION CONCERNING NIGHT WORK IN BAKERIES.

Given at Helsinki on 11 May 1928.

Upon the advice of the Minister for Social Affairs, it is hereby stipulated that the Convention concerning night work in bakeries, adopted by the General Conference of the International Labor Organization held at Geneva in 1925, shall come into force in Finland.

Helsinki, 11 May 1928.

(Signed) LAURI KR. RELANDER,
President of the Republic.

(Signed) K. A. Lohi,
Minister for Social Affairs.

[*Ibid.*, p. 116. The letter from the Minister of Foreign Affairs transmitting the above decree, said: "The issue of the said Decree taking the place of the official ratification of the Convention mentioned above, I have the honour, in accordance with Article 7 of this Convention, herewith to communicate to you a copy of the same."]

(Translation)

Act for the ratification of the Draft Convention concerning the compulsory medical examination of children and young persons employed at sea adopted by the International Labour Conference at its Third Session, held at Geneva from 25 October to 19 November 1921.

The Senate and the Chamber of Deputies have adopted:

The President of the Republic promulgates the Act which is as follows:

Sole Section.—The Minister for Foreign Affairs shall be authorized to address to the Secretary-General of the League of Nations the communication provided for in Article 405 (seventh paragraph) of the Treaty of Versailles in respect of the Draft Convention concerning the compulsory medical examination of children and young persons employed at sea, adopted by the International Labour Conference at its Third Session, held at Geneva from 25 October to 19 November 1921.

A certified true copy of this document shall be appended to this Act.

This Act, which has been discussed and adopted by the Senate and by the Chamber of Deputies, shall be put into force as the law of the State.

Done at Paris, 15 March 1928.

(Signed) GASTON DOUMERGUE,
By the President of the Republic.

(Signed) Aristide Briand,
Minister for Foreign Affairs.

(Signed) André Tardieu,
Minister of Public Works.

(Signed) Andre Fallières,
Minister of Labour, Health and Social Welfare.

[13 *Ibid.*, No. 2 (1928), p. 83-84. The letter from the Minister for Foreign Affairs transmitting the above Act states that it constitutes "ratification within the meaning of Article 405 (seventh paragraph) of the Treaty of Versailles . . ."]

(Translation)

THE FEDERAL COUNCIL
OF THE
SWISS CONFEDERATION

Having seen and examined the
Convention concerning Workmen's Compensation
and Occupational Diseases,

adopted by the General Conference of Representatives of the Members of the International Labour Organization at its Seventh Session, held in 1925, which Convention was approved

by the Federal Assembly of the Swiss Confederation on 9 June 1927, and the tenor of which is as follows:

(Here follows the text of the convention)

Declares that the above-mentioned Convention is ratified and that it is applied by the Federal Act of 13 June 1911 concerning sickness and accident insurance and by the measures taken in pursuance thereof, and promises, on behalf of the Swiss Confederation, to cause it to be strictly and faithfully observed so long as it shall continue to be applicable in Switzerland.

In faith whereof the present ratification has been signed by the President and by the Chancellor of the Swiss Confederation and sealed with the Federal Seal.

Done at Berne, this eighth day of November of the year one thousand nine hundred and twenty-seven (8 November 1927).

On behalf of the Swiss Federal Council:

(Signed) MORTA

President of the Confederation,

(Signed) Kaeslin,

Chancellor of the Confederation.

[13 *Ibid.*, No. 1 (1928), p. 54.]

NANKING, 15 March 1934.

Sir,

In conformity with Article 350 of the Treaty of St. Germain, I have the honour to inform you that the Convention concerning the rights of association and combination of agricultural workers, adopted by the General Conference of the International Labour Organization of the League of Nations in its Third Session, was ratified by the Chinese Government on February 9th, 1934.

I have the honour to request you to be good enough to register the said ratification according to the provisions of Article 351 of the above-mentioned Treaty.

I have the honour to be, etc. . . .

(Signed) WANG CHING WEI

Minister for Foreign Affairs of the Republic of China.

[19 *Ibid.*, No. 1 (1934), pp. 16-17.]

(Translation)

MANAGUA, 9 March 1934.

Sir,

I have the honour to inform you that the National Congress of Nicaragua, by a Decree issued on 21 February of this year, formally ratified the following Draft Conventions adopted at the First Session of the International Labour Conference (29 October 1919):

(1) Draft Convention limiting hours of work in industrial undertakings to eight in the day and forty-eight in the week;

(2) Draft Convention concerning unemployment;

(3) Draft Convention concerning the employment of women before and after childbirth;

(4) Draft Convention concerning the employment of women during the night;

(5) Draft Convention fixing the minimum age for admission of children to industrial employment;

(6) Draft Convention concerning the night work of young persons employed in industry.

The President of the Republic approved the Decree in question on 24 February of this year, and I beg you in consequence to take note of the formal ratification of my Government in accordance with Article 406 of Part XIII of the Treaty of Versailles.

I have the honour, etc.,

(Signed) Leonardo ARGUELLO.

[*Ibid.*, p. 26.]

AT THE COUNCIL CHAMBER, WHITEHALL,
 The 27th day of August, 1927
 By the Lords of His Majesty's Most Honourable
 Privy Council.

Whereas on 20th August 1926 the Secretary-General of the League of Nations communicated to His Majesty's Government a certified copy of a draft Convention concerning the simplification of the inspection of emigrants on board ship which had been adopted by the International Labour Conference at Geneva on 5th June 1926:

And Whereas it is provided in Article 405 of the Treaty of Versailles that in the case of a draft Convention so communicated each Member of the International Labour Organization shall, if such draft Convention obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification thereof to the Secretary-General of the League of Nations:

And Whereas such draft Convention has in respect of Great Britain and Northern Ireland obtained the consent of the authority or authorities within whose competence the matter lies and such action as is necessary to make the provisions of the said draft Convention conditionally effective therein has been taken:

Now, THEREFORE, the Lords of the Council are pleased to order, and it is hereby ordered, that the said draft Convention be confirmed and approved, provided, however, that such confirmation and approval shall not take effect until the date by which the Secretary-General of the League of Nations shall have received and registered the formal ratifications without reservations of the said draft Convention by France, Germany, the Netherlands, Italy, Norway, and Spain.

And it is further ordered that formal communication thereof be made to the Secretary-General of the League of Nations.

(Signed) M. P. A. HANKEY.

[12 *Ibid.*, NO. 4 (1927), p. 171. See also 130 *British and Foreign State Papers* (1929), pp. 52-53.]

Whereas on the 3rd August 1925 the Secretary-General of the League of Nations communicated to the Government of the Irish Free State a certified copy of a Draft Convention concerning workmen's compensation for occupational diseases which had been adopted at the 7th Session of the International Labour Conference held at Geneva from 19th May to 10th June, 1925:

And whereas it is provided by Article 405 of the Treaty of Versailles that in the case of a Draft Convention so communicated each member of the Labour Organization shall, if such Draft Convention obtain the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification thereof to the Secretary-General of the League of Nations;

And whereas the provisions of the said Draft Convention are capable of being applied within the Irish Free State;

And whereas the Oireachtas has by resolution recommended the Executive Council to ratify the said Convention in respect to the Irish Free State;

Now therefore the Executive Council is pleased to order and it is hereby ordered that the said Draft Convention be ratified accordingly and that formal communication thereof be made to the Secretary-General of the League of Nations.

(Signed) DIARMUID O HEIGCEARTUICH,
Rúnaí don Ard-Chomhairle
(Secretary to the Executive Council)

Dublin.

This 8th day of November, 1927.

[13 *Ibid.*, No. 1 (1928), p. 48.]

ARTICLE 7. WHEN RATIFICATION IS NECESSARY

The ratification of a treaty by a State is a condition precedent to its coming into force so as to bind that State

(a) when the treaty so stipulates; or

(b) when the treaty provides for ratification by that State and does not provide for its coming into force prior to such ratification; or

(c) when ratification was made a condition in the full powers of the State's representatives who negotiated or signed the treaty; or

(d) when the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification.

GENERAL COMMENT

This article is based upon the assumption that treaties which have been signed on behalf of certain States are subject to ratification by those States, and that where it is not so provided and there is doubt in regard to the matter, the presumption is to be that such ratification is necessary. Early writers, who considered the negotiators of treaties as the mandatories of sovereign princes, and who applied to that relationship the private law rule that the principal is bound by the act of his agent, regarded ratification as unnecessary or at any rate as little more than a mere formality which was not essential to the validity or binding force of a treaty signed by plenipotentiaries acting within the scope of their authority. It was early realized, however, that the analogy of the relation between principal and agent in private law and that between a sovereign and his plenipotentiary in the making of treaties was not apt, and that the interests and welfare of the State required that the sovereign should not be committed by the act of a plenipotentiary. Accordingly, ratification came to be regarded, not as the mere confirmation of a contractual act already completed by the plenipotentiary when he signed a treaty, but as itself the expression of the sovereign's willingness to contract and therefore as an essential step in bringing the treaty into force. Likewise ratification came to be regarded as necessary in all cases except where the sovereign himself negotiated and signed the treaty, thus rendering his ratification superfluous, or when he expressly authorized dispensing with ratification. With the general disappearance of absolute monarchs and the development of constitutional systems of government under which various organs other than the head of State were given a share in the treaty-making power, the importance of ratification increased and the presumption as to its necessity in all but exceptional cases became even stronger. In many, if not most, modern States the organ of authority charged with the negotiation of treaties is not competent by itself to bind the State definitively until certain other organs have approved those treaties and or authorized their ratification. In the ordinary case, therefore, it is to be presumed that treaties today are signed subject to ratification in order that such constitutional requirements may be complied with. See, in connection with the above

remarks, Hall, *International Law* (8th ed., 1924), sec. 110; 1 De Louter, *Le Droit International Public Positif* (1920), pp. 488-491; Dupuis, "Les Relations Internationales," 2 *Recueil des Cours* (1924), p. 324; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 317 ff.; Basdevant, "La Conclusion et la Rédaction des Traités," 15 *Recueil des Cours* (1926), pp. 574-575; 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 369 ff.; Cavaglieri, "Règles Générales du Droit de la Paix," 26 *Recueil des Cours* (1929), pp. 519-520; and 1 Hudson, *International Legislation* (1931), p. xlvi.

It should be kept in mind throughout the discussion of this article that the term "ratification," as here used, refers only to that formal confirmation and approval of a treaty by a State which is normally indicated by the drawing up and signing of an instrument or act of ratification by the competent authority—usually the head of State—and *not* to the legislative or other approval which may be necessary under the constitution of the State to render the treaty definitive internally or to put the executive in a position to proceed with ratification properly so called. As was pointed out in the comment on Article 6, this distinction is not always observed, and the rôle of the United States Senate in treaty-making, for example, is sometimes improperly designated as "ratification", whereas strictly and properly speaking *ratification* is a function of the President (or his agents). Such loose usage of the term inevitably leads to confusion. In this connection a recent writer, who refers to ratification properly so called as "ratification in the international sense" and to the constitutionally prescribed parliamentary or other approval as "ratification in the constitutional sense", says:

It is probably unfortunate that the internal domestic processes whereby the executive is placed in a position to bind the State by a given agreement should have received the name of "ratification", as this often leads to confusion. Thus it is sometimes said that an agreement needs ratification, when in the international sense it does not, and what is meant is that one of the parties cannot, under its own constitution, become engaged until certain purely domestic acts have been carried out. Again, and conversely, it is sometimes loosely said, e.g. that in the United Kingdom treaties do not need ratification, when all that is meant is that in general the treaty-making power is, in the United Kingdom, vested in the Crown, and that the approval of Parliament need not be obtained before a treaty engagement is entered into; but a given treaty may none the less require ratification in the international sense on the part of this country. (Fitzmaurice, "Do Treaties Need Ratification?," 15 *British Year Book of International Law* (1934), p. 113, at p. 116.)

The failure to make the distinction just referred to has caused some writers, when specifying the conditions under which ratification of a treaty by a State should be regarded as a condition precedent to its coming into force so as to bind the State, to include some such statement as: when ratification is required by that State's constitution. See, e.g., Field, *Outlines of an Inter-*

national Code (1876), Article 192; Fiore, *International Law Codified* (Borchard trans., 1918), Article 755. An examination of a large number of constitutions reveals that a number of them provide that treaties, or certain of them, in order to be binding upon the State, shall be submitted to and approved by parliament or some other organ of the State and that a few of them refer to such approval by the word "ratification". No constitution is known, however, which requires that the treaties entered into by the State shall be subject to ratification in the sense in which that term is properly used and in which it is used here, although some of them specifically confer the power of ratification upon the head of State. Of course, the provision in the constitution of a State that treaties made on its behalf shall, for example, bind it only if approved by the legislature will probably make it imperative, in the ordinary case, for the organs of the State charged with negotiating a treaty on its behalf to reserve the right of ratification in order that the constitutional provision may be complied with before final acceptance of the treaty on behalf of the State is signified. In such a case, however, it is evident that ratification is a condition precedent to the treaty's coming into force so as to bind the State because ratification was reserved and not because of the constitutional provision, the sole effect of which, to repeat the words of Fitzmaurice, is to declare that the State "cannot, under its own constitution, become engaged until certain purely domestic acts have been carried out." So long as those acts are carried out, it is of no importance, from the constitutional point of view, whether confirmation and approval of the treaty is signified by the particular formality known as ratification. If, for example, the specified parliamentary approval of a given treaty were given prior to the time of signature thereof by the executive, certainly there would seem to be nothing in the constitutional provision which would prevent the executive from dispensing with ratification and binding the State as from signature.

It will be seen that Article 7 is expressed in the form of a single sentence, the various subparagraphs being set off by semicolons and joined by the conjunction "or". The article is to be read and applied as a whole, therefore, and the question as to whether or not ratification is a condition precedent to a particular treaty's coming into force with respect to a certain State is not to be determined simply on the basis of whether or not the case falls within the provision in paragraph (a), for example. Ratification by that State will be necessary if the case comes within any one, or more, of paragraphs (a), or (b), or (c), or (d).

When it is said that ratification is "a condition precedent" to a treaty's coming into force so as to bind a State, it is meant that such action must take place before any legal obligation under the treaty can arise for the State. Cf. 1 Hudson, *International Legislation* (1931), p. xliii. There may, of course, be other prescribed conditions precedent, such as exchange or deposit of ratifications. Under this Convention, some form of notification

of ratification to the other signatory or signatories would be an additional condition precedent in the case of treaties which do not provide otherwise and which, although subject to ratification, do not provide for the exchange or deposit of ratifications. See Article 10, paragraph (c).

(a) when the treaty so stipulates; or

(b) when the treaty provides for ratification by that State and does not provide for its coming into force prior to such ratification.

COMMENT

There seems to be no room for difference of opinion that ratification of a treaty by a particular State is a condition precedent to its coming into force so as to bind that State when the treaty contains an express provision to that effect. Treaties sometimes contain such provisions.

Likewise it seems never to have been doubted that ratification by a State is similarly necessary when it has signed a treaty which, although not explicitly stating that ratification by it shall be a condition precedent to its being bound by the treaty, contains a provision which indicates that the treaty is to be ratified by States on behalf of which it is signed, and which does not provide for its coming into force with respect to any of them prior to such ratification. Such provisions are common in treaties today. Referring to the instruments in the four volumes of Hudson's *International Legislation* (1931), a recent writer has said:

Provisions within the treaties requiring ratification are more frequent than provisions requiring signature. Indeed, they are so frequent that they raise a question as to whether ratification is required if the treaty itself fails to demand it. . . .

In one hundred seventy-eight of the instruments surveyed, the treaty specifically requires ratification, and in thirteen more the requirement is implied through mention. The usual form is "The present Convention shall be ratified," or "The present Convention is subject to ratification." Or, ratification may be referred to in connection with the place of deposit of ratifications, or in connection with declarations permissible at the time of ratification, or otherwise. (Eagleton, "Problems of International Legislation," 8 *Temple Law Quarterly*, 1934, pp. 378-379.)

A treaty may provide for ratification by only one or by certain of the signatories. Thus the commercial agreement of May 16, 1907, between France and the United States provided (Article 6):

This Agreement shall be ratified by the Royal Government of the Netherlands as soon as possible, and upon official notice thereof the President of the United States shall issue his proclamation giving full effect to the provisions of Article I of this Agreement. From and after the date of such proclamation this Agreement shall be in full force and effect. . . . (2 Malloy, *Treaties, etc.*, pp. 1276-1277.)

Likewise Article 10 of the treaty between France and Tunis signed at Casr-Saïd on May 12, 1881, provided that:

Le présent traité sera soumis à la ratification du gouvernement de la République française et l'instrument de ratification sera remis à S. A. le bey de Tunis dans le plus bref délai possible. (6 Martens, *Nouveau Recueil Général de Traités*, 2d ser., p. 507.)

In such cases, at least in so far as the provisions of the treaty itself are concerned, ratification is necessary only in the case of those States of which it is specifically required.

A treaty which is subject to ratification by a State may nevertheless provide that it, or a certain part of it, shall come into force so as to bind the State prior to such ratification. The agreement signed at Rapallo on April 16, 1922, by Germany and the Soviet Union, for example, provided (Article 6):

Articles 1 (b) and 4 of this Agreement shall come into force on the day of ratification, and the remaining provisions shall come into force immediately. (19 *League of Nations Treaty Series*, p. 247.)

In such cases it is evident that ratification by a State is not intended to be, and in practice it is not, a condition precedent to the treaty's coming into force so as to bind the States concerned. It does not seem, however, that such cases are the same as those in which ratification is dispensed with entirely; in fact the right of ratification is specifically provided for. Perhaps it can be said that in such cases the treaty comes into force at the time prescribed subject to the condition subsequent that ratification is forthcoming. No instance is known where ratification in such cases was not forthcoming.

(c) when ratification was made a condition in the full powers of the State's representatives who negotiated or signed the treaty.

COMMENT

The expression "full powers" refers to the written authorization, commonly designated by that name, which is usually issued to the representatives of a State charged with negotiating a treaty on its behalf. For a discussion and some examples of full powers, see 1 Satow, *Guide to Diplomatic Practice* (1917), p. 105 ff.; for the full powers of delegates to the Peace Conference of 1919, see Kraus und Rödiger, *Urkunden zum Friedensvertrage von Versailles vom 28. Juni 1919* (1920), p. 147 ff. See also 2 Hyde, *International Law* (1922), p. 36; and Basdevant, "La Conclusion et la Rédaction des Traités," 15 *Recueil des Cours* (1926), p. 548 and p. 608 ff.

It is fundamental that the representatives of a State can not bind it to any greater degree or extent than they are authorized in their full powers. If, for example, they are not therein authorized to bind the State definitively, but instead only to negotiate or sign a treaty subject to ratification, that is the limit of their authority beyond which they can not act effectively, and of that fact all States participating in the negotiations will have due notice inasmuch as the full powers of the representatives of each State are regularly presented for examination by the representatives of the other participating

States at the beginning of the negotiations. It follows, therefore, that even though a particular treaty is itself silent as to the matter of ratification, or, indeed, even if it contains a provision purporting to dispense with the necessity for ratification, ratification thereof by a certain State may still be a condition precedent to its coming into force so as to bind that State, and this because the right of ratification was reserved in the full powers issued to the representatives of that State who negotiated or signed the treaty. Cf. 1 Hudson, *International Legislation* (1931), p. xliii; Fitzmaurice, 15 *British Year Book of International Law* (1934), pp. 120–121; and 1 Oppenheim, *International Law* (4th ed., 1928), p. 721, where it is said that “it must be emphasized that renunciation of ratification is valid only if given by representatives duly authorised to make such renunciation,” and that “if the representatives have not received a special authorisation to dispense with ratification, their renunciation is not binding upon the States which they represent.”

In such a case, while ratification may be a condition precedent to the treaty's coming into force with respect to the particular State referred to, it may not be necessary in the case of other States whose representatives carried full powers which did not make ratification a condition. See 1 Hudson, *International Legislation* (1931), p. xliii, n. 1.

A clause or statement, the effect of which is to make ratification a condition within the meaning of this paragraph, appears quite generally in full powers—even a promise of ratification presumably indicating by implication an intention not to dispense therewith. It has been said that a clause indicating that the right of ratification is intended to be reserved is “very usual, indeed when a formal treaty or convention is being negotiated almost invariable.” Fitzmaurice, article cited, 15 *British Year Book of International Law* (1934), pp. 120–121. Reference may be made in this connection to the collection of full powers issued to delegates to the Peace Conference of 1919, referred to above. The German full powers, for example, contained the following:

Vollmacht, über den Entwurf eines Friedensvertrags mit den Vertretern der alliierten und assoziierten Regierungen zu verhandeln und die vereinbarten Bedingungen des Friedens vorbehaltlich der Zustimmung der Reichsregierung zu unterzeichnen. (Kraus und Rödiger, *op. cit.*, p. 147.)

The French full powers contained the clause: “sous la réserve des lettres de ratifications qu'après le vote des Chambres Je ferai délivrer en bonne et due forme pour être échangées dans le délai convenu.” *Ibid.*, p. 169. The Japanese full powers authorized the Japanese plenipotentiaries to negotiate, conclude and sign all treaties, conventions, declarations and other acts having as their purpose the establishment of a definitive peace, and then stated:

Nous examinerons les articles qui auront été stipulés et convenus par les Plénipotentiaires Impériaux sus-nommés et qui, après avoir été soumis à Notre approbation, seront ratifiés par Nous. (*Ibid.*, p. 169.)

In the Belgian full powers the King authorized his plenipotentiaries "à signer les actes et traités qui interviendront, Nous réservant d'approuver et de ratifier ce que Nos dits plénipotentiaires auront stipulé, promis et signé, en vertu des présents pleins pouvoirs, conformément aux instructions dont ils sont munis." *Ibid.*, p. 170. The Haitian full powers contained a promise "d'avoir pour agréable et de ratifier ce dont notre Délégué sera convenu dans les limites de ses pleins-pouvoirs." *Ibid.*, p. 176. The Czechoslovakian, Italian and Polish full powers also contained promises of fulfillment and execution of the treaties signed by their plenipotentiaries, "under reservation of letters of ratification." *Ibid.*, pp. 197-199. Cf. the Nicaraguan full powers ("celebre y firme *ad referendum*"), *ibid.*, p. 181; the Siamese full powers (containing a pledge "to approve whatsoever Our Delegates shall have in pursuance of the Present powers and in accordance with the instructions herein contained, agreed upon and signed."), *ibid.*, p. 192; the Peruvian and Uruguayan full powers (authorizing conclusion "*ad referendum*"), *ibid.*, pp. 194, 195.

The phraseology of the full powers issued by His Britannic Majesty was somewhat unique. Instead of containing a clearly unqualified reservation of ratification, the statement was to the effect that His Majesty engaged and promised to acknowledge and accept whatever was concluded by his plenipotentiary, "subject if necessary to Our approval and Ratification." Kraus and Rödiger, *op. cit.*, p. 152. The formula "subject if necessary to our Ratification" is regularly employed in United Kingdom full powers. With respect to this Fitzmaurice, who points out that the constitutionally required parliamentary approval of treaties is sometimes erroneously referred to as "ratification", and who makes the distinction between "ratification in the constitutional sense" and "ratification in the international sense" referred to above, remarks:

In the case of a country according to whose constitution certain international agreements require "ratification" in the constitutional sense and others not, the words "if necessary" might be held to relate to the necessity or otherwise of such "ratification", although strictly speaking it seems unnecessary to make mention of "ratification" in the constitutional sense in a full power. In the case of the United Kingdom, however, where, with the possible (though by no means certain) exception of treaties involving a cession of territory, no international engagement needs the sanction, as such, of the legislature, it seems likely that the words "if necessary" must relate to the necessity or otherwise of international ratification according to the terms of the treaty itself or according to the inference to be drawn from collateral documents or surrounding circumstances. In other words, the United Kingdom form of full powers appears to leave it an open question whether ratification is or is not necessary, and seems to confer on the plenipotentiaries the power, unless their instructions are to the contrary, to negotiate a treaty which does not require ratification. (15 *British Year Book of International Law* (1934), p. 126.)

The full powers issued to the representatives of the United States were in the form which is regularly employed in United States full powers. They authorized the commissioners "to negotiate, conclude and sign for and in the name of the United States, any and all International Acts necessary to the conclusion of a definite peace, the same to be transmitted to the President of the United States for his ratification, by and with the advice and consent of the Senate thereof." Kraus und Rödiger, *op. cit.*, p. 151. A similar reservation of the right of ratification has been inserted in full powers issued by the United States "from the first". Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 94.

(d) when the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification.

COMMENT

Even though a treaty is itself silent as regards ratification, and even though ratification was not made a condition in the full powers of the representatives of a State who negotiated or signed it, still ratification of the treaty by that State will be a condition precedent to the treaty's coming into force with respect to it if the form or nature of the treaty or the attendant circumstances do not indicate an intention to dispense with the necessity for ratification. In other words, ratification, even though not expressly provided for, is always to be presumed to be necessary unless there is some definite indication of an intention to the contrary. This, it is believed, is in accordance with the preponderance of modern authority.

Most modern writers hold that, in general, when a treaty is negotiated or signed by plenipotentiaries, the right of ratification exists by implication even if no express provision therefor is contained in the treaty and even if it is not expressly reserved in the full powers of the plenipotentiaries. Some of them add, as a sort of corollary, that a reservation of ratification is to be read into the full powers issued to a negotiator if they happen to be silent on the matter. Thus Crandall states:

By the early writers on international law, living at a time when the theory of personal sovereignty generally obtained, and the negotiator was the immediate agent of the sovereign, the rule of Roman law, that the principal is bound by the agent acting within his powers, was applied to treaty negotiations. The advantages of entrusting full and general powers to the negotiators, and the importance of the trust, have led recent writers quite generally to admit the right of ratification, even if no express reservation be made in the treaty or full powers. A reservation of this right is now by the practice of nations to be read into the full powers of the negotiator. (*Treaties, Their Making and Enforcement* (2d ed., 1916), p. 2.)

Oppenheim asserts that "it is now a universally recognized customary rule of International Law that treaties regularly require ratification, even if this

is not expressly stipulated. . . ." 1 *International Law* (4th ed., 1928), p. 720. Hall declares that "express ratification, in the absence of special agreement to the contrary, has become requisite by usage whenever a treaty is concluded by negotiators accredited for the purpose," and that it "was a custom, which was recognized by Bynkershoek as forming an established usage in the early part of the eighteenth century, to look upon ratification by the sovereign as requisite to give validity to treaties concluded by a plenipotentiary; so that full powers were read as giving a general power of negotiating subject to such instructions as might be received from time to time, and of concluding agreements subject to the ultimate decision of the sovereign." He adds: "Later writers may declare that by the law of nature the acts of an agent bind his state so long as he has not exceeded his public commission, but they are obliged to add that the necessity of ratification is recognized by the positive law of nations." *International Law* (8th ed., 1924), sec. 110. See also, for similar opinions, Heffter, *Le Droit International de l'Europe* (Bergson trans., 4th Fr. ed., 1883), p. 199; Lawrence, *Principles of International Law* (7th ed., 1923), pp. 299-300; 1 Westlake, *International Law* (1910), pp. 290-291; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), pp. 317, 320; Liszt, *Le Droit International* (Gidel trans., 1928), p. 180; Cavaglieri, "Règles Générales du Droit de la Paix," 26 *Recueil des Cours* (1929), p. 519. A few modern writers, to be sure, have taken the contrary view and denied that the right of ratification should generally be regarded as reserved even in the absence of express provision to that effect in the treaty or full powers. Genet, for example, so argues. "La clause tacite de ratification," 38 *Revue Générale de Droit International Public* (1931), p. 749 ff. Fitzmaurice, likewise, presents a plausible argument for abandoning the view that ratification is to be presumed as necessary even though not expressly reserved in a treaty or in the full powers of the negotiator, and for adopting the principle "that only those treaties need ratification which say so in terms, or as to which an inference of an intention that there should be ratification can be drawn; and that in regard to all other treaties it can be assumed that they are not intended to be ratified and, in the absence of indication to the contrary, are intended to come into force at the moment of signature." 15 *British Year Book of International Law* (1934), pp. 122-129. Fitzmaurice admits, however, that "the weight of modern authority . . . is on the other side" (p. 122); that "the weight of authority is in favour of the view that even if a treaty is completely silent on the subject, the necessity for ratification is nevertheless to be read into it or at any rate exists as a general principle of law"; and that, as a consequence, "it is also held . . . that in all cases where the full powers of plenipotentiaries do not expressly reserve the right of ratification, such a reservation is to be read into the full powers" (p. 124).

As early as 1813, Sir William Scott, in the case of *The Eliza Ann* (1 Dodson, 244, at 248), stated that: "According to the practice now prevailing, a sub-

sequent ratification is essentially necessary, and a strong confirmation of the truth of this position is that there is hardly a modern treaty in which it is not expressly so stipulated; and therefore it is now to be presumed that the powers of plenipotentiaries are limited by the condition of a subsequent ratification." In the *Oder Commission Case*, the Permanent Court of International Justice recognized that, amongst "the ordinary rules of international law" is "the rule that conventions, save in certain exceptional cases, are binding only by virtue of their ratification." *Publications of the P. C. I. J.*, Series A, No. 23, p. 20.

The Havana Convention on Treaties apparently recognizes no exceptions to the general rule that ratification is a condition precedent to the coming into force of a treaty with respect to States participating in its negotiation. It declares (Article 5):

Treaties are obligatory only after ratification by the contracting States, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself.

It has been generally recognized, however, that there are exceptions to the general principle: that there may be, and in fact sometimes are, treaties which do not need to be ratified as a prerequisite to their coming into force with respect to one or another of the negotiating States. Certainly there is no apparent reason why ratification should be held to be necessary if it can be shown that the State or States concerned did not intend it to be. In other words, if the form or nature of the treaty concerned, or the attendant circumstances, indicate an intention to dispense with the necessity for ratification, it seems reasonable that that intention should prevail. It remains to be considered, therefore, as to when the form or nature of the treaty or the attendant circumstances may be regarded as indicating such an intention.

First, however, it seems desirable to refer again to the distinction previously mentioned between ratification properly so called and such constitutionally required approval of treaties by legislatures or other organs as is sometimes erroneously referred to as "ratification", and to recall that it is only the former which is referred to when the term ratification is used here. Hence when it is said that ratification is or may be dispensed with, it does not mean that constitutionally prescribed parliamentary approval, for example, is or may be likewise dispensed with. Thus if, for example, the head of a State is vested with the authority to ratify treaties he may properly authorize dispensing with that formality in the case of a particular treaty and purport to bind the State without it. He may, for example, authorize signature of a treaty which contains no provision for ratification and which provides that it shall come into force upon signature. If, however, the particular treaty is one which, according to the constitution of the State, must be approved by parliament, the head of State can not, and does not by dispensing with ratification, dispense with the necessity for such approval. If such approval is given in advance there is no difficulty, and there is no doubt that

the State can be, and is, bound by signature alone and without ratification. If, on the other hand, the treaty is signed before such consent is given, it simply means that the executive has purported to commit the State in advance and taken the chance that the required legislative approval will be given subsequently. If it is not forthcoming, the treaty, so far as that State is concerned, is one concluded by an incompetent organ and Article 21 of this Convention would apply.

Secondly it may be observed that, although it has not seemed desirable to abandon the well-established principle that ratification is, in general, to be presumed to be necessary, and to adopt instead the rule championed by a few writers that ratification shall be deemed necessary only when expressly provided for, there seems to be no compelling reason for going so far as to say that a reservation of the right of ratification shall be read into full powers which are silent on the subject. Various reasons might operate to prevent a State which desired to reserve the right of ratification from succeeding in getting an express provision to that effect into a treaty; there is nothing, however, to prevent its expressly making ratification a condition in the full powers issued to its negotiators, and, if it does not do so, it would seem reasonable to assume that the negotiator is competent to negotiate a treaty which is not subject to ratification. See Fitzmaurice, 15 *British Year Book of International Law* (1934), pp. 125, 129. This is implicit in Article 7. Paragraph (e) provides that ratification of a treaty shall be a condition precedent to its coming into force so as to bind a State when ratification was made a condition in the full powers of the State's representatives who negotiated or signed the treaty. The assumption is that when ratification is *not* made a condition in the full powers, then, *in so far as they are concerned*, ratification is not a condition. To say, however, that a reservation of ratification is not to be read into full powers which are silent on the subject is not equivalent to saying that, if the full powers issued to a negotiator do not expressly reserve the right of ratification, an intention is thereby indicated to dispense therewith. It simply means that if the powers issued to a negotiator are silent as regards the necessity of ratification, and if the negotiator proceeds to sign a treaty which dispenses with ratification either expressly or by reason of an indication of an intention to that effect resulting from the form or nature of the treaty or the attendant circumstances, he will not be deemed to have exceeded his powers, and ratification will not therefore, in that case, be a condition precedent to the treaty's coming into force so as to bind his State.

A treaty may expressly provide that no ratification thereof shall be necessary. Thus the convention of October 24, 1860, between China and Great Britain provided (Article 7):

. . . It is further agreed that no separate ratification of the present Convention shall be necessary, but that it shall take effect from the date of its signature. . . . (50 *British and Foreign State Papers*, p. 10.)

More frequently treaties simply provide that they shall come into force on signature, or on a certain date thereafter, indicating by inference rather than explicitly that ratification is intended to be dispensed with. See Fitzmaurice, 15 *British Year Book of International Law* (1934), p. 119, and n. 1; 1 Oppenheim, *International Law* (4th ed., 1928), p. 721, n. 2. The agreement concerning a transit card for emigrants, for example, provided (Article 11):

The present agreement shall come into force ninety days after it has been signed by three Governments, and it shall thereupon take effect, as regards any signatory Government, ninety days after the date of its signature by the said Government. (4 Hudson, *International Legislation* (1931), p., 2848.)

There seems to be no doubt that if a treaty containing such provisions is signed on behalf of a State, its ratification thereof is not required and is not a condition precedent to the treaty's coming into force so as to bind it—provided, of course, that the person or persons signing the treaty with the said provisions therein contained did not exceed their powers in so doing.

It has been said by most writers who have dealt with the subject, that treaties concluded and signed by heads of States in person do not require ratification. This is the logical inference where the heads of State are absolute sovereigns or where they at least possess the full treaty-making authority of the States concerned, inasmuch as ratification by them would, in the circumstances, be a superfluous act. Likewise in practice treaties signed by such heads of States have not been subject to ratification by the States which they represented. See, for example, the Holy Alliance of September 14/26, 1815, signed by the Emperor of Austria, the King of Prussia and the Emperor of Russia. 2 Martens, *Nouveau Recueil des Traités*, p. 630. The Treaty of May 12, 1881, between France and Tunis was not subject to ratification by Tunis, it having been signed by the Bey in person; the treaty was signed on behalf of France, on the other hand, by a plenipotentiary and was, by its own terms, subject to ratification by the French Government. 6 Martens, *Nouveau Recueil Général de Traités* (2d ser.), p. 507. Cf. 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), pp. 320–321. The development of constitutional limitations on the treaty-making power of heads of States, however, has prompted some writers to qualify the rule that treaties signed by heads of States do not need ratification. Oppenheim, for example, says that “treaties concluded by Heads of States in person do not want ratification, provided that they do not concern matters in regard to which constitutional restrictions are imposed upon Heads of States.” 1 *International Law* (4th ed., 1928), p. 721. It has also been suggested that, if there is a general rule that treaties require ratification, and if, as seems true, the purpose of ratification nowadays is to give the State an opportunity to reconsider a treaty before finally accepting it, there is no compelling reason for assuming that when heads of States sign a treaty, even if they have the full treaty-making power, they intend to

dispense with ratification and to commit their States from the time of signature. Fitzmaurice, 15 *British Year Book of International Law* (1934), pp. 126-127.

As a matter of fact, treaties are very seldom signed by heads of States today. So rare is the occasion on which heads of States sign a treaty in person that it seems reasonable to infer that exceptions to ordinary rules are intended on such occasions. Consequently, if heads of States, whether they have the full treaty-making power or not, sign a treaty in person and make no provision in the treaty for reservation of the right of ratification and in no other way indicate an intention to reserve that right, it seems that it can be safely assumed that the intention was to dispense with the necessity of ratification.

The following interesting observation has been made in connection with the point just discussed:

The practice of signing treaties directly between Heads of States has indeed virtually fallen into desuetude, but a modern analogy is to be found in the personal signature of treaties on the part of the permanent heads of governments of what may be called "authoritarian" states, as opposed to states governed under a genuine parliamentary system. An example is afforded by the "protocols" signed at Rome on March 17, 1934, personally by Signor Mussolini on behalf of Italy, Herr Dollfuss on behalf of Austria, and General Gömbös on behalf of Hungary, providing for consultation and economic co-operation. These protocols do not provide that ratification is required; nor do they provide that ratification shall not be required; they do not even provide that they are to come into force on the date of signature—they contain no provision of any kind as to their entry into force. Nevertheless, there arises an irresistible inference both from this very silence, and also from the personality of the signatories and the type of states of whose governments they are the heads, that they intended to bind themselves and their respective states by their mere signatures, and that the agreements came into force as from the moment of signature. (Fitzmaurice, 15 *British Year Book of International Law* (1934), p. 119.)

An intention to dispense with ratification may be inferred, in the absence of indication to the contrary, in the case of treaties concluded by certain subordinate officials of a State who have a limited power to enter into agreements for certain purposes—such as military officers, postal authorities, etc. In regard to this, Oppenheim remarks:

For some non-political purposes of minor importance, certain minor functionaries are recognized as competent to exercise the treaty-making power of their States, which is, so to say, delegated to them. Such functionaries are *ipso facto*, by their offices and duties, competent to enter into certain agreements without the requirement of ratification. Thus, for instance, in time of war, military and naval officers in command can enter into agreements concerning a suspension of arms, the surrender of a fortress, the exchange of prisoners, and the like. But it must be emphasized that treaties of this kind are valid only when these functionaries have not exceeded their powers. (1 *International Law* (4th ed., 1928), p. 707. See also p. 720.)

See, in the same sense, Hall, *International Law* (8th ed., 1924), p. 385; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 321.

In the absence of provision for ratification in the treaty itself or full powers, it is possible that an intention to dispense therewith may be indicated by the fact that the treaty is recorded in a certain form. It has sometimes been stated that agreements in the form of declarations, protocols, exchanges of notes, etc.—especially if concerned with relatively unimportant matters—do not require ratification unless it is expressly provided for. See Basdevant, *op. cit.*, 15 *Recueil des Cours* (1926), p. 576; 1 Oppenheim, *International Law* (4th ed., 1928), pp. 721–722. Cf. 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 374. Inasmuch as the precise form or the name given to an instrument have no juridical significance, however (see Articles 4 and 5 of this Convention), it seems impossible to lay down any definite and universally applicable rule that treaties in certain forms or designated by certain names are, in the absence of indication to the contrary, to be presumed not to be subject to ratification. It is possible, however, that, in the practice of certain States, a particular form or name will regularly be given to instruments which they do not consider as requiring ratification. If, then, these States record an agreement in an instrument having such form and name, the inference will be that ratification is intended to be dispensed with.

In certain circumstances the fact that the signatories of an instrument were obviously desirous of having the terms thereof come into force immediately may indicate an intention to dispense with ratification—although it is probable that, in such cases, the necessity for ratification will be expressly ruled out by the terms of the treaty.

The above paragraphs are intended merely to suggest possible cases in which the form or nature of a treaty or the attendant circumstances may be such as to indicate an intention to dispense with ratification which will prevail over the general presumption that ratification is always necessary. It is obviously impossible to be exhaustive or dogmatic in the matter; the circumstances of each particular case must be taken into account in applying the rule laid down in paragraph (d), and what may indicate an intention to dispense with ratification in one case may not in another. All that can be said definitely is that, if there be any doubt, it is to be resolved in favor of the necessity for ratification.

ARTICLE 8. NO OBLIGATION TO RATIFY

The signature of a treaty on behalf of a State does not create for that State an obligation to ratify the treaty.

COMMENT

The rule here laid down means that a State is not, as the result of signature on its behalf of a treaty which is subject to its ratification (see Article 7), legally bound to ratify the treaty. On the contrary, in so far as any obligation resulting from the fact of signature of the treaty on its behalf is con-

cerned, the State may as of right and at its own discretion withhold its ratification, and this even though the representatives of the State who signed the treaty acted within their instructions and even though their full powers may have contained a promise of ratification. This is not equivalent to saying that a State can never violate any obligation in refusing to ratify a treaty which has been signed on its behalf. If, for example, the State had bound itself by a previous treaty to ratify the treaty which has been signed in its behalf, then its failure to ratify that treaty would be a violation of an obligation for which it would be responsible. In such a case, however, the obligation violated is one resulting from the previous treaty and not one created by signature on its behalf of the later one. As has been said, such cases "do not . . . support the contention that by the signature of a treaty in its behalf a State is deprived of the right not to accept the terms of the compact." 2 Hyde, *International Law* (1922), p. 43.

Earlier writers on international law, writing at a time when the theory of the personal sovereignty of monarchs prevailed, when in fact the full treaty-making authority was vested in monarchs, and when the negotiators of treaties were regarded as their personal agents or mandatories held generally that the monarch (and so, of course, the State) was bound to ratify treaties negotiated and signed by his agents so long as the latter acted within their powers or instructions. They applied to treaty negotiations the rule of the Roman law that the principal was bound by the act of his agent so long as the latter did not exceed his authority. See, in this connection, Grotius, *De Jure Belli ac Pacis*, Lib. II, Ch. 11, sec. 12 (Classics of International Law, Kelsey trans., p. 337); Bynkershoek, *Quaestiones Juris Publici*, II, 7 (Classics of International Law, Frank trans., p. 175); Vattel, *Le Droit des Gens*, Lib. II, Ch. 12, sec. 156 (Classics of International Law, Fenwick trans., p. 161); 1 G. F. de Martens, *Précis du Droit des Gens* (Vergé trans., 1864), sec. 48. See also the discussion by Anzilotti, 1 *Cours de Droit International* (Gidel trans., 1929), pp. 370-371. This view no longer prevails, however, and modern writers are practically unanimous in holding that there is no *legal* obligation upon a State to ratify a treaty which has been signed on its behalf. See, for example, Bluntschli, *Droit International Codifié* (Lardy trans., 1880), Art. 420; 1 F. de Martens, *Traité de Droit International* (Léo trans., 1883), p. 520; 1 Westlake, *International Law* (2d ed., 1910), p. 291; Lawrence, *Principles of International Law* (7th ed., 1923), pp. 299-300; Hall, *International Law* (6th ed., 1909), p. 323; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 2; 2 Satow, *Guide to Diplomatic Practice* (1917), p. 273; 2 Hyde, *International Law* (1922), p. 41; Hatschek, *Völkerrecht* (1923), p. 231; Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), p. 260; Liszt, *Droit International* (Gidel trans., 1928), p. 180, Strupp, *Éléments du Droit International Public* (Blociszewski trans., 1927), p. 180; Hershey, *International Law* (rev. ed., 1927), p. 445; 1 Oppenheim, *International Law* (4th ed.,

1928), pp. 722-723; 1 Hoijer, *Les Traités Internationaux* (1928), p. 131; Cavaglieri, "Règles Générales du Droit de la Paix," 26 *Recueil des Cours* (1929), pp. 520-521; 1 Anzilotti, *op. cit.*, p. 372; 1 Hudson, *International Legislation* (1931), p. xliii; Fenwick, *International Law* (2d ed., 1934), p. 335. Apparently, among modern writers, only Wegmann, takes the view that there is a rule of customary international law which prohibits the full exercise of the right to refuse ratification except in certain cases. *Die Ratifikation von Staatsverträgen* (1892), p. 32 ff. The modern rule, as well as the reasons therefor, are well stated by Brierly in the following passage (*The Law of Nations*, 1928, p. 166):

A treaty does not become binding by the mere signatures of the representatives of the contracting States, despite their title of "plenipotentiaries", but requires to be ratified. There are good reasons which render such a rule a practical necessity. The constitutional law of some states vests the treaty-making power in some organ which cannot delegate it to plenipotentiaries, and yet cannot itself carry on negotiations with other states; for example, in the United States the power is vested in the President, subject to the advice and consent of the Senate. But apart from such cases the interests with which a treaty deals are often so complicated and important, that it is reasonable that an opportunity for considering the treaty as a whole should be reserved. Moreover a democratic state must consult public opinion, and this can hardly take shape while the negotiations, which must be largely confidential, are going on. These being the reasons that render ratification necessary, it is clearly impossible, as is done by some writers, to specify the circumstances in which a refusal to ratify is justified and those in which it is not. There is no legal, nor even a moral, duty on the state to ratify a treaty signed by its plenipotentiaries; it can only be said that refusal is a serious step which ought not to be taken lightly.

Although there is practically unanimous agreement among modern publicists that a State is under no *legal* obligation to ratify a treaty which has been signed on its behalf, a number of them, including some of those cited above, hold that there is a strong *moral* obligation upon the State to do so, and that ratification can in honor and good faith be withheld only for serious and substantial reasons. Indeed it has been said that "the weight of opinion holds that a moral obligation to ratify exists." Harley, "The Obligation to Ratify Treaties," 13 *American Journal of International Law* (1919), pp. 389, 405. Cf. Wegmann, *op. cit.*, pp. 25-29. Various of the writers holding this view have undertaken to specify the "solid reasons" upon which a refusal to ratify might properly be based. There seems to be fairly general agreement among them that ratification may be withheld, not only with legal but with moral propriety as well, when the negotiator exceeded his powers or was compelled to sign the treaty under personal duress; when it is discovered that the treaty conflicts with obligations previously incurred or with the public law of the State; when a fundamental change in the circumstances existing at the time of signature occurs between the time of signature

and ratification; when it is discovered that the negotiations were tainted with fraud; when an error is discovered with respect to facts, a correct knowledge of which would have induced the State not to sign the treaty in its actual form; when the treaty is subject to approval by organs or authorities other than those which controlled its negotiation, and when such approval is not forthcoming; etc. See, for a statement of similar reasons, Hall, *International Law* (6th ed., 1909), p. 324; Harley, *loc. cit.*, p. 397. For various expressions of the view that there is something of a moral obligation to ratify, see Hall, *op. cit.*, p. 323 ff.; Heffter, *Droit International de l'Europe* (4th ed. by Geffcken, Bergson trans., 1883), p. 202; Ullmann, *Völkerrecht* (1908), p. 265 ff.; 1 De Louter, *Le Droit International Public Positif* (1920), p. 490; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), pp. 329-330; Cavaglieri, *loc. cit.*, p. 520.

Much may be said for the view that States should not arbitrarily withhold their ratifications of treaties which have been signed on their behalf, and that they should regard themselves as morally bound to proceed with ratification except when really serious reasons prevent their doing so. The fact remains, however, that each State must be its own judge of those reasons, and that a moral obligation is as elastic as are the consciences of men. Oppenheim expresses the sound view of the whole matter when he says (1 *International Law*, 4th ed., 1928, pp. 722-723):

The question now requires attention whether ratification can be refused on just grounds only, or according to discretion. Formerly it was maintained that ratification could not be refused unless the representatives had exceeded their powers, or violated their secret instructions. But nowadays there is probably no publicist who maintains that a State is in *any* case *legally* bound to accord ratification. Yet many insist that a State is, except for just reasons, in principle *morally* bound not to refuse ratification. I cannot see, however, the value of such a moral, in contradistinction to a legal, duty. The fact upon which everybody agrees is that International Law does in no case impose a duty of ratification upon a contracting party. A State refusing ratification will always have reasons for doing so which appear just to itself, although they may be unjust in the eyes of others. In practice, ratification is given or withheld at discretion. . . . A State which often, and apparently wantonly, refused to ratify treaties would lose all credit in international negotiations, and would soon feel the consequences. On the other hand, it is impossible to lay down hard and fast rules respecting just and unjust causes for refusing ratification. The interests at stake are so various, and the circumstances which must influence a State are so imponderable, that it must be left to the discretion of every State to decide the question for itself.

It was stated in the opening paragraph of this comment that the rule here laid down was to be understood as meaning that there is no obligation upon a State to ratify a treaty which has been signed on its behalf even though the persons who signed the treaty in its behalf had been equipped with full powers which contained a promise of ratification. In the 18th

and early 19th centuries full powers frequently contained promises of ratification, and it has sometimes been contended that if the full power issued to a negotiator contained such a promise, the State which he represented was in consequence bound to ratify whatever he agreed to, so long as he did not exceed his instructions. [For examples of earlier full powers containing a promise of ratification, see 1 Satow, *Guide to Diplomatic Practice* (1917), pp. 107, 112, 114, 115; 2 *ibid.*, p. 274. See also the full powers issued to negotiators of the Treaty of Paris of 1763 in 1 Martens, *Recueil de Traités d'Alliance*, p. 121 ff. See also the following full powers issued to negotiators of treaties concluded with the United States: French (treaty of June 24, 1822), 3 Miller, *Treaties and Other International Acts of the United States of America* (1933), p. 85; Colombian (treaty of October 3, 1824), *ibid.*, p. 190; Danish (treaty of April 26, 1826), *ibid.*, p. 245; Russian (treaty of December 18, 1832), *ibid.*, p. 736.] Thus the full power issued by the King of Spain to the Spanish Minister who signed the Florida cession treaty of February 22, 1819 (2 Malloy, *Treaties, etc.*, p. 1651), contained the following clause:

Obliging ourselves, as we do hereby oblige ourselves, to approve, ratify, and fulfill, and to cause to be inviolably observed and fulfilled, whatsoever may be stipulated and signed by you: to which intent and purpose, I grant you all authority and full power, in the most ample form, thereby as of right required.

With regard to that clause, the American Secretary of State, Mr. Adams, in a note to Mr. Forsyth, Minister to Spain, said: "The obligation of the King of Spain, therefore, in honor and in justice, to ratify the treaty signed by his minister, is as perfect and unqualified as his royal promise in the full power; and it gives to the United States the right, equally perfect, to compel the performance of the promise." He pointed out that if Spain should counter such an argument with a reference to the rejection or amendment of treaties by the United States, it was to be recalled "that, by the nature of our Constitution, the full powers of our ministers never are or can be unlimited," since senatorial consent to ratification is necessary, and that consequently if ratification was withheld or a treaty amended "no promise or engagement of the State was violated." In Spain, on the other hand, the King possessed complete power to ratify treaties, and therefore when he promised to ratify whatever his minister should sign, he committed "his own honor and that of his nation to the fulfillment of his promise." And in another letter to the Chairman of the Committee on Foreign Relations, Mr. Adams said: "The King of Spain was bound to ratify the treaty; bound by the principles of the law of nations applicable to the case; and further bound by the solemn promise in the full power." See, regarding this case, 5 Moore, *Digest of International Law* (1906), pp. 188-190. Field in his draft code proposed the following provision:

A nation by whose public minister a treaty is concluded in conformity with his powers, is bound to ratify the same, if his powers contain an

express agreement, authorized by the law of the nation, that it shall be ratified when so concluded; unless by the terms of the treaty its ratification is optional with such nation; or unless, before the time agreed on for its ratification, an event has occurred or been discovered which if occurring or discovered after its ratification would authorize such nation to rescind or refuse to perform it. (Article 193)

Full powers containing a promise of ratification are relatively rare today, but occasionally, perhaps as a survival of the earlier forms and formulæ, a modern full power does contain what appears to be an unconditional undertaking to ratify whatever the negotiator, acting within his instructions, may conclude and sign. Thus, for example, the Haitian full power issued to its delegate to the Peace Conference of 1919 gave him authority

. . . pour étudier, d'accord avec les Alliés et les Etats-Unis et conclure avec le Gouvernement Allemand, ce conformément à ses instructions, toutes Conventions ou dispositions propres à atteindre le but envisagé.

Promettant d'avoir pour agréable et de ratifier ce dont notre Délégué sera convenu dans les limites de ses pleins-pouvoirs.

Likewise the Rumanian and Yugoslav full powers contained a passage

Promettant en outre, en foi et parole de Roi, d'avoir pour agréable et de faire exécuter ponctuellement ce dont Notre plénipotentiaire sera tombé d'accord avec les dits plénipotentiaires conformément aux instructions qui lui seront donnés par Nous.

And the Siamese full power included a pledge "to approve whatsoever Our Delegates shall have in pursuance of the Present powers and in accordance with the instructions herein contained agreed upon and signed." For these instruments, see Kraus und Rödiger, *Urkunden zum Friedensvertrage von Versailles vom 28. Juni 1919*, pt. 1 (Berlin, 1920), pp. 176, 185, 190, 192.

The view taken here is that such a promise of ratification contained in the credentials of a negotiator or plenipotentiary is not to be regarded as creating a specific obligation to ratify; it is, rather, to be considered simply as a promise to ratify if ratification is found to be desirable and possible. See Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), p. 133 ff. This view seems to be implicitly if not expressly stated by most of the writers cited above, who hold that there is no obligation upon States to ratify treaties which have been signed on their behalf. It accords with the fact that in many if not in most States today the authority which issues the instructions and full powers to negotiators is not itself constitutionally competent to proceed with the ratification of treaties without the approval or assent of other organs of the State, and that consequently its promise of ratification must at least be regarded as conditioned upon its success in obtaining such approval or assent. And finally it comports with what would seem to be the modern conception of the purpose of reserving ratification, to wit, "that the time between signature and ratification is granted to the

parties for the purpose of thinking the matter over, and that if a state changes its mind for any reason that is at all distinguishable from mere caprice, it may refuse to complete the bargain by ratification." Lawrence, *Principles of International Law* (7th ed., 1923), p. 301. If that is the purpose of reserving ratification, then, even were the authority which issued a full power containing a promise of ratification competent by itself and acting alone to fulfill that promise, or even were the promise concurred in by the full treaty-making power, the promise should still be regarded as conditional rather than absolute. *Per contra*, see Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 2, where it is implied that if "the powers and instructions are given by the full treaty-making organ of the State" there is at least a qualified obligation to ratify; and pp. 78-79 where there is a discussion of the case in which John Jay advised the Senate to consent to ratification of the Consular Convention of 1788 with France even though it "would prove more inconvenient than beneficial to the United States," apparently on the ground that the Congress of the Confederation, then the sole treaty-making authority, had promised ratification in the commission to Jefferson.

The frequency with which, in practice, States withhold or delay ratification of treaties which have been signed on their behalf seems to indicate that there is a general conviction that there is no obligation upon a State to ratify a treaty simply because the treaty has been signed by its duly authorized representatives or plenipotentiaries. Although signed on behalf of 33 States, the Hague Convention of 1907 relative to the creation of an international prize court was never ratified by any of them. Not one of the other twelve conventions concluded at the Hague Conference of 1907 was ratified by all of the States on behalf of which it was signed; in each case an average of about 41% of the signatory States failed subsequently to ratify. Seventeen States which affixed their signatures to all the conventions failed to ratify any of them. See Hudson, "Present Status of the Hague Conventions of 1899 and 1907," 25 *American Journal of International Law* (1931), p. 114 ff. On November 27, 1933, five years after the Sixth International Conference of American States, Panama alone had ratified all eleven of the conventions which had been adopted at that conference; Argentina and Paraguay had ratified none, and Chile, Ecuador, El Salvador and Peru only one each. An average of about nine ratifications of each convention had been deposited.

In May, 1930, a committee appointed by the Council of the League of Nations reported that 552 ratifications had been deposited with respect to the 39 conventions, agreements and protocols which had been concluded under the auspices of the League up to that time, but that there were "553 signatures still unratified." *League of Nations Document A.10.1930.V.*, p. 2. On September 1, 1931, there were 58 conventions and agreements which had been concluded under the auspices of the League; 739 ratifications had been

effected, but 825 signatures or accessions remained unratified. *League of Nations Document A.26.1931.V.9*. See also, in this connection, the United States Department of State publication of October 1, 1932, entitled *Lists of Treaties submitted to the Senate 1789-1931 which have not gone into force*; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), pp. 82 and 95 ff., for reference to treaties to the ratification of which the United States Senate refused consent, which the President did not even submit to the Senate, or which the President did not ratify although the Senate gave its consent.

It does not appear that any of the States which failed to ratify the treaties referred to above were regarded as having violated any obligation devolving upon them as the result of signature of the treaties on their behalf. Neither does it appear that any State in recent times has seriously contested the right of another State to refuse to ratify a treaty which had been signed on its behalf. In 1903, the United States Government did protest against Colombia's refusal to ratify the Hay-Herran Treaty of 1903 which granted to the United States the right to construct a canal across the Isthmus of Panama, negotiations of which had been initiated by Colombia. In a telegram of June 9, 1903, the American Secretary of State instructed the Minister at Bogotá to say to the Colombian Minister of Foreign Affairs that (*U. S. Foreign Relations*, 1903, p. 146):

The Colombian Government apparently does not appreciate the gravity of the situation. The canal negotiations were initiated by Colombia, and were energetically pressed upon this Government for several years. The propositions presented by Colombia, with slight modifications, were finally accepted by us. In virtue of this agreement our Congress reversed its previous judgment and decided upon the Panama route. If Colombia should now reject the treaty or unduly delay its ratification, the friendly understanding between the two countries would be so seriously compromised that action might be taken by the Congress next winter which every friend of Colombia would regret.

And when the Colombian Congress finally refused to approve the treaty, the Secretary of State, in a letter to General Reyes, said (*ibid.*, p. 299):

The Department is not disposed to controvert the principle that treaties are not definitely binding till they are ratified; but it is also a familiar rule that treaties, except where they operate on private rights, are, unless it is otherwise provided, binding on the contracting parties from the date of their signature, and that in such case the exchange of ratifications confirms the treaty from that date. This rule necessarily implies that the two Governments, in agreeing to the treaty through their duly authorized representatives, bind themselves, pending its ratification, not only not to oppose its consummation, but also to do nothing in contravention of its terms.

Certainly the Secretary's remarks, based apparently upon a theory of the retroactive effect of ratification which must itself be regarded as unsound

(see Article 11 and Comment), cannot be regarded as a successful argument that a State which has signed a treaty is bound not to oppose its ratification, much less that it is its duty to ratify the treaty. The Colombian Minister for Foreign Affairs was on firmer ground when he stated (*ibid.*, pp. 153-154):

The previous requisite of legislative approval is indispensable for the exchange of ratifications, and before this is done the treaty is but a project which, according to the law of nations, has no rights or obligations, and for the same reason, according to that law, to reject or delay its ratification is not cause for the adoption of measures tending to alter the friendly relations between the two countries.

The Assembly and Council of the League of Nations have on several occasions considered ways and means of increasing the number of ratifications of treaties concluded under League auspices. In 1930 a special committee submitted a report which contained some concrete suggestions and which was approved by the Assembly. *League of Nations Document A.10.1930.V.; Official Journal*, 1930, pp. 598-607; *Records of the Eleventh Assembly, Plenary*, pp. 213-217. The committee was careful to point out, however, that, in drafting its proposals, it "did not fail to bear in mind that the signature and ratification of, and accession to, conventions is a matter in regard to which Governments possess an entire freedom of action, and that no suggestion can be put forward which in any way prejudices their sovereign rights in this sphere."

Article 7 of the Havana Convention on Treaties provides:

Refusal to ratify or the formulation of a reservation are acts inherent in national sovereignty and as such constitute the exercise of a right which violates no international stipulation or good form.

Finally, reference may be made to the dissenting opinion of Judge Moore in the *Mavrommatis Case*, where it was said: "The doctrine that governments are bound to ratify whatever their plenipotentiaries, acting within the limits of their instructions, may sign, . . . is obsolete and lingers only as an echo of the past." *Publications of the Permanent Court of International Justice*, Series A, No. 2, p. 57. There is nothing to suggest that the other members of the court did not share this view.

It seems hardly necessary to say that, if there is no duty upon a State to ratify a treaty which has been signed on its behalf, there can be no general obligation upon it, other than perhaps one of ordinary courtesy, to convey to the other States concerned a statement of its reasons for refusing to ratify such a treaty. The Havana Convention on Treaties (Article 7) does provide that "in case of refusal to ratify it shall be communicated to the other contracting parties." Again, the Assembly resolution of October 3, 1930, authorizes the Secretary-General of the League to address an annual request to any signatory of a treaty concluded under League auspices which has not ratified it before the expiration of one year from the date of the closing of

the protocol of signature, asking it as to "what are its intentions with regard to ratification of the convention." *Records of the Eleventh Assembly, Plenary*, p. 215. Apparently there is no thought in either case, however, that a State must give detailed reasons in its statement, if that statement is that it intends not to ratify the treaty. The committee report upon which the Assembly resolution was based (*League of Nations Document A.10.1930.V.*), in reference to another suggestion that future general conventions concluded under League auspices be accompanied by a protocol binding the signatories, under certain circumstances, to "inform the Secretary-General of the League in writing of its intentions with regard to the convention", said:

A provision of this kind leaves intact absolute liberty of the Governments as regards ratification. It leaves Governments free to couch their notification to the Secretary-General in general terms, and, if they so prefer, not to state their reasons for not taking the necessary steps with a view to ratification. On the other hand, it gives them the opportunity to state their reasons for not proceeding to ratification and to explain any difficulties which they might encounter in obtaining the necessary approval.

Likewise, it is hardly necessary to state that, if there is no duty upon a State to ratify a treaty which has been signed on its behalf, there is, of course, no duty upon it, if it has completed its ratification of the treaty, to proceed with the deposit or exchange of its ratification should it desire not to do so. It is perfectly conceivable, for example, that the President of the United States, after having secured the consent of two-thirds of the Senate to ratification of a particular treaty, and after having actually drawn up and signed an instrument of ratification, might decide that the treaty was, for valid reasons, unacceptable. There can be no doubt that, in such a case, he could refuse to deposit or exchange the ratification without placing the United States in the position of refusing to perform an obligation.

ARTICLE 9. OBLIGATION OF A SIGNATORY PRIOR TO RATIFICATION

Unless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed subject to ratification is under no duty to perform the obligations stipulated, prior to its ratification of the treaty; under some circumstances, however, good faith may require that, pending ratification, the State shall, for a reasonable time after signature, refrain from taking action which would render its performance of the obligations stipulated impossible or more difficult.

COMMENT

This article must be read in connection with Article 10, which lays down the rule that a treaty which is subject to ratification does not come into force for the signatories until they have ratified it, unless the treaty by its own terms

otherwise provides. This is the general doctrine as set forth by writers on international law; it is the view which national and international tribunals have uniformly adopted; and it is in accord with the general practice. See the comment on Article 10; also the comment on Article 7 dealing with the subject of ratification. It is also the rule of the Havana Convention of 1928 on treaties (Article 5) and of most of the draft codes that have been proposed.

The view is frequently expressed that a treaty which must be ratified as a condition of its coming into force is only a *projet* which has no obligatory force until this condition has been fulfilled. There is some controversy among writers on international law on this point. Whatever the correct view may be as to the status of a treaty during the period between signature and ratification, it is undoubtedly true that treaties, especially multipartite treaties, do usually contain provisions which have a certain juridical effect during that period, in the sense that they have to be complied with before the treaty comes into force. Such are provisions relative to ratification, the opening of conventions for signature, provisions which determine what States shall be invited to adhere to a treaty and the conditions under which they may adhere, provisions which charge a particular government or head of a State with notifying the other signatories of ratifications or accessions deposited with it or him, or which bind one of the parties to perform certain duties in connection with the execution of the treaty immediately following its own ratification but before ratification has been effected by the other signatories, or which forbid the signatories from taking action in contravention of the provisions of the treaty prior to their ratification (*e.g.*, Article 38 of the Berlin Act of July 26, 1885). See Nisot, "*La Force Obligatoire des Traités Signés, Non encore Ratifiés*," 57 *Journal du Droit International* (1930), p. 878 ff.

In general, however, prior to ratification a treaty records only an "inchoate" engagement which becomes definitive only when it has been "formally confirmed and approved" by the States which accept it, through an "act" known as ratification. This being so, the conclusion follows logically and inevitably that until then the signatories are under no legal duty to perform the obligations created by the treaty, and, it may be added, they are not entitled to claim any rights stipulated for their benefit therein.

It would seem that if a signatory were legally bound to perform the obligations stipulated for in a treaty prior to its ratification of that treaty, the utility of ratification would disappear, since the obligation of performance would no longer depend upon ratification. In that case the necessity of ratification might as well be dispensed with and the rule (Article 8 of this Convention) that a State is under no obligation to ratify a treaty signed on its behalf would have little meaning since the obligation of performance would result from signature alone. Moreover, if performance were a duty prior to ratification an awkward situation would arise in all cases where the obligations of the treaty were performed by one or more of the signatories,

wholly or in part, after which the other signatory or signatories should refuse to ratify the treaty.

In these circumstances it would seem that the only sound and reasonable rule would be that which is here proposed, namely, that, in the absence of a contrary provision in the treaty itself, there is no legal obligation, that is, no obligation under international law, upon any signatory to perform the stipulations of a treaty which is subject to ratification, until it has ratified the treaty. Legal logic, to say nothing of considerations of reason, convenience, and expediency, is opposed to any rule which makes performance of a treaty stipulation a duty before the process of making the treaty has been completed and before the engagement which it proposes to establish has become definitive.

It is believed that the rule here proposed, namely, that there is no such duty prior to ratification, enunciates a sound general principle of international law and practice. It may not be superfluous to repeat here the statement of the Permanent Court of International Justice in the case of the *Oder River Commission* (*Publications of the P. C. I. J.*, Series A, No. 23, p. 20), that it is a rule of international law that treaties "save in certain exceptional cases are binding only by virtue of their ratification." Compare also Judge Moore's dissenting opinion in the *Mavrommatis Case* (*ibid.*, Series A, No. 2, p. 57), where, referring to the interval which elapsed between the signature and the ratification of the Treaty of Lausanne, at which time the Palestine Protocol became operative, he maintained that the application of the Greek Government in behalf of Mavrommatis was subject to dismissal by the Court "on the ground that the enforcement of unratified treaties . . . is beyond the Court's jurisdiction." And he added: "The doctrine . . . that treaties may . . . be regarded as legally operative and enforceable before they have been ratified, is obsolete, and lingers only as an echo of the past." If this is an accurate statement of the juridical status of treaties between the date of their signature and ratification, as it is believed to be, it is difficult to see how a signatory can be regarded as legally bound to act as if a treaty were already in force and binding upon it.

Nevertheless, it is recognized by Article 9 that there may be exceptional cases and special circumstances where good faith may require a State, for a reasonable time after signature and while ratification is still pending, to refrain from taking action which would render performance by it of the obligations stipulated for in the treaty impossible or more difficult in case it subsequently ratifies. It is believed that when a duly authorized plenipotentiary signs a treaty on behalf of his State, the signature is not a simple formality devoid of all juridical effect and involving no obligation whatever, moral or legal, on the part of the State whose signature the treaty bears. It would seem that not only the treaty-making organ itself but also the other organs of the State which are competent to act for it, once a treaty has been signed on its behalf, are not, if they observe good faith, entirely free to act

as if the treaty had never been signed. It would seem also that one signatory State has a right to assume that the other will regard its signature as having been seriously given, that ordinarily it will proceed to ratification, and that in the meantime it will not adopt a policy which would render ratification useless or which would place obstacles in the way of the execution by it of the provisions of the treaty, once its ratification has been given.

Manifestly, it is not possible to draw a precise line of demarcation between a duty which is required by international law and one which is required by good faith. But the duty of good faith on the part of States is one which is often emphasized by writers on international law as being the basis of international relations. As to this, see the comment on Article 20. When the second part of Article 9 declares that "good faith" may require a policy of abstention on the part of signatories in the circumstances mentioned, it does not envisage a legal duty, *e.g.*, a duty under international law, such as that envisaged by the first part of the article which relates to the duty of performance. In other words, while the obligation of a signatory to fulfill its treaty engagements once it has ratified a treaty is generally admitted to be a legal one, under Article 9 a signatory is only under a duty of good faith to refrain from the action referred to therein. The essential distinction between the two kinds of duty is that non-performance of the former involves important legal consequences—the responsibility of the non-performing party and its liability to make reparation for any losses or damages sustained by the other party or parties; whereas non-performance of the latter produces no such legal results. It may expose the non-performing party to the charge of bad faith or may impair its good name and reputation, but it does not render such party liable to damages for violation of a legal obligation, because no legal obligation existed which could be violated.

Examples of hypothetical cases wherein the obligation of good faith referred to in Article 9 might be regarded as being ignored are the following: (1) A treaty contains an undertaking on the part of a signatory that it will not fortify a particular place on its frontier or that it will demilitarize a designated zone in that region. Shortly thereafter, while ratification is still pending, it proceeds to erect the forbidden fortifications or to increase its armaments within the zone referred to. (2) A treaty binds one signatory to cede a portion of its public domain to another; during the interval between signature and ratification the former cedes a part of the territory promised to another State. (3) A treaty binds one signatory to make restitution of certain property to the other signatory from which it has been wrongfully taken, but, while ratification is still pending, it destroys or otherwise disposes of the property, so that in case the treaty is ratified restitution would be impossible. (4) A treaty concedes the right of the nationals of one signatory to navigate a river within the territory of the other, but the latter soon after the signature of the treaty takes some action which would render navigation of the river difficult or impossible. (5) By the terms of a treaty

both or all signatories agree to lower their existing tariff rates, but while ratification of the treaty is pending one of them proceeds to raise its tariff duties. (6) A treaty provides that one of the signatories shall undertake to deliver to the other a certain quantity of the products of a forest or a mine, but while ratification is pending the signatory undertaking the engagement destroys the forest or the mine, or takes some action which results in such diminution of their output that performance of the obligation is no longer possible.

In all these hypothetical cases a State on behalf of which a treaty has been signed, presumably by a duly authorized plenipotentiary, takes action while ratification is still pending which would render it impossible or more difficult for it to perform the obligations which it has, conditionally at least, agreed to assume, and which it would be bound to perform upon ratification. Good faith on the other hand would seem to require that the signatory adopting such policy should at least defer its action until it has become certain that the treaty will not be ratified; that is, until a time when it can no longer be said that ratification is still pending. Indeed, good faith might require it to refrain from taking such action until it has formally notified the other signatory that it will not proceed to ratification.

It should be observed that action of the kind referred to, during the interval between signature and ratification, would not necessarily indicate bad faith. It depends entirely upon the circumstances of the particular case. Thus the hypothetical treaty referred to above for the lowering of tariff rates may have been signed by the representative of a government which was committed to a policy of tariff revision downward; and then, immediately following the signing of the treaty referred to, a new government may have come into power committed to the opposite policy, and perhaps it came into power with a popular mandate to increase tariff rates. Under the circumstances its action in raising its tariff rates ought not to be regarded as an act of bad faith. It would be still less so if the action were taken at a considerable interval after signature or at a time when there no longer existed any reasonable prospect that the treaty would ever be ratified, or if, in the meantime, the State taking the action notified the other signatory that it would not proceed to ratification, or if its declared policy indicated clearly that it had no intention of ratifying the treaty. To take an extreme example, if the United States, on behalf of which the Treaty of Versailles was signed in 1919, were now, after the lapse of sixteen years, to take some action which would render performance by it of the obligations stipulated for in that treaty impossible or more difficult in case it should ratify, it could hardly be claimed that such action would involve a manifestation of bad faith on its part. Article 9 of this Convention is based on this view. It follows that when a reasonable time has passed, further abstention from the action referred to ceases to be a duty of good faith. What would be a "reasonable time" in a given case cannot, of course, be precisely defined; it would, manifestly,

depend upon the circumstances of the particular case. The phrase "reasonable time" is not uncommon in municipal law and jurisprudence and the idea which it connotes is fairly well understood by writers on international law.

The principle laid down in the second part of Article 9 relative to the duty of a signatory to refrain under certain circumstances from taking the action there referred to, has the support of reputable writers on international law. Crandall (*Treaties, Their Making and Enforcement*, 2d ed., 1916, p. 343) observes that, although a treaty is "inchoate and not definitely binding until the exchange of ratifications, it is in good faith provisionally binding from the date of signing, in the sense that neither party may, without repudiating the proposed treaty, voluntarily place itself in a position where it cannot comply with the conditions as they existed at the time the treaty was signed." Cavaglieri ("*Règles Générales du Droit de la Paix*," 26 *Recueil des Cours*, 1929, p. 520) also remarks that "a State whose plenipotentiaries have already signed a treaty is bound to adopt a correct attitude during the interval between its signature and ratification and to refrain from all action which would render more difficult or even impossible the future execution of the treaty." Anzilotti (1 *Cours de Droit International*, Gidel trans., 1929, p. 372) likewise says:

Il faut encore observer que, en excluant tout effet obligatoire du traité antérieurement à la ratification, on ne veut pas dire que l'Etat puisse ne tenir aucun compte du texte intervenu et faire comme si rien ne s'était produit. Il y a lieu, par contre, d'admettre que, lorsque la procédure de ratification d'un traité régulièrement signé est pendante, l'Etat doit s'abstenir d'accomplir des actes de nature à rendre impossible ou plus difficile l'exécution régulière du traité une fois ratifié. Mais il est clair qu'il ne s'agit pas alors d'un effet du traité comme tel, mais bien d'une application du principe qui défend d'abuser du droit. (V. Cour permanente de justice internationale, arrêt n° 7, *Publications* série A; n° 7, p. 37 et s.).

Compare also Fauchille (1 *Traité de Droit International*, pt. 3, 1926, p. 319), who observes that:

Si la ratification est nécessaire pour la validité du traité, celui-ci n'étant avant elle qu'un simple projet, il ne s'en suit pas cependant que la signature n'ait pas à elle seule de l'importance. En réalité, le traité uniquement signé n'est pas dépourvu de toute valeur. C'est qu'en effet on doit admettre que, une fois le traité signé, les puissances qui y ont pris part ont l'obligation de ne rien faire jusqu'au moment de sa ratification qui puisse rendre celle-ci inutile ou superflue. S'il n'en était ainsi, si le traité ne devait point nécessairement demeurer intact, tel qu'il a été signé, il en résulterait en quelque sorte une atteinte à la parole donnée et on ouvrirait toutes grandes les portes à l'arbitraire. Ce qu'en définitive il faut dire du traité signé et non encore ratifié, c'est qu'il n'est qu'un projet de traité, mais un projet à termes parfaitement définis et arrêtés, auquel on ne peut plus rien changer. L'obligation qui

existe ainsi de ne rien faire qui puisse nuire au traité en rendant superflue toute ratification. . . .

Hoijer (1 *Les Traités Internationaux*, 1928, p. 136) expresses substantially the same opinion, concluding that signatories are at least under a moral obligation to refrain from doing anything which would interfere with (*nuire*) the treaty or render its ratification superfluous.

It is not possible to determine from the language used by Cavaglieri and Anzilotti in their opinions cited above whether the obligation of abstention is regarded by them as a duty under international law or one merely of good faith for the violation of which there is no legal responsibility. If the former, the rule enunciated by them goes further than the rule of Article 9 which considers the duty to be one only of good faith. Their rule is also more sweeping than that of Article 9 since it is not qualified by the reference to special circumstances which "*may*" (but not necessarily does) make it a duty of good faith to refrain from the action mentioned.

There are some opinions of statesmen and diplomats which support the general principle here under discussion. See *e.g.*, the communication of Secretary of State Hay to the American Minister at Bogotá of January 5, 1904, in which he asserted that the signatories of a treaty "bind themselves pending its ratification, not only not to oppose its consummation but also to do nothing in contravention of its terms." *U. S. Foreign Relations*, 1903, p. 299. This proposition is of doubtful soundness; in any case it goes much further than that laid down in Article 9.

Jurisprudence, both national and international, in respect to the duty referred to in this article appears to be scant and not very helpful. In the case of *Megaldis v. The State of Turkey*, the Turkish-Greek Mixed Arbitral Tribunal rendered an award on July 26, 1928 (8 *Recueil des Décisions des Tribunaux Arbitraux Mixtes Institués par les Traités de paix*, p. 390), in which the rule here proposed was affirmed, mainly on the basis of Fauchille's opinion cited above. In this case the Turkish authorities had seized certain coins, paper money and jewelry between the date of the signature by Turkey of the Treaty of Lausanne of 1923 and the date of the coming into force of the treaty, and had justified their action on the basis of Article 67 of the treaty which, it was contended, exempted Turkey from the duty of restitution. The tribunal held that the Turkish contention was unfounded, because, among other reasons, the seizure could not be deemed to have been made with the view to appropriating the objects in question in view of the fact that from the time of the signature of the treaty and before its entry into force the contracting parties were under a duty to do nothing which might impair the operation of its clauses. The tribunal said (*ibid.*, p. 395):

Qu'en outre, il est évident que la saisie n'a pas pu être faite dans le but de s'approprier les objets, étant donné qu'il est de principe que déjà avec la signature d'un Traité et avant sa mise en vigueur, il existe pour les parties contractantes une obligation de ne rien faire qui puisse nuire

au Traité en diminuant la portée de ses clauses. (Voir Fauchille, *Traité de droit international public*, ed. 1926, t. 1, partie III, p. 320).

The tribunal added that it was interesting to observe that this principle—"which in substance is only a manifestation of the good faith which is the basis of all law and every convention—has received a certain number of applications in treaties and other analogous acts, among others a treaty recently concluded between Turkey and Italy."

In the *Case concerning Certain German Interests in Upper Silesia*, decided by the Permanent Court of International Justice, it was argued on behalf of Poland (*Publications of the P. C. I. J.*, Series C, No. 11, Vol. 2, pp. 631-632), that the alienation of certain property by Germany between the date of signature of the Treaty of Versailles (June 28, 1919) and the coming into force of the treaty (January 20, 1920) was illegal because it was in violation of the principle that "the contracting States ought not during the period of time between the date of the signature and that of the coming into force of the treaty do anything which might prejudice or render impossible the future execution of the treaty." The court did not find it necessary to express an opinion on the question of the duty of signatories to abstain between signature and ratification from taking action which would render impossible or more difficult the execution of a treaty. As to Poland's contention and the question at issue the Court said:

In the last place, Poland has contended that the transaction by which the transfer of the Chorzów factory from the Reich to the Obersehlische was effected, took place at a date when the Treaty of Versailles was signed though not yet in force, and has argued from this that as, in her opinion, the Treaty of Versailles did not permit Germany to alienate property, the action of the German Government in selling property situated in the territory included in the cession and placing the value of this property outside this territory was contrary to international law, which is essentially based on the good faith of the contracting Parties.

As regards this argument, the Court may confine itself to observing that, as, after its ratification, the Treaty did not, in the Court's opinion, impose on Germany such obligation to refrain from alienation, it is, *a fortiori*, impossible to regard as an infraction of the principle of good faith Germany's action in alienating the property before the coming into force of the Treaty which had already been signed.

In these circumstances, the Court need not consider the question whether, and if so how far, the signatories of a treaty are under an obligation to abstain from any action likely to interfere with its execution when ratification has taken place. (*Ibid.*, Series A, No. 7, pp. 39-40.)

Anzilotti cites this case, apparently to support his view stated above as to the duty of abstention on the part of signatories prior to ratification (1 *Cours de Droit International*, 1929, p. 372).

Treaties sometimes expressly provide, or the signatories otherwise agree, that during the interval between signature and ratification they will not take action which would be in contravention of the stipulations of the treaty

as signed. Thus Article 38 of the General Act of Berlin of February 26, 1885, after having provided that the Act should be ratified within at least one year and that it should come into force for each State from the date of its ratification, added: "In the meantime the signatories of this Act pledge themselves not to adopt any measure which would be contrary to the stipulations of the said Act." 10 Martens, *Nouveau Recueil Général* (2d ser.), p. 414. Similarly, by a protocol to the Convention on the Control of Trade in Arms and Ammunition signed at St. Germain-en-Laye, September 10, 1919, the plenipotentiaries signing the convention declared that "they would regard it as contrary to the intention of the High Contracting Parties, and to the spirit of this Convention that, pending the coming into force of the convention, a contracting party should adopt any measure which is contrary to its provisions." 1 Hudson, *International Legislation* (1931), p. 343. It would perhaps be going too far to say that the principle laid down in these two treaties expresses what, apart from treaty provisions, is the general understanding as to the duty of signatories prior to ratification; but the fact that treaties sometimes contain such provisions indicates that there are treaties to which the application of the principle is recognized as desirable. The two instruments mentioned belong to that class of treaties already described, in which there were special circumstances which would have impaired the utility of the treaty or defeated its object or made execution more difficult, if prior to and pending ratification some of the signatories had taken action contrary to the stipulations of the treaty. In the case of these two treaties the obligation of abstention was either fixed by the treaty itself or by an agreement embodied in a protocol annexed to the treaty, and, as Fauchille points out (1 *Traité de Droit International*, pt. 3, 1926, p. 320), had a signatory violated the agreement it would have been liable in damages to the other parties for its conduct.

Article 9 of this Convention lays down much the same general principle to be applied to similar situations for which the treaties themselves or agreements collateral thereto do not impose an obligation of abstention. Manifestly, however, all States which should become parties to this Convention would not be under the same sort of obligation as that created by the two above-mentioned treaties, because the obligation created by those treaties was a *legal* one for violation of which a State is responsible, whereas that established by the present Convention is that of *good faith* merely, for violation of which there is no legal sanction. There is also another important distinction between the rule laid down by this Convention and the obligation created by the two treaties mentioned, namely, that they forbid *any* action which would be contrary to the provisions of the treaty, whereas the present Convention envisages only such action as would render performance by a signatory of the obligations stipulated for impossible or more difficult. It is quite conceivable that certain action which would be contrary to the provisions of the treaty would not necessarily render performance impossible

or more difficult; nevertheless the former action is forbidden by the two treaties referred to, whereas only the latter is envisaged by the present Convention. The obligation created by this Convention is therefore less broad and sweeping than that established by those treaties.

ARTICLE 10. DATE OF COMING INTO FORCE

Unless otherwise provided in the treaty itself,

(a) A treaty which is not subject to ratification shall come into force on the date of signature.

COMMENT

The phrase "come into force" as used in this article has reference to the date when the stipulations of the treaty become legally binding on the parties in their relations with one another, unless they are bound by the provisions of a general convention which subordinates the treaty's becoming binding to the performance of some posterior act such as registration or publication (*e.g.*, Article 18 of the Covenant of the League of Nations and Article 17 of the present Convention). The phrase is often used interchangeably with the expression "take effect" or "go into effect" or "become effective" and sometimes with the phrase "become operative" (*e.g.*, the Convention for the Amelioration of the Condition of the Sick and Wounded of Armies in the Field, signed at Geneva July 6, 1906 (Article 30). The formula used in French is usually *mettre en vigueur* or *entrer en vigueur*.

The date upon which a treaty comes into force or takes effect is not, however, necessarily that upon which it becomes operative in the sense that its stipulations become applicable or its obligations become performable. The latter date will depend upon the terms of the treaty and may, in fact, be subsequent to the former. Thus a treaty for the cession of territory or the delivery of commodities may come into force as an international engagement, for example, on January 1 of a certain year, although the obligation of cession or delivery may not exist until a later date. See 1 Hudson, *International Legislation* (1931), pp. liv-lv, and Mahaim, "*Les Conventions Internationales du Travail*," 11 *Revue de Droit International et de Législation Comparée* (1930), 3rd Ser. p. 127 ff. Likewise treaties, the execution of which is, by their own terms, dependent upon the enactment of legislation by the parties, do not become operative or applicable until such legislation has been enacted, although they may come into force on a date prior thereto.

When a treaty requires a series of legislative enactments to take place after exchange of ratifications before it can become operative, it will take effect as a national compact, on its being proclaimed, but it cannot become operative as to the particular engagements until all the requisite legislation has taken place. Davis, Notes, United States Treaty Volume (1776-1887), 1228, citing Cushing, Atty. Gen., 6 Op. 750. 5 Moore, *Digest of International Law* (1906), p. 246.

In those countries where, under the municipal law, treaties do not have the force of law and are not, therefore, applicable by the courts or other authorities until they have been "transformed" into the body of municipal law, the situation results that while treaties may come into force internationally on a fixed date they do not become operative and enforceable internally until a later date. See the comment on Article 23. But such provisions of municipal law have no international significance and do not affect the duty of performance which begins on the date when the treaty by its own terms comes into force.

On the other hand, while treaties may become "operative" on a date subsequent to that on which they "come into force", they or certain of their stipulations may become operative prior to the latter date. Sometimes in fact treaties which by their own terms fix a date subsequent to signature, on which they shall come into force, expressly provide that certain of their stipulations shall be performable as from the date of signature. It may be remarked in this connection that treaties often contain provisions which do have a certain juridical effect from the date of signature even though they do not come into force until a later date. Thus, provisions relating to ratification and the exchange or deposit of ratifications are applicable before a treaty comes into force, in the sense that such provisions are operative and must be complied with before the treaty can come into force. Likewise, provisions determining what States may accede to a treaty and laying down the conditions under which an accession will be effective are in a sense "operative" before the date fixed for the taking effect of the treaty. The same may be said of treaty provisions which require instruments of ratification to be deposited with a certain government or international office such as the Secretariat of the League of Nations or the Director General of the Pan American Union. This has been clearly pointed out by M. Nisot in an article entitled "*La Force Obligatoire des Traités Signés, Non encore Ratifiés*," in 57 *Journal du Droit International* (1930), p. 878 ff.

The effect of the phrase "unless otherwise provided in the treaty itself," which precedes and qualifies each of the three paragraphs of this article, is to restrict the application of the rules laid down in the article to those cases only in which the treaty itself does not expressly fix the date of its coming into force, independently of ratification. In short, the article is intended to provide a solution only when the parties to a treaty themselves have not done so. In the first place, a treaty may contain no provision at all regarding the date when it shall come into force. Considering the importance of inserting in every treaty a stipulation fixing precisely the date upon which it shall take effect or indicating the condition or circumstances the happening of which will bring it into force, it is surprising that the draftsmen of treaties have often overlooked or ignored this importance. Thus, none of the Hague Conventions of 1899 contained any provisions relative to the date of their coming into force, although they were subject to ratification. Likewise,

some of the conventions adopted at Havana on February 20, 1928, by the Sixth International Conference of American States contain no provisions as to the date of their taking effect, although they provide for their submission to ratification, for the deposit of ratifications with the Pan American Union at Washington, and for notification to the signatory governments by the Union of the deposits. This was true, for example, of the Conventions on the Status of Aliens, on Treaties, on Diplomatic Officers, on Consular Agents, on Maritime Neutrality, on Asylum, and on Rights and Duties of States in the Event of Civil Strife. There is uncertainty as to the date of their coming into force. Hudson (4 *International Legislation* (1931), p. 2375), though admitting that the date is uncertain, thinks it "should probably be considered" as the date of the notification of the deposit of the second ratification. The conventions adopted by the Seventh International Conference of American States at Montevideo in December, 1933, were, in this respect, an improvement over those of 1928, all of them containing express provision as to the date when they were to come into force. Texts in 28 *American Journal of International Law* (1934), Supp., p. 61 ff.

The Pan American Sanitary Convention signed at Havana, November 14, 1924 (2 Hudson, *International Legislation* (1931), p. 1508), contained no provision either for the date of its coming into force or for exchange or deposit of the ratifications. The defect was cured by an additional protocol (*ibid.*, p. 1531). The provisional convention regarding air traffic between Belgium and Switzerland, signed at Brussels June 13, 1922, contained no provision for ratification, exchange of ratifications, or the date of coming into force, although it appears that in fact it was ratified and that the ratifications were exchanged August 1, 1922, the convention taking effect on the latter date (12 *League of Nations Treaty Series*, p. 295). The convention regarding nationality, between Albania and Greece, signed October 13, 1926, provided for an exchange of ratifications, but fixed no date for its coming into force, a defect which was cured by an additional protocol signed November 10, 1928 (83 *ibid.*, p. 369).

Of the various code projects that have been proposed, those of Field and Liszt are entirely silent as to the date of the coming into force of treaties. Of those which deal with the matter, all of them do so in an incomplete and unsatisfactory manner. Thus Bluntschli's draft (Article 421) lays down only the rule that when a treaty has been ratified, it takes effect, unless it provides otherwise, from the date of the signature of the final protocol by the plenipotentiaries of the contracting States. Fiore's draft (Article 773) provides simply that a treaty shall take effect "only from the time it can be considered legally perfect," and (Article 774) when ratification is necessary "it shall take effect only after ratification." The Havana Convention on Treaties, of February 20, 1928 (Article 8), provides that "treaties shall become effective from the date of exchange or deposit of ratifications, unless some other date has been agreed upon through an express provision." It

lays down no rule as to the date of the coming into force of treaties which are not subject to ratification.

Many treaties, however, contain express provision as to the date when they shall come into force, although it must be said that such provisions are sometimes so ambiguous and lacking in clearness that it is difficult or impossible to determine what was the date intended by the negotiators. As a result, controversies between the parties have not been unknown. As an example of many such provisions which might be cited, attention may be called to the final protocol of the Third International Opium Conference signed at The Hague June 25, 1914, fixing the date of the coming into force of the International Opium Convention of January 23, 1912. 3 *Treaties, etc., between the United States and Other Powers*, p. 3039; 107 *British and Foreign State Papers*, p. 341.

The dates fixed by such provisions vary greatly. In the case of bipartite treaties which are subject to ratification, it is sometimes provided that they shall come into force on ratification by both signatories, which means that they will come into force on the date of the last ratification. But sometimes it is provided that they shall come into force on a fixed date subsequent to their ratification, or upon the expiration of a specified number of hours or days thereafter, or upon the date of the exchange of ratifications or on a fixed date subsequent thereto.

In the case of multipartite treaties, for which a deposit of ratifications rather than exchange is now usually required, it is a common practice to provide that they shall come into force upon the deposit of the ratifications of all the parties, or of the ratifications of a certain number of them (sometimes as few as two or three), or upon the date of the *procès-verbal* recording the fact of deposit of a certain number of ratifications, or upon a fixed date following the closure of the *procès-verbal*.

It is sometimes provided in the case of multipartite treaties that they shall come into force for each signatory Power, upon the date of the deposit of its ratification, or upon the expiration of a certain period (*e.g.*, 40 days) from the date of the deposit of its ratification. Such instruments come into force, therefore, on different dates for different parties. *Cf.* in this connection, Hudson (1 *International Legislation* (1931), p. liv), who remarks:

In multipartite instruments, it is frequently provided that the deposit of a certain number of ratifications will bring the convention into force; this has the disadvantages that most of the states ratifying cannot know immediately when they become bound, and that in some instances, notably that of the Arms Traffic Convention of September 10, 1919, the states first depositing their ratifications may be those least affected by the terms of the instrument. In some instruments, also, it is provided that the instrument shall come into force for each state on the date of its ratification; or on the date of the deposit thereof. This may have the wholly unintended result of making only one state bound, when a consensual transaction was contemplated, and it is a form of

draftsmanship which is to be condemned. It would seem the most desirable provision in a multipartite instrument, where circumstances permit, that it is to come into force a certain number of days after the deposit of a certain number of ratifications.

As to the disadvantages referred to by Hudson, see also Dupuis "*Les Relations Internationales*," 2 *Recueil des Cours* (1924), p. 330, and 1 Hoijer, *Les Traités Internationaux* (1928), p. 142.

In the case of the draft conventions adopted by the International Labor Conference, it is usually provided that they shall come into force upon the date of the issuance of notification by the Secretary-General of the League of Nations that the ratifications of the required number of members of the International Labor Organization have been registered with the Secretariat. Thereafter the conventions come into force for any member on the date on which its ratification is registered with the Secretariat. Unlike bipartite treaties, they may therefore have a number of dates of effectiveness which are not the same for all parties.

In the case of certain conventions concluded by conferences called or held under the auspices of the League of Nations, the instruments of ratification are required to be transmitted to the Secretary-General and deposited in the archives of the Secretariat, it being provided that the convention shall come into force upon the date of the receipt by him, or upon a certain date thereafter, of the fifth, sixth, or some other ratification. Thus the date of effectiveness is made to depend upon the state of the ratifications. See, *e.g.*, the Barcelona Convention of April 20, 1921, on freedom of transit (1 Hudson, *op. cit.*, p. 625), and the Barcelona Convention of the same date on the régime of navigable waterways of international concern (1 *ibid.*, p. 638), and the Convention of November 3, 1923, on the simplification of customs formalities (2 *ibid.*, p. 1094).

The provisions of the Treaty of Versailles relative to the coming into force of that treaty were somewhat unusual. A first *procès-verbal* was to be drawn up as soon as the treaty had been ratified by Germany on the one hand, and by three of the Principal Allied and Associated Powers on the other hand. The treaty was then to come into force as from the date of the *procès-verbal* as between the parties which had ratified it. For the determination of all periods of time provided for in the treaty this date was to be the date of the coming into force of the treaty. In all other respects the treaty was to come into force for each State on the date of the deposit of its ratification. The date of the *procès-verbal* referred to above was January 10, 1920, which was the date on which the treaty came into force.

Many treaties which provide for their ratification fix the precise date on which they shall come into force without regard to the state of the ratifications. An example was the Universal Postal Convention signed at London on June 28, 1929, which by the terms of Article 81 was to become effective on July 1, 1930. Manifestly, whether a treaty in such a case would come

into force on the date thus fixed will usually depend upon whether the required number of ratifications, or exchanges or deposits, have been made. This may result, however, in the anomalous situation of a treaty coming into force, theoretically at least, before it has been ratified, in case it is a treaty subject to ratification, or before it has received the required number of ratifications or before the ratifications have been exchanged or deposited, if that is required. In such cases the treaty provision fixing the date of its coming into force must yield, it would seem, to the provisions relative to ratification.

Sometimes treaties expressly provide that they shall take effect from the date of signature (see some examples mentioned by Hoijer, 1 *Les Traités Internationaux*, 1928, p. 138). A recent example of such a treaty was that between Persia and the Soviet Union, signed at Moscow February 26, 1921. 9 *League of Nations Treaty Series*, p. 384. The treaty of peace between the United States and Spain, signed December 10, 1898, established for both parties certain obligations which were to be performed upon the signature of the treaty. See Articles 5 and 6. 2 Malloy, *Treaties, etc.*, p. 1690. The treaty specified no date when it should come into force, but it was held by the United States and British Arbitration Commission under the Special Agreement of August 18, 1910, that the other provisions of the treaty took effect on the date of the exchange of ratifications. See the case of the *Iloilo Claims*, Nielsen's *Report, American and British Claims Arbitration* (Washington, 1926), p. 403.

Occasionally, a treaty provides that it shall come into force only upon the taking place of a certain event. Thus the Protocol on the Pacific Settlement of International Disputes, opened for signature on October 2, 1924, was to come into force only when plans for a reduction of armaments should have been agreed upon at an international conference for which the protocol provided (Article 21). 2 Hudson, *International Legislation* (1931), p. 1378. The Locarno Treaty of mutual guarantee, signed October 16, 1925, provided (Article 10) that it should come into force only when Germany had become a member of the League of Nations. 3 Hudson, *op. cit.*, p. 1695. The treaty for the preservation and protection of fur seals, signed at Washington, July 7, 1911, provided that its first five articles should "go into effect" as soon as, but not before, an international agreement should be concluded and ratified by the governments of the United States, Great Britain, Japan and Russia, by which each of those States should undertake to prohibit for a period of not less than 15 years its own nationals and all persons subject to its laws and treaties, from engaging in pelagic sealing in certain parts of Behring Sea and the North Pacific Ocean, and effectively to enforce such prohibition. 3 *Treaties, etc., between the United States and Other Powers* (1923), p. 2632. See also the final protocol to the convention of March 14, 1884, for the protection of submarine cables (2 Malloy, *Treaties, etc.*, p. 1959), and the commercial reciprocity convention between the United States and Mexico, signed January 20, 1883, Article 8 of which provided that it should "take

effect as soon as it has been approved and ratified by both contracting parties according to their respective constitutions; but not until the laws and regulations that each shall deem necessary to carry it into operation, shall have been passed both by the government of the United States of America and by the government of the United Mexican States." 1 *ibid.*, p. 1151.

Occasionally, though rarely, the date of coming into force is left to be fixed by subsequent agreement between the parties. See, *e.g.*, the agreement of May 14, 1884, between the United States and Siam regulating the liquor traffic in Siam (2 Malloy, *op. cit.*, p. 1639); and the Convention of March 14, 1884, for the Protection of Submarine Cables, 2 *ibid.*, p. 1954.

Not infrequently treaties provide that they shall take effect only upon publication or promulgation according to the laws of the respective parties, or upon a certain fixed date thereafter. Among numerous examples see Malloy, *op. cit.*, pp. 1270, 1531, 1784, 2107, and 265. . If, in the absence of such a provision, the law or practice of a particular State requires publication as an essential condition of the treaty's becoming a part of the law of the land, such requirement has no international effect. See Miller, 1 *Treaties and Other International Acts of the United States* (1931), p. 19, who remarks that "the law or practice of a particular country may require promulgation of the treaty in one form or another but unless promulgation is specially provided for in the treaty, the absence of such usage or requirement, or even the omission to carry out the requirement when it exists, is of no significance as to the international obligation of the treaty."

Reference may be made in this connection to the extradition treaty of December 22, 1931, between the United States and Great Britain, Article 18 of which provided that it should "come into force" 10 days after its publication in conformity with the forms prescribed by the laws of the high contracting parties. No "form" is prescribed by the laws of the United States for the publication of treaties; the British Extradition Act of 1870 provides that the Act shall apply to a foreign State with which an extradition arrangement has been made, only when the Act is directed to apply to such State by an Order in Council reciting the terms of the arrangement. When the extradition case of *Factor v. Laubenheimer and Hazard* came before the Supreme Court of the United States in 1932 (290 U. S. 276), the Order in Council envisaged by the Act of 1870 had not been issued by the British Government, although the ratifications had been exchanged, and the treaty had been proclaimed by the President of the United States. It was argued by counsel for the petitioner that the treaty had not come into force, but the majority of the court found it "unnecessary to determine whether or not the treaty as suggested in the argument is now in force and binding on the United States although not binding on Great Britain until proclaimed by an Order in Council." The distinction referred to earlier in this comment between the date of the coming into force of a treaty between the parties, and the date when its obligations become performable was manifestly not

applicable in this case. In view of the provision referred to in the treaty, it would seem that it had not come into force at the time the Factor case was decided by the Supreme Court. See in this sense the conclusion of Hudson, "The Factor Case and Double Criminality in Extradition," 28 *American Journal of International Law* (1934), p. 276, n. 10.

Occasionally, treaties provide that certain of their articles shall come into force on different dates. Thus, some may be declared to take effect from the date of signature while others are to take effect at some subsequent date, e.g., the date of ratification or the exchange of ratifications. Such was the Treaty of Rapallo, signed April 16, 1922, by Germany and the Soviet Union, Articles 1b and 4 of which were to come into force only upon ratification of the treaty, whereas the other articles were to take effect immediately. 12 Martens, *Nouveau Recueil Général* (3d Ser., 1923), p. 70. Similarly, upon the signature of the convention for the pacification of the Levant, signed at London July 15, 1840, the plenipotentiaries of Austria, Great Britain, Prussia, Russia, and Turkey agreed by a protocol that the preliminary measures referred to in Article 2 of the convention should be put into effect at once without waiting for the exchange of ratifications, at which time the other provisions of the treaty were to come into force. 2 Hertslet, *Map of Europe by Treaty* (1875), p. 1022.

The treaty concerning the Archipelago of Spitzbergen, signed at Paris February 9, 1920, provided that it should come into force, in so far as the stipulations of Article 8 were concerned, from the date of its ratification by the signatory Powers, but that in all other respects it should come into force on the date of the enactment by Norway of certain mining regulations. 1 Hudson, *International Legislation* (1931), p. 436. It actually came into force at noon August 14, 1925, the date of the taking effect of the Norwegian legislation referred to. 13 *Bulletin de l'Institut Intermédiaire International* (1925), p. 214.

In the case of International Labor Conventions, to which there are no signatories, it is usually provided that they shall come into force on the date on which the ratifications of two members of the International Labor Organization have been registered with the Secretary General of the League of Nations, or, as is the case with some of the later conventions, 90 days or 12 months after such registration. Thereafter the convention comes into force for any other member on the date on which its ratification has been registered, or, as in the case of the later conventions referred to above, 90 days or 12 months thereafter. See, as to the date when International Labor Conventions come into force, Morellet, in 16 *International Labour Review* (1927), p. 760; Teltsik, "Ratification of International Labour Conventions," 18 *ibid.* (1928), p. 714.

Such of the Havana Conventions of 1928 as contain provisions relative to the date of their coming into force fixed varying dates therefor. Thus the Convention on Commercial Aviation was to come into force for each signa-

tory State ratifying it, in respect to other States having already ratified it, 40 days from the deposit of its ratification. The Convention on Literary and Artistic Copyright was to take effect as between the signatories having ratified it, three months after the communication of their ratifications to the Government of Cuba. The Convention on the Pan American Union was to take effect only when all the States represented at the conference which adopted the convention should have received notice that all the ratifications had been deposited with the Pan American Union, and when the accessions or ratifications of the 21 American Republics had been received.

It will be seen from this review of the practice that the stipulations which treaties contain in regard to the date of their coming into force, when they contain any stipulations at all on the subject, are far from being uniform and frequently they are not in accord with the rules laid down in this Convention. But the parties to treaties are entirely free to fix any date they choose for the coming into force of the treaties which they enter into. Article 10 of this Convention in no way restricts their freedom in this respect. The rules which it proposes apply only when the treaties themselves do not fix the date of their coming into force. If they contain such a provision, that provision governs and the rules here proposed have no application.

Paragraph (a) is intended to lay down a rule concerning the date of the coming into force of a particular class of treaties which do not by their own terms otherwise provide, namely, signed treaties which are not subject to ratification. If the treaty is unsigned, the rule of paragraph (a) manifestly could not apply, since there would be no date of signature. Examples of unsigned treaties not subject to ratification are, however, likely to be so rare as to render practically unnecessary the need of a rule governing the date of their entry into force. No examples of the kind are known, and it is hardly likely that such treaties will ever be concluded in the future.

Paragraph (a) provides that the class of treaties which it envisages shall come into force on the date of their signature. Ordinarily, treaties which are signed are signed by all signatories on the same day, and under this paragraph that day would be the date on which they came into force, unless they otherwise provide. The question might arise as to what hour of the day they came into force and it might be a question of considerable importance in the case of armistice agreements and treaties of peace. See Deák, "Computation of Time in International Law," 20 *American Journal of International Law* (1926), p. 502 ff. In the further development of treaty-making procedure it may come to pass that the desirability of making more precise provisions on these points will be recognized.

To the statement made above, however, that treaties are usually signed by all signatories on the same day, there have been exceptions even in the case of bipartite treaties. Thus the Treaty of Amity and Commerce between the United States and Prussia in 1785 was signed by Franklin at Passy on July 9, 1785, by Jefferson at Paris on July 28, by Adams at London on August

5, and by Thulemeier at The Hague on September 10. 2 Malloy, *Treaties*, etc., p. 1486. The date of the last signature was that upon which the treaty was regarded as having been concluded. Cf. 2 Miller, *Treaties and Other International Acts of the United States* (1931), p. 183. Had it not been subject to ratification, it would under paragraph (a), have come into force on the date of the last signature.

[Unless otherwise provided in the treaty itself,]

(b) A treaty which contains provisions for exchange or deposit of ratifications shall come into force upon such exchange or deposit of ratifications by all the signatories.

COMMENT

This paragraph lays down a rule governing the date of the coming into force of a second group of treaties, namely, those which provide for the exchange or deposit of the instruments of ratification but which are nevertheless silent as to the date when they shall come into force. Included in this group would also be those treaties which contain no clause expressly providing for ratification, but which, nevertheless, provide for the exchange or deposit of ratifications. Clearly the requirement of ratification though not expressed results by implication from the stipulation that ratifications shall be exchanged or deposited. Examples of such treaties have not been lacking. Among them may be mentioned the Prussian-American treaty of 1785 referred to above (2 Miller, *op. cit.*, p. 183), the Cape Spartel Lighthouse Convention of 1865 (1 Malloy, *Treaties*, etc., p. 1217), and the treaty of 1905 for the establishment of the International Institute of Agriculture (100 *British and Foreign State Papers*, p. 595).

Treaties which provide for ratification and deposit or exchange of ratifications, but which contain no provision as to the date when they should come into force, have not been uncommon. Among them may be mentioned the treaty of defensive alliance between Albania and Italy, signed November 22, 1927 (69 *League of Nations Treaty Series*, p. 341), the treaty of friendship between the Chinese Republic and the Persian Empire, signed June 1, 1920 (9 *Ibid.*, p. 17), and the Protocol respecting the New Hebrides, signed August 6, 1914 (10 *ibid.*, p. 333). The rule adopted in paragraph (b) is that such treaties shall come into force on the date upon which such exchange or deposit of ratifications is effected by all the signatories. This rule has been approved by nearly all writers on the subject since Vattel, and it is regarded by some as having the force of an established rule of international law. See Phillipson, *Termination of War and Treaties of Peace* (1916), p. 198; see also Hatschek, *Völkerrecht* (1923), p. 229; Barthélemy, 11 *Revue Générale de Droit International Public* (1904), p. 338; Morellet, 16 *International Labour Review* (1927), p. 755 ff; Cavaglieri, 26 *Recueil des Cours* (1929), p. 519; Dupuis, 2 *ibid.* (1924), p. 330; Grimm, 14 *Zeitschrift für Völkerrecht* (1927-28), p. 477 ff; and 1 Fauchille, *Traité de Droit International*, pt. 3 (1926), p. 325.

The rule is also in accord with the jurisprudence. In the *Case concerning Certain German Interests in Upper Silesia* before the Permanent Court of International Justice (*Publications of the P.C.I.J.*, Series A. No. 7), the Polish Government admitted that according to the general principles of the law of nations, the formal entry into force of the treaty of Versailles commenced from the exchange of the instruments of ratification (date of the first *procès-verbal* of the deposit of ratifications presumably meant), and the German Government relied upon this rule as a sufficient answer to the contention made by Poland. *Ibid.*, Series C, No. 11, Vol. II, p. 825.

In the case of *Kotzias v. Tyser* (1920), 2 K. B. 69, the English High Court rejected the contention that the Treaty of Versailles was binding from the date of signature, saying that "the general rule of international law is that . . . peace is not concluded until a treaty of peace is finally binding upon the belligerents, and that stage is not reached until the ratifications of the treaty of peace have been exchanged between them." This decision was followed in *Lloyd v. Bowring* (1920), 36 T.L.R. 397, and in *Rattray v. Holden* (1920), 36 T.L.R. 798.

In the case of the *Iloilo Claims* (1925) before the Anglo-American Mixed Claims Commission set up under the special agreement of August 18, 1910 (Nielsen's *Report, American and British Claims Arbitration*, Washington, 1926, p. 382), it was argued on behalf of the British Government that the treaty of peace between the United States and Spain, signed December 10, 1898 (2 Malloy, *Treaties, etc.*, p. 1690), which provided for an exchange of ratifications (Article 17), but which did not specifically provide when the treaty should come into force, was binding on the United States from the date of signature. This contention was rejected by the commission, which held that the United States was under no duty in respect to the maintenance of order in the Islands until the treaty had been ratified.

The rule of paragraph (b), it will be noted, requires the exchange or deposit of the instruments of ratification of *all* the signatories to bring a treaty into force, unless, of course, the treaty otherwise provides. Exchange or deposit of the ratifications of a less number would not therefore be sufficient. There may be no reason why in particular cases a treaty should not be put into effect as between the ratifying States when it has been ratified or ratifications deposited by a less number than all of the signatories, and treaties often so provide. (*E.g.*, the Conventions for the Amelioration of the Condition of the Sick and Wounded of Armies and for the Treatment of Prisoners of War, signed at Geneva July 27, 1929, were to become effective six months after the deposit of at least two instruments of ratification. 27 *American Journal of International Law*, Supp., p. 56.) But unless a treaty does so provide it would seem to be a reasonable presumption that it was not the intention of the negotiating States that it should come into force when only some of them had ratified it or deposited their ratifications.

On the other hand, treaties sometimes expressly provide that they shall

not come into force until *all* the signatories have ratified or until they have all deposited their ratifications. Even when unanimity is waived by express provision, it is sometimes provided that ratification by certain specified signatories is necessary to bring the treaty into force, such, for example as a majority of the States which are permanent members of the Council of the League of Nations, and a certain number of other States members of the League of Nations (see, *e.g.*, the Geneva Protocol of October 2, 1924, for the Pacific Settlement of International Disputes, Article 21).

[Unless otherwise provided in the treaty itself,]

(c) A treaty which is subject to ratification but which contains no provision for exchange or deposit of ratifications, shall come into force when it is ratified by all the signatories and when each signatory has notified its ratification to all other signatories.

COMMENT

This paragraph lays down a rule for a third group of cases, namely, those arising under treaties which are subject to ratification, but which contain no provision for exchange or deposit of the instruments of ratification. Under this paragraph such treaties come into force when they have been ratified by all the signatories and when each signatory has notified its ratification to all the other signatories.

What has been said above regarding exchange or deposit by all the signatories as a condition of the coming into force of a treaty applies equally to ratification by all the signatories when there is no provision for exchange or deposit of the instruments of ratification. In both cases there must be unanimous acceptance by all the signatories, unless the treaty otherwise provides. In the former case all the signatories must have exchanged or deposited their ratifications; in the latter case ratification by all is required, and each signatory must in addition notify all its cosignatories of its ratification. The desirability of requiring such notice to be given is clear. Without it, the fact of ratification by one signatory could not be officially known to the other signatories. No particular form or medium of notification is required by paragraph (c). Presumably, the notice would be given through the diplomatic channel in the form and manner customarily followed by the particular foreign office of the ratifying State. The date on which the treaty comes into force would naturally be the date of the notification given by the last ratifying signatory.

Usually treaties which, by their own terms, are subject to ratification, expressly provide, as already stated above, either for the exchange or, in the case of multipartite treaties, for the deposit of the instruments of ratification. It is hardly necessary to say that there is no rule of international law which requires the instruments of treaty ratifications to be exchanged or deposited. It is wholly an optional matter with the parties. Grimm, in his summary of German practice (14 *Zeitschrift für Völkerrecht* (1928), p. 477 ff),

lists various treaties between Germany and other Powers which contained no provision for exchange or deposit of ratifications, this formality not having been considered essential. Among treaties which have provided that they should be subject to ratification but which have contained no provision for exchange or deposit of ratifications may be mentioned the Convention on the Establishment of Common Rules of Private International Law, signed at Riga July 12, 1921 (in fact the ratifications were exchanged), 1 Hudson, *International Legislation* (1931), p. 673; and the Money Order Convention of the Pan-American Postal Union, signed at Buenos Aires September 15, 1921 (*ibid.*, p. 726). See also the *League of Nations Treaty Series*, Nos. 278, 282, 283, 291, 304, 498, 1034, for other examples.

The provisions of this article are limited by the provisions of Article 17 of this Convention.

Article 17 provides in effect that no treaty, even though it has come into force, is binding until it has been registered with the Secretariat of the League of Nations or, in case it is one the registration of which with the Secretariat is not required by Article 18 of the Covenant, until it has been communicated to the Secretariat or officially published by one of its parties. See the comment on that article.

ARTICLE 11. RETROACTIVE EFFECT

Unless otherwise provided in the treaty itself, a treaty which comes into force subsequently to the date of signature shall not be deemed to have retroactive effect as from the date of signature.

COMMENT

This article is intended to be a definite rejection of the rule supported by some writers on international law and some courts, particularly those of the United States, that treaties which by their own terms come into force upon a date subsequent to their signature, for example, upon ratification or upon the exchange or deposit of the instruments of ratification, nevertheless take effect retroactively as from the date of signature. The phrase, "unless otherwise provided in the treaty itself," restricts the application of the provision to those cases in which a treaty does not by its own terms provide that it shall take effect retroactively as from the date of signature. Treaties which so provide have been rare. The rule here proposed enunciates what is believed to be a sound and logical principle, namely, that treaties are binding on the parties only from the date upon which they come into force; that is, they should operate prospectively and not retroactively, unless they expressly provide otherwise.

The rule which the present article condemns is thus stated by Moore (5 *Digest of International Law*, 1906, p. 244), on the basis of American doctrine and jurisprudence: "A treaty is binding on the contracting parties,

unless otherwise provided, from the date of its signature, the exchange of ratifications having, in such case, a retroactive effect, confirming the treaty from that date." This rule was so generally supported by the older writers that F. de Martens was able to declare some fifty years ago that it was one which was "universally recognized and accepted as an axiom by all authors who have written on international law." 1 *Traité de Droit International* (Léo trans., 1883), p. 525. Pradier-Fodéré, about the same time, while criticizing the rule, as did de Martens, made a similar affirmation regarding the universality of its acceptance. 2 *Traité de Droit International Public* (1885), p. 793. The rule was defended by Wheaton, who declared that "every treaty is binding on the contracting parties from the date of its signature, unless it contain an express stipulation to the contrary. The exchange of ratifications has a retroactive effect, confirming the treaty from its date." *Elements of International Law* (Lawrence's ed., 1863), p. 453. Bluntschli embodied the rule in his draft (Article 421). He said:

Cette règle est l'expression d'un usage reçu par les nations. Elle se fonde sur le fait qu'au moment de la signature du traité, la position respective des états est définitivement régularisée; la ratification, qui survient quelques jours plus tard, a seulement pour but de lever le dernier obstacle à l'exécution immédiate du traité.—La ratification doit donc être considérée comme ayant eu lieu, de la volonté des parties, à l'instant de la signature du protocole définitif. (*Droit International Codifié*, Lardy trans., 1880, p. 252.)

See, in the same sense, Klüber, *Droit des Gens Moderne de l'Europe* (1831), sec. 87; 1 Calvo, *Droit International* (5th ed., 1898), p. 660; 2 Mérignhac, *Traité de Droit Public International* (1907), p. 667; 1 Twiss, *Law of Nations* (1884), sec. 251; Woolsey, *International Law* (6th ed., 1899), p. 171; Wharton, *International Law Digest* (1886), sec. 132; Taylor, *International Public Law* (1901), p. 389; Hershey, *Essentials of International Public Law* (rev. ed., 1927), p. 444; 2 Hyde, *International Law* (1922), p. 49; G. F. de Martens, 1 *Précis du Droit des Gens Moderne de l'Europe* (Vergé trans., 1864), sec. 48; and, with qualification, Crandall, *Treaties, their Making and Enforcement* (2d ed., 1916), p. 344. It should be said, however, that some of these writers limit the rule of retroactivity to cases where the treaty deals with public as contradistinguished from private or individual rights. Lawrence (*Principles of International Law*, 7th ed., p. 300) says: "But when a treaty is ratified, its legal effects are held to date from the moment of signature, unless, as was the case with the treaty of Paris of 1856, it is agreed that they shall come into force from the moment of ratification." He recognizes an exception, however, in the case of treaties of cession, as to which he says, "it is undoubted law that they commence to operate from the actual transfer of the ceded territory." The rule as to retroactivity also has the support of two other English writers of high repute, Westlake and Hall, although the former limits the principle of retroactivity to treaties or treaty provisions affecting "public rights," while

Hall restricts it to "effects which are capable of being retroactive, such as the imposition of national character upon ceded territory." 1 Westlake, *International Law* (1910), p. 291; Hall, *International Law* (6th ed., 1909), p. 326.

American courts have, from the beginning, recognized and applied the rule of retroactivity. In the case of *Hylton's Lessee v. Brown* (1806), 1 Washington C. C. 298, 343, a United States Circuit Court first enunciated and applied it. It held that, even admitting that the preliminary treaty of peace between Great Britain and the United States, which was signed on November 30, 1782, and which was to come into force when a treaty of peace had been concluded between Great Britain and France (which was in fact signed on January 20, 1783, and ratified on February 3 of the same year), did not come into force until the date of ratification of the Anglo-French treaty, it nevertheless operated retroactively from the date of signature, ratification being nothing more than "evidence of the authority under which the ministers acted." The only authority relied upon by the court in support of its conclusion was that which it deduced from Grotius, Vattel and G. F. de Martens. An examination of the work of Grotius fails to reveal any authority in support of the view of the court; in fact, Grotius does not appear to have discussed the question of the date when treaties come into force. The only statement of Vattel which bears on the subject is that "the treaty of peace binds the contracting parties from the moment it is concluded and has passed through the formalities attending its acceptance"; he expresses no opinion on the question of the retroactive effect of treaties. *Droit des Gens*, Bk. IV, Ch. 3, sec. 24 (*Classics of International Law*, Fenwick trans., p. 352). The only one of the three writers relied upon by the court, who had expressed a definite opinion on the matter was G. F. de Martens, who, in his *Précis du Droit des Gens*, first published in 1788, after referring to the "general maxim that public conventions do not become obligatory until ratified" declared: "but when the ratifications have been exchanged they render the treaty obligatory from the date of signature, in the absence of an express stipulation to the contrary." Vol. 1, sec. 48. The authority thus relied upon by the court was so scant as to justify the conclusion that the rule applied by it was its own invention.

In 1832 the Supreme Court of the United States, in the case of *United States v. Arredondo* (6 Peters, 691), affirmed the rule laid down by the Circuit Court in *Hylton's Lessee v. Brown*, but subject to the limitation that it applied only in so far as treaties are international compacts and deal with the rights or obligations of the parties as such. That is to say, they were to be deemed as operating retroactively as from the date of signature only in so far as they related to the mutual rights and obligations of the parties as States, but not in so far as they affected individual or private rights. The court said: "But the ratification by the United States was in February following and the treaty did not take effect till its ratification by both parties

operated like the delivery of a deed to make it the binding act of both. That it may and does relate back to its date of signature as between the two governments so far as respects the rights of either under it may be undoubted, but as respects individual rights in any way affected by it a very different rule ought to prevail."

The rule of retroactivity was reaffirmed in 1850 by the Supreme Court of the United States in the cases of *United States v. Reynes* (9 Howard, 127) and *Davis v. Police Jury of Concordia* (9 Howard, 280), which involved the date of the taking effect of the Treaty of San Ildefonso of October 1, 1800, by which Spain ceded Louisiana to France, and also of the treaty of April 30, 1803, by which France ceded the same territory to the United States. In the former case the Supreme Court said: "In the construction of treaties the same rules which govern other compacts properly apply. They must be considered as binding from the period of their execution [*i.e.*, the date of signature]; their operation must be understood to take effect from that period unless it shall, by some condition or stipulation in the compact itself, be postponed." This treaty between the United States and France therefore operated from its date of signature. The opinion of the court in the *Reynes* case regarding the retroactivity of treaties was really not essential to the decision of the question at issue and must therefore be regarded as *obiter*. In the case of *Davis v. the Police Jury of Concordia*, the Supreme Court cited Vattel and Martens as authority for its view that it was a rule of international law that treaties which are subject to ratification operate from the date of signature, as did the Circuit Court in the case of *Hyllon's Lessee v. Brown*. It also cited the case of *The Fama* decided by Lord Stowell in 1804 (5 C. Rob. 106), but an examination of that case shows that his Lordship did not hold that a treaty operates retroactively as from the date of its signature.

In *Haver v. Yaker*, decided in 1869 (9 Wall. 32), the Supreme Court reaffirmed the rule as limited in the *Arredondo Case*, namely, that treaties operate retroactively as from the date of signature except as regards private rights. As to the principle of retroactivity the court said:

It is undoubtedly true, as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. Wheaton's International Law, by Dana, 336, bottom paging. But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this Court, in *Arrendondo's Case*, reported in 6 Pet. 749. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the Federal Constitution [article 6] declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it.

But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the treaty under consideration. As the individual citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned.

The principle of retroactivity has more recently been affirmed by American courts. See, among other cases that might be cited, *Shepard v. Northwestern Life Insurance Company* (1889), 40 Fed. Rep. 341; *Dooley v. United States* (1901), 182 U. S. 222; *United States v. Grand Rapids* (1908), 165 F. 297; *Armstrong v. Bidwell* (1903), 124 Fed. Rep. 690; and *San Lorenzo Title and Improvement Co. v. City Mortgage Co.* (1932), 48 S.W. (2d) 310 (Texas Court of Civil Appeals). The United States Court of Claims has approved the rule in *Beam v. United States* (1907), 43 Ct. Cl. 61, and *McLeod v. United States* (1910) 45 Ct. Cl. 339.

It will be seen from this review that the doctrine of retroactivity is well established in American jurisprudence, although for the most part the courts have applied it to treaties only in so far as they relate to the reciprocal rights and obligations of the parties as States, and have denied its application in the case of treaties or treaty provisions which relate only to individual rights. Hyde (2 *International Law*, 1922, p. 49) thus states the rule:

It is laid down as a rule of the law of nations, that in the absence of special agreement, a treaty upon the exchange of ratifications operates retroactively, as from the date of signature. This is said to be true, however, only so far as the agreement concerns the relations between State and State. With respect to the rights of private individuals, the date of operation, unless otherwise specified, is regarded as simultaneous with that of the exchange of ratifications. A treaty does not operate retroactively so as to affect vested rights acquired before the compact was concluded or signed by the signatory parties.

Butler (2 *Treaty-Making Power of the United States*, 1902, p. 127) states it as follows:

The rule in this respect can be broadly stated to the effect that a treaty takes effect when the ratifications are exchanged, but that as to the contracting governments the treaty relations are supposed to date back to the date when the plenipotentiaries concluded it. . . . It has, therefore, been held that private rights are not affected by a treaty until the delivery has actually taken place, as individuals are not entitled to rely on the provisions of a treaty until every formality has been complied with, and the treaty actually proclaimed by the executive as a law. As to the contracting governments, however, the rule appears to be different, and the relations are to be considered as established on the basis of the treaty from the time that the treaty is concluded; this is, of course, subject to the possibility of non-ratification, but the ratification

when completed is to be considered as having a retroactive effect and dating back to the day of the conclusion of the treaty by the plenipotentiaries. . . .

See also the opinions of various Secretaries of State and Attorneys General in Moore, 5 *Digest of International Law* (1906), p. 244 ff. Attention may be called especially to the following from a communication of Secretary of State Hay to the United States Minister at Bogotá on January 5, 1904 (*U. S. Foreign Relations*, 1903, p. 299): "The Department is not disposed to controvert the principle that treaties are not definitely binding till they are ratified; but it is also a familiar rule that treaties, except where they operate on private rights, are, unless it is otherwise provided, binding on the contracting parties from the date of their signature and, that in such cases the exchange of ratifications confirms the treaty from that date."

This doctrine has found little support outside the United States. F. de Martens, who in 1883 admitted that the rule as to retroactivity was universally recognized and accepted, criticized it for its "absolute lack of logic." If, he said, an international convention before ratification is only a *projet* of an engagement or a simple promise without juridical value, it is evident that it ought not to take effect from the date of signature, an act which does not give it an obligatory character. (1 *Traité de Droit International*, p. 525.) Pradier-Fodéré (2 *Traité de Droit International Public*, 1885, p. 793) quoted Martens' criticism with approval. Geffcken (note on Heffter, *Droit International*, 1883, p. 202), pronounced the principle of retroactivity to be inadmissible in the absence of a stipulation in the treaty to the contrary. De Louter (1 *Droit International Public Positif*, 1920, p. 493) expresses the same opinion. He admits that nearly all the older authors hold the contrary view, but that view, he declares, is "the logical result of an erroneous conception which regards ratification as a suspensive condition of the obligatory character of a treaty rather than an essential element." Fauchille (1 *Traité de Droit International*, pt. 3, 1926, p. 319) adopts the same view and so do Rivier (2 *Principes de Droit des Gens*, 1896, p. 79), Hoijer (1 *Les Traités Internationaux*, 1928, p. 137), Despagnet (*Cours de Droit International Public*, 1910, p. 534), Piédelièvre (*Précis de Droit International Public*, 1894, p. 285), Teltsik (18 *International Labour Review*, 1928, p. 729), Strupp (*Eléments de Droit International Public*, Blociszewski trans., 1927, p. 181), and Liszt (*Le Droit International*, Gidel trans., 1928, p. 180). Barthélemy (11 *Revue Général de Droit International Public*, 1904, p. 338) pronounces the doctrine of retroactivity to be a "fiction which cannot be admitted in the absence of a precise stipulation to the contrary." M. Morellet (16 *International Labour Review* (1927), p. 755 ff.) reaches the following conclusion: The older theory which held that signature alone produced a binding treaty is no longer followed; today the majority of writers consider signature as only a preliminary formality "whose effect is to give definite shape to the results of the negotiations and to fix *ne varietur* the text of the agreement reached." It

is ratification, he adds, "which constitutes the essential legal act by which the State contracts an engagement; hence, in the absence of stipulations to the contrary, a treaty takes effect on the date of ratification, and the old idea that ratification should operate retroactively to make the treaty take effect as from the date of signature is almost universally abandoned." Phillipson (*Termination of War and Treaties of Peace*, 1916, p. 196), adverting to the opinion of the Supreme Court of the United States in *Haver v. Yaker* that the retroactivity of treaties from the date of signature, so far as concerns the rights of the contracting governments, is "a principle of international law," declares that "neither jurists and publicists nor governments have ever uniformly maintained such a principle, and it certainly cannot be inferred from actual practice." It is difficult, he adds, to see why such a sharp line of demarcation should be drawn between the rights of governments and the rights of subjects, in respect to the date when treaties take effect. As regards both, it should be recognized that treaties go into effect, in the absence of stipulations to the contrary, upon the date of the exchange of ratifications, and that the effect of this act does not operate retroactively. Although supported by Hall and Westlake the doctrine is not approved by Oppenheim, Brierly, McNair and other English writers, nor by French writers like Fauchille, Basdevant and Dupuis, nor by the more recent German authors, nor by Italian writers such as Anzilotti, Cavaglieri, Fiore and Gemma. On the other hand, it is definitely condemned by many writers.

It may also be stated that none of the codes on treaties that have been proposed, save that of Bluntschli (Article 421), contain any support of the principle of retroactivity. Fiore's draft (Article 773) declares that "a treaty takes effect only from the time it can be considered legally perfect," although the parties "may stipulate that when the treaty is ratified, its effect should relate back to the time of its signature. But this requires an express declaration." The Havana Convention on Treaties of February 20, 1928 (Article 8), appears to condemn the principle. It declares that "treaties shall become effective from the date of exchange or deposit of ratification, unless some other date has been agreed upon through an express provision."

The courts of other countries have not followed the jurisprudence of the United States. There is a statement by Lord Stowell in the case of the *Elsebe* (1804), 5 C. Rob. 190, to the effect that "in matters of treaty, it is true, the act of ratification may be said to operate with retrospective effect, to confirm the terms of the treaty from the date of the preliminary articles"; but this statement was *obiter* and it is inconsistent with the more definite opinion which he pronounced nine years later in the case of the *Eliza Ann* (1813), 1 Dodson, 244, and Hudson, *Cases on International Law* (1929), p. 908, where he said, apropos of the treaty between Great Britain and Sweden, signed on July 18, 1812, and ratified by Great Britain on August 4th of the same year and by Sweden on August 14:

It is said, however, the the treaty, when ratified, refers back to the time of its signature by the plenipotentiaries, and that it does so in this case more especially on account of the terms in which it is drawn. The words in one of the articles of the treaty, "Dès ce moment tout sujet de mésintelligence, qui ait pu subsister sera regardé comme entièrement cessant et détruit," have been pointed out, and from these it has been contended, that all hostilities were to cease the moment the treaty was signed. But I take that not to be the case; the positive and enacting part of the articles is, that there shall be a firm and inviolable peace between the two countries; the other part is descriptive only of the pacific intention of the parties, and of their agreement to bury in oblivion all the causes of the war. It does not stand in the same substantive way as the former part of the article, and must be considered as mere explanatory description. . . . I am of opinion, therefore, that the ratification is the point from which the treaty must take effect. "Dès ce moment" must be referred to the moment at which the treaty received its valid existence by mutual ratification. It is perfectly clear that it was so considered on the part of Sweden.

Reference was made in the comment on Article 10 of this Convention to the decision of the English High Court of Justice in *Kotziás v. Tyser* (1920), 2 K.B. 69, rejecting the argument that the Treaty of Versailles, which was signed June 28, 1919, and which came into force on January 10, 1920, was nevertheless binding from the date of its signature, to the extent that the war came to an end on that date—in other words, that the effect of ratification and deposit of the instruments of ratification operated retroactively back to the date of signature. As to this the court said:

The general rule of international law is that . . . peace is not concluded until a treaty of peace is finally binding upon the belligerents and that stage is not reached until ratifications of the treaty of peace have been exchanged between them. . . . In the recital of the preliminary part of the treaty it stated that the Powers have agreed that from the coming into force of the treaty the state of war will terminate. . . . The treaty of peace thus provides that it is to come into force or in other words that peace is to be concluded by a deposit of ratification of the treaty and a *procès-verbal* thereof that was not accomplished until the month of January 1920.

This view as to the non-retroactivity of the Treaty of Versailles was followed by the English courts in the cases of *Lloyd v. Bowring* (1920), 36 T. L. R. 397, and *Rattray v. Holden* (1920), 36 T. L. R. 798. There have been other decisions of English courts dealing with the date when treaties take effect but none of them contain any indication of support for the doctrine of retroactivity. See McNair, "*L'Application et l'Interprétation des Traités d'après la Jurisprudence Britannique*," 43 *Recueil des Cours* (1933), p. 297 ff. The language used by Sir Henry Duke, President of the British Prize Court in 1920, in the case of *The Pellworm* (9 Lloyd's Reports of Prize Cases, p. 168) seems to have been intended to be an affirmation of the principle that a treaty subject to ratification has no binding force until it has been

ratified and that its effect when so ratified operates only from the date of ratification.

There appears to be no authority in the decisions of the continental courts in support of the rule of retroactivity. The French courts have sometimes made a distinction between a treaty's becoming "definitive" and its "coming into force," holding that it does not become "definitive" until ratified, but that it may come into force before ratification; and also a distinction between the coming into force of a treaty internally (date of promulgation) and its coming into force as an international engagement (*e.g.*, from the date of ratification); but there appear to be no French decisions supporting the principle of retroactivity. The same observation may be made regarding the jurisprudence of Germany, Belgium, Switzerland and Italy. On the contrary, there are some decisions which definitely reject the principle.

In the case of the *Syrian Capitulations* (Denunciation by Turkey), the Court of Appeal of Beirut, on June 16, 1926, rejected the argument of the appellants that Article 28 of the Treaty of Lausanne, which provided for the complete abrogation of the capitulations, had retroactive effect. The court pointed out that whenever the treaty intended that a particular stipulation should operate retroactively it said so expressly (*e.g.*, Article 69), but that when it did not expressly indicate such an intention a stipulation had no retroactive effect. McNair and Lauterpacht, *Annual Digest*, 1927-28, No. 126.

The Italian Court of Cassation held in February 1925, in the case of *Cominelli v. Capelli* (*ibid.*, 1925-26, No. 256), that the plaintiff's change of nationality took place only on the date of the exchange or deposit of ratifications (July 16, 1920) of the Treaty of St. Germain, which was the date of the coming into force of the treaty. The full international effects of the treaty, including changes of nationality of the inhabitants of the transferred territories, could not, said the court, begin before the date of the exchange of ratifications.

Occasionally the rule of retroactivity has been applied in special circumstances where considerations of equity or good faith required it. See, *e.g.*, the decision of the Supreme Court of Poland in *Schrager v. Workmen's Accident Insurance Institute for Moravia and Silesia* (*ibid.*, 1927-28, No. 274), and in *Gospodarstwa Krajowego v. Czyzewicz* (*ibid.*, p. 399, n. 1); but there is nothing in these decisions to indicate approval of the general principle of retroactivity.

The decisions of international arbitration tribunals have generally been opposed to the rule of retroactivity. Reference may be made to the award of Francis Lieber in the case of the *Zacualtipan Claims* under the United States-Mexican Convention of July 25, 1868. 4 Moore, *International Arbitrations* (1898), p. 3798 ff. The claims arose out of an attack by United States military forces on Zacualtipan on July 25, 1848, 23 days after the

signing of the treaty of peace, but before its ratification. The question was whether the attack was lawful or whether a legal state of peace existed, notwithstanding that the treaty had not been ratified. In the course of this opinion, in which the United States was held not liable, Lieber said:

Many of the best authorities hold that peace begins *de jure* when it is signed, and not from the day when it is ratified by the two supreme belligerent powers or the authorities which by the law of the land have alone the right to ratify. This, however, is far from being unconditional. If a peace were signed with a moral certainty of its ratification and one of the belligerents were, after this, making grants of land in a province which is to be ceded, before the final ratification, it would certainly be considered by every honest jurist a fraudulent and invalid transaction. But it is well understood that a peace is not a complete peace until ratified; that, as a matter of course, the ratifying authority has the power of refusing unless, for that time, it has given up this power beforehand, but there can be no doubt that so soon as peace has been preliminarily signed, active hostilities ought to cease, according to the spirit of civilization and consistent with the very idea and object of the whole transaction, which is to stop the war and establish peace. It would be an unjustifiable act to continue vehement hostilities under such circumstances as if nothing had happened, wherever it is possible, and when the contrary is not plainly understood or actually expressed. (*Ibid.*, p. 3801.)

In the case of the *Chilean-Peruvian Accounts* (2 Moore, *History and Digest of International Arbitrations*, 1898, p. 2091), the arbitrator in his award of April 7, 1875, held that the treaty of alliance between Chile and Peru, which was signed December 5, 1865, and of which ratifications were exchanged January 14, 1866, became operative from the former date ("The exchange of ratifications has a retroactive effect, confirming the treaty from its date.") This conclusion was not supported by any authority other than that of Lawrence's Wheaton, p. 453.

It has sometimes been asserted that the award in the *El Chamizal Case* between the United States and Mexico (5 *American Journal of International Law*, 1911, p. 804) supported the doctrine of retroactivity, but it is clear from the award and the arguments in the case that this point was not in issue. What was involved was the question of the retrospective operation of the provisions of the boundary treaty of 1884 between the United States and Mexico relating to the effect of changes in the bed of the Rio Grande River upon the location of the boundary line; this was a very different question from the retroactive effect of the treaty from the date of its signature.

In the *Sambiaggio Case* the Umpire of the French-Venezuelan Commission of 1902 (Ralston, *Venezuelan Arbitrations of 1903*, 1904, p. 666), held that treaties should not be interpreted to operate retroactively unless by their own terms they were declared to so operate. In the course of his award he said: "Treaties are to be interpreted, generally, *mutatis mutandis*, as are

statutes" (citing Wharton's *Digest of the International Law of the United States*, sec. 133), "and on many occasions the Supreme Court of the United States has held that in the absence of express language, statutes will not be held to be retroactive. In one of the most recent cases brought before that tribunal it was held that 'a statute should not be construed to act retroactively, or to affect contracts entered into prior to its passage, unless its language be so clear as to admit of no other construction.'"

In the case of the *Iloilo Claims* which came before the British-American Claims Commission set up under the special agreement of August 10, 1910 (Nielsen's *Report, American and British Claims Arbitration*, 1926, p. 382 ff.), it was argued on behalf of the British Government in support of its claim for damages resulting from the destruction of certain British-owned property by the Filipinos at Iloilo in February 1899, that the United States was responsible for the maintenance of order in Iloilo, and therefore for the losses sustained therein by British subjects, from the date of the signature of the treaty of cession, December 10, 1898, although the exchange of ratifications did not take place until April 11, 1899. Article 5 of the treaty provided that Spain would proceed to evacuate the Philippines upon the exchange of ratifications, and Article 17 provided that the treaty should be ratified by both governments and the ratifications should be exchanged within six months from its date of signature, but it did not fix a precise date as to when the treaty should come into force. In the course of his oral argument Sir Cecil Hurst for the British Government said (Nielsen's *Report*, p. 393):

. . . it is quite clear on the documents I have read, that the United States had assumed responsibility for controlling Iloilo practically from the day of the conclusion of the treaty of peace which was signed in Paris on December 10, 1898.

There is a quotation there from Rivier, which does not establish a particular principle, but I merely quote it in order to show that there is some textbook authority for the position that under certain circumstances, in certain particular cases, a treaty can go into force at the time of its execution, without the necessity of waiting for ratification. I am not, of course, arguing here the proposition that, generally speaking, a treaty goes into force at the time of its signing. In certain circumstances, I suggest that may be so, but not as a universal proposition, because generally a treaty, in itself, provides for its own ratification, and technically it does not go into force until ratifications have been exchanged. But, in some cases, there is no ratification clause attached to the treaty and it may go into force at once. In other cases, even if there is a ratification clause, I suggest that if the action of one party makes it quite clear that they propose to act in advance of the exchange of ratifications, the treaty must be held to go into force, and that is the proposition which I wish to establish.

He then referred to the opinions of certain authors and of the United States Supreme Court in the cases of *Davis v. Police Jury of Concordia* and *United*

States v. Reynes (supra) in support of this contention, although he confessed that he did not "personally attach very much importance" to them, his object merely being to show that there was "at any rate some precedent" for his proposition. It is quite clear from the language used by the British agent that he rested his case as to the date of the taking effect of the treaty upon what he considered to be the intention of the parties in this respect, rather than upon any assumed rule of international law. In fact, he made no effort to prove the existence of such a rule. The American agent, in his reply, denied the various contentions of the British agent and stated that he would ignore the opinions expressed by the Supreme Court regarding the coming into force of treaties from the date of their signature and would deal with the "well known facts of international practice." These decisions, he contended, did not support the general principle that treaties are retroactive as from the date of signature, but merely embodied the doctrine of "the fraud upon the party" between signature and ratification. The opinions expressed by the governments of the United States and Spain, he added, showed that both governments regarding the treaty as coming into force only from the date of ratification. *Ibid.*, p. 398 ff.

The award of the tribunal sustained the American contention. *Ibid.*, p. 404. As to the date when the obligations of the treaty became performable, it said: "We are of opinion that there was no duty upon the United States under the terms of the protocol, or of the then-unratified treaty, or otherwise to assume control at Iloilo. *De jure* there was no sovereignty over the islands until the treaty was ratified."

Direct pronouncements by the Permanent Court of International Justice on the question of retroactivity of treaties seem to be entirely lacking. In the case of the *Mavrommatis Jerusalem Concessions (Publications of the P. C. I. J., Series A, No. 5, p. 39)*, the court refused to go into the question whether the Treaty of Sèvres and Protocol XII annexed to the Treaty of Lausanne of 1923 might before their ratification have produced certain legal effects as regards the contracting parties. In the *Oder Commission case (ibid., Series A, No. 23, p. 20)*, it referred to a binding convention as one "made effective in accordance with the ordinary rules of international law amongst which is the rule that conventions, save in certain exceptional cases, are binding only by virtue of their ratification." In the *Case concerning Certain German Interests in Upper Silesia (ibid., Series A, No. 7, p. 39; Series C, No. 11, vol. 2, p. 631)* the Polish Government contended that, although the transaction by which the transfer of the Chorzów actory from the Reich to the *Oberschlesische* was effected took place at a date when the Treaty of Versailles had not yet come into force, it was forbidden because it violated the principle that "the contracting States ought not during the period between the date of the signature and that of the coming into force of the treaty do anything which might prejudice or render impossible the future execution of the treaty." This was not, however, an argument in

favor of the doctrine of retroactivity of treaties. In fact, the Polish Government admitted that "according to the general principles of the law of nations the formal coming into force of a treaty commences only from the date of the exchange of the instruments of ratifications." *Ibid.*, Series C, No. 11, vol. II, pp. 631-632. The court, however, did not find it necessary to make any pronouncement on this point, the decision turning on the question whether there had been an abuse of power on the part of Germany. See page 40 of the judgment.

The conclusion to be drawn from this review is that, apart from express stipulation in treaties themselves providing for it, the rule that treaties which come into force subsequently to the date of signature operate retroactively as from the date of signature, has no support today among writers on international law outside the United States, that it is not supported by the decisions of national courts in any country except the United States, and that there is little or no authority for it in the decisions of international tribunals. In the face of these facts, it would seem unwarranted to incorporate such a rule in this Convention. The rule also runs counter to considerations of convenience, logic and reason. Manifestly, if treaties which are subject to ratification, and which by their own terms come into force when ratified or when the instruments of ratification are exchanged, are deemed to operate retroactively from such date back to the date of signature, anomalous situations may result and the obligations of the parties during the intervening period may be very uncertain. This does not mean that there may not be exceptional cases in which the principle of retroactivity can be justified upon considerations of public policy, convenience or reason but in such cases treaties should by their own terms so provide.

There was some justification for the old rule in the age when it originated, when the signature of a treaty possessed an importance which it has long ago lost, when ratification was regarded as a mere formality confirmatory of the act of signature, and when ratification by the head of the State of a treaty signed by a duly authorized plenipotentiary usually followed as a matter of course. Under these circumstances there was nothing particularly anomalous in regarding a treaty which was subject to ratification as taking effect from the date of signature. But these conditions have entirely changed. Ratification is now regarded as more than a mere formality (see the comment on Article 6); it is considered generally as an essential step in the process of treaty making and may be and is frequently withheld by the ratifying authority even when the plenipotentiary has acted in accord with his full power. (See the comment on Article 8.) Logically, therefore, one cannot attribute to the act of ratification a retroactive effect, permitting the treaty to be considered as binding from the date of its signature.

The principle of retroactivity in respect to the date when treaties take effect must not, as indicated above, be confused with the retrospective application of certain of its provisions, back even to a time antedating the

conclusion of the treaty. Thus in the *El Chamizal Case* referred to above it was not contended by either party that the boundary treaty between the United States and Mexico, which was signed November 12, 1884, and the ratifications of which were exchanged September 13, 1886, took effect retroactively as from the date of signature. It was, however, contended by the United States that the provisions of Articles 1 and 2 relating to the effect of alterations in the bed of the Rio Grande River upon the boundary line, operated retrospectively so that it covered such alterations as had taken place prior to the conclusion of the treaty (5 *American Journal of International Law*, 1911, p. 740), and this view of the matter was taken by two of the three commissioners constituting the tribunal (*ibid.*, p. 805).

The provision in Art. 17, par. (c) of this Convention, which attributes a retroactive effect so far as concerns their binding force, to treaties which have not been registered (or published) at the time they come into force but which are registered (or published) within a reasonable time thereafter, does not constitute an exception to the principle laid down in the article here under discussion. The present article rejects the rule which attributes a retroactive effect to treaties covering a period during which they were not in force (*e.g.*, the period intervening between signature and ratification or exchange or deposit of ratifications), while Art. 17, par. (c) merely attributes retroactive effect to the act of registration or publication, if not unreasonably deferred, in order that it may render binding a treaty which according to its terms has already come into force.

ARTICLE 12. ACCESSION

(a) As the term is used in this Convention, an accession to a treaty is an act by which the provisions of the treaty are formally approved and accepted by a State on behalf of which the treaty has not been signed or ratified.

COMMENT

THE PROCESS OF ACCESSION

Treaties, especially multipartite treaties of the type often referred to as "law-making", frequently envisage a process by which States which did not participate in the negotiation thereof, or which did not affix their signatures thereto, and which cannot therefore, normally at least, proceed to ratification, can become parties to them on a status exactly the same as that enjoyed by those States which negotiated, signed, and ratified them in the normal way. This process is referred to as "adhesion", "accession", or "adherence", the words being used interchangeably in practice. In French the terms "*accession*" or "*adhésion*" are both used; British practice seems to favor "accession"; the United States Department of State is apparently partial to "adherence". 1 Hudson, *International Legislation* (1931), p. xlvii, n. 2.

Some writers have, indeed, tried to make a distinction between these terms, particularly as between "accession" and "adhesion". The distinction sometimes made is to the effect that "accession" involves acceptance by a non-signatory State of all the provisions of a treaty, whereas "adhesion" refers to acceptance by a non-signatory State of some, but not all, of the provisions of a treaty. Oppenheim states the distinction in this manner: "Whereas through accession a third State becomes a party to the whole treaty, with all the rights and duties arising from it, through adhesion a third State becomes a party only to such parts or principles of the treaty as it has adhered to." 1 *International Law* (4th ed., 1928), p. 743.

Again a distinction is made to the effect that by accession a non-signatory State becomes a party to a treaty on exactly the same status as, and with all the rights and obligations of, an original party, whereas by adhesion a non-signatory State merely indicates its approval of certain clauses or principles in the treaty and its intention voluntarily to conform its own actions or policies thereto. See 1 F. de Martens, *Traité de Droit International* (Léo trans., 1883), pp. 536-537; 2 Pradier-Fodéré, *Traité de Droit International Public* (1885), p. 827 ff.; Strupp, *Eléments du Droit International Public* (1927), p. 187. See also 2 Satow, *Guide to Diplomatic Practice* (1917), pp. 281-282; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), pp. 360-361; Cavaglieri, "Règles Générales du Droit de la Paix," 26 *Recueil des Cours* (1929), p. 526; 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 429. Martens adds that adhesion "est une acceptation moins solennelle que l'accession," and Pradier-Fodéré remarks that even though adhesion is something more than mere approbation, nevertheless "elle ne constitue par elle-même un engagement défini." "La puissance qui adhère", he says, "ne devient pas partie co-contractante. . . ." De Louter says: "On entend par accession l'action par laquelle un tiers vient s'ajouter absolument, comme partie égale, aux parties primitives, et se soumettre à tous leurs droits et devoirs par l'échange ou le dépôt réciproque des ratifications. On nomme adhésion le consentement par oui ou non, avec ou sans condition, d'un tiers au contenu entier ou à certaines clauses du traité, de sorte qu'il ne participe aux droits et aux devoirs qui en dérivent que tout autant qu'il résulte de son adhésion même." 1 *Le Droit International Public Positif* (1920), p. 496.

Génet, reviewing the distinctions made between accession and adhesion, concludes that adhesion "est un acte unilatéral, qui n'engage que l'adhérent; l'accession est un acte plus complet, qui fait entrer l'accédant dans le groupe des Etats liés réciproquement par le traité conclu." That distinction, he declares, possesses a real theoretical and practical interest, and ought to be maintained in diplomatic usage. 3 *Traité de Diplomatie et de Droit Diplomatique* (1932), p. 455. Dupuis says: "L'accession est souvent confondue avec l'adhésion bien que le sens propre de ces deux termes ne soit pas identiques. L'adhésion n'implique pas en soi que l'Etat adhérent devienne partie contractante; elle implique simplement, de la part de l'Etat adhérent, appro-

bation des clauses qui ont son adhésion et obligation de ne pas entraver l'exécution des clauses approuvées." "Les Relations Internationales," 2 *Recueil des Cours* (1924), p. 330.

Most of the authors who refer to or draw these distinctions between accession and adhesion are, however, forced to confess that they are unsupported by the practice of States. Like Oppenheim, for example, they add to their remarks some statement to the effect that "it must be specially observed that the distinction between accession and adhesion is one made in theory, to which practice frequently does not correspond." 1 Oppenheim, *op. cit.*, p. 743. See also 3 Genet *op. cit.*, pp. 455-456; 1 De Louter, *op. cit.*, p. 497; 2 Pradier-Fodéré, *op. cit.*, p. 829; Satow, Fauchille, Dupuis, Cavaglieri and Anzilotti, *loc. cit.* Thus, in practice, we find adhesion used to refer to acceptance of a treaty *in toto* (Protocol concerning the Adhesion of States not represented at the Third Conference on Private International Law to the Convention of June 12, 1902, relating to the Settlement of the Conflict of Laws concerning Marriage, 51 *League of Nations Treaty Series*, p. 209), while, in one instance at least, the word "accession" is employed in reference to acceptance by a nonsignatory State of some, but not all, of the provisions of an instrument (Protocol relating to the Accession of Belgium and Portugal to Certain Provisions of Instruments signed at Lausanne, 28 *ibid.*, p. 197). And, normally, the words "accession" (Article 5 of the Convention on Freedom of Transit, 1 Hudson, *International Legislation* (1931), p. 625), "adhesion" (Article 41 of the Convention on the Regulation of Aerial Navigation, *ibid.*, p. 359), and "adherence" (Article 8 of the Treaty regarding Principles and Policies to be followed in matters concerning China, 2 *ibid.*, p. 823) seem to be used indifferently to indicate the same thing; *i.e.*, the process which the writers mentioned above would describe as "accession", and by which a non-signatory State may become a party, on a footing of equality with signatory States, to an entire treaty. In some cases we even find that process referred to by different words in the same instrument or even in the same clause. Thus the Protocol for the "Accession" of the United States to the Protocol of Signature of the Statute of the Permanent Court of International Justice provides for the "adherence" of the United States to the latter instrument, and Article 18 of the Berne Convention of September 9, 1886, for the Protection of Literary and Artistic Property, contains the following:

Cette accession sera notifiée etc. . . .

Elle emportera, de plein droit, adhésion à toutes les clauses et admission à tous les avantages stipulés dans la présente Convention. (12 Martens, *Nouveau Recueil Général de Traités* (2d ser.), pp. 173, 183.

See also the articles under Title V of the Sanitary Convention of 1912, 13 *ibid.* (3d ser.), pp. 3, 41.

In short, in so far as an attempted technical distinction between "acces-

sion" (or "adherence") and "adhesion" is concerned, it seems evident, as the Committee of Experts on the Progressive Codification of International Law expressed it, that "international practice, particularly in modern times, does not recognize this theoretical distinction, and as a rule no account is taken of it." Report on the Admissibility of Reservations to General Conventions, *League of Nations Official Journal*, 1927, p. 881. See, also, Eagleton, "Problems of International Legislation," 8 *Temple Law Quarterly* (1934), pp. 387-388. Under the circumstances it is not fundamentally important, therefore, whether one term or the other is employed. It seems preferable, however, to use the term "accession" in this article, not only because that term is very generally used in practice, but also because it is the term which even those who attempt to distinguish between "adhesion" and "accession" use to indicate the particular process which is in mind; to wit, that by which a State becomes a party to a treaty with a status the same as that of a State which becomes a party thereto through some other procedure, such as signature and ratification.

THE TERM AS HERE USED

Accession, then, in one sense of the word, is a process by which a State, under certain circumstances, becomes a party to a treaty. Normally the final step in that process, and in any event the one which has international significance and effect, is the communication or deposit of a written instrument formally recording the approval and acceptance of the treaty by or on behalf of the acceding State. In other words, accession is effected, internationally, by means of an instrument or act. This instrument or act is, in practice, commonly called an "instrument of accession", or simply "an accession". It is with reference to such an act that the term "an accession" is used in this Convention.

Some examples of accessions to treaties are appended at the end of the comment to this article. For accessions to the Treaty of August 27, 1928, for the Renunciation of War, see the United States Department of State Publication No. 468, *Treaty for the Renunciation of War* (Washington, 1933), p. 110 ff. Apparently some foreign offices have no special form for accessions. The "accessions" of a number of the States which became parties to the Treaty for the Renunciation of War were, in form, ratifications of the treaty to which their representatives had previously purported to "accede" subject to ratification.

Also, as used in this Convention, the term "accession" is applied only to an act by which a State which has not signed or ratified a treaty approves and accepts the treaty. In other words, as the term is here used, only a non-signatory State which does not ratify a treaty—(non-signatory States can ratify treaties in relatively few cases, such as the International Labor Conventions)—can accede to a treaty. In short, an accession takes the place of signature in the case of a treaty which has been signed and which is

not subject to ratification, or of signature and ratification in the case of a treaty which has been signed subject to ratification.

In normal practice it is only States which have not signed a treaty, either because they were not participants in the negotiation thereof or because they failed to sign it within the period during which it was open for their signature, which can accede to the treaty. Thus, such of the Hague Conventions of 1899 and 1907 as were open to accession, were open to accession by "non-signatory powers" only. See texts of the conventions in Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915). (In the case of the Conventions for the Pacific Settlement of International Disputes, a distinction was made between States which participated in the conferences but failed to sign the conventions within the period during which they were left open for their signature, and States which did not sign the conventions because they were not represented at the conferences. Articles 59 and 60 of the Convention of 1899, and 93 and 94 of the Convention of 1907.) The final clauses of numerous other treaties, expressly or by clear implication, limit the privilege of accession to non-signatory States. See, for example, Article 35 of the Convention on the Traffic in Opium and Drugs, 3 Hudson, *International Legislation* (1931), p. 1589; Articles 41 and 42 of the Convention on the Regulation of Aerial Navigation, 1 *ibid.*, p. 359; Article 159 of the Sanitary Convention of 1912, 13 Martens, *Nouveau Recueil Général de Traités* (3d ser.), pp. 3, 41; Article 21 of the International Convention for the Suppression of Counterfeiting Currency, 112 *League of Nations Treaty Series*, p. 371; Article 35 of the Convention for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, *United States Treaty Series*, No. 847. See also the remarks of M. Rolin in connection with the General Act for the Pacific Settlement of International Disputes, wherein he refers to the "traditional and old notion" according to which the process of accession had "been long in use in the case of conventions open for the acceptance of States other than those which had signed them." *Records of Ninth Assembly, First Committee*, p. 70. And the remark of M. Ito, in the same connection, that "the process of adhesion had been contemplated for those States that had not participated in the framing of a convention or had not signed it in due time." *Ibid.*, p. 66. M. Motta's report to the Eighth Assembly of the League of Nations on the subject of accessions subject to ratification states:

International practice admits of two procedures or, if you prefer it, two formalities, whereby States enter into undertakings with one another; these are respectively signature and accession. Of the two, signature is, of course, more usual and more widely used; it is adopted when a State participates in an international Conference and, on the conclusion of the deliberations, signifies its acceptance of certain undertakings by signing the Act framed by that Conference. It has become customary, at the moment of signing a Convention, to allow States which cannot immediately decide upon this procedure a time-limit within which they may still sign in due form. . . .

If a State has not participated in a Conference or if, after having so participated, it has not signed within the time-limit specified in the final Protocol, the only method by which it can still become a party to the Act, with other States, is by accession. (*Records of Eighth Assembly, Plenary*, p. 141.)

There are apparently some instances in practice in which a State which has signed a treaty may become a party to the treaty by accession instead of by the more usual process in such cases, *i.e.*, by ratification. For example, where a multipartite treaty comes into force when the ratifications of some but not all of the signatory States have been deposited, other signatories which failed to deposit their ratifications prior to that time may be confined thereafter to adhering to the treaty instead of being permitted to ratify it. This seemingly is the practice in the case of the conventions on the protection of industrial property. 1 Hudson, *International Legislation* (1931), p. xlvii, citing 44 *La Propriété Industrielle* (1928), p. 213. And apparently Article 53 of the Hague Convention of 1907 relative to the Creation of an International Prize Court was intended to embody this idea. That article provided that certain Powers were entitled to sign the convention up to the date of the deposit of ratifications contemplated in the preceding article, and that after that deposit they might at any time adhere to it, purely and simply. Referring to that article, the report of the First Commission says: "When the deposit of ratifications necessary to make the convention applicable has taken place, the situation becomes fixed in the sense that the Powers which have not participated in this deposit can only become adhering Powers. In the case of a Power which has signed before the deposit but has not ratified until subsequent thereto, it will be considered only as an adhering Power." Scott, *The Proceedings of the Hague Peace Conferences, The Conference of 1907*, vol. 1 (1920), p. 210. There is nothing to indicate, however, in what respect the status of an adhering Power was to differ from that of a ratifying Power, and, indeed, it was apparently the idea that the States in question were to "adhere" by means of instruments of "ratification". (*Ibid.*)

The General Treaty of Peace and Amity which was signed on behalf of the Central American Republics at Washington on February 7, 1923, provides in Article 18 that "any of the Republics of Central America which should fail to ratify this Treaty shall have the right to adhere to it while it is in force." 2 Hudson, *International Legislation* (1931), pp. 901, 908. The records of the conference yield no information as to what was intended by this provision, and, unless there was some idea that acceding States would stand in a different relation to the treaty from ratifying States—an idea which would conflict with general practice—there seems to be no reason or necessity for it. The treaty put no limit upon the time within which ratifications should be deposited, and it is not evident why a signatory should not at any time have become a party to the treaty—if it desired so to do—by ratification rather than by accession. (The proceedings of the Central American Conference

may be found in *Conference on Central American Affairs*, Washington, 1923.)

The agreement between Iraq, Palestine, Syria, Transjordan and Turkey concerning the creation of an International Office for Information regarding Locusts (109 *League of Nations Treaty Series*, p. 121) provides for accession by the States which signed the treaty in the following articles:

7. Each government shall notify its accession as quickly as possible to the High Commissioner of the French Republic, who shall communicate it to the other signatory States.

8. For each signatory State the present agreement shall enter into force on the day of notification of its accession.

The International Office shall not be established unless at least three of the signatory States give their accession.

The *League of Nations Treaty Series* (Vol. 109, p. 123, n. 2) notes the "accessions" of the various signatory States. Such provisions are quite extraordinary and are to be regarded as exceptional. A possible explanation of them is that some of the countries participating in the negotiations perhaps did not have a standard form of instrument of ratification in their diplomatic equipment.

Another, and an unusual, case in which a State which had signed a treaty at the usual time chose to accede to it rather than, as would normally be the case, to ratify it, occurred in connection with the Additional Protocol to the Convention on the Régime of Navigable Waterways of International Concern. 1 Hudson, *International Legislation* (1931), p. 659. The protocol was open for signature or adherence by any State which had signed or adhered to the principal convention. By Article 1, signatory States were required to declare at the time of signature whether they accepted the obligations of the protocol as to (a) all navigable waterways, or only as to (b) all naturally navigable waterways. The Swedish representative signed the protocol, declaring at the same time that Sweden accepted it to the full extent of paragraph (a). Subsequently, however, the competent constitutional organs in Sweden gave their consent to acceptance of the protocol only to the extent of paragraph (b). Thereupon the Royal Swedish Government expressed the desire "to supersede the signature given by its representative", and, instead of its ratification, it communicated to the League Secretariat its accession to the protocol. 59 *League of Nations Treaty Series*, p. 345. It is to be noted that the Swedish signature was "superseded", so it might be said with some reason that Sweden adhered as a non-signatory State even though its signature was in fact written upon the protocol.

The exceptional cases just discussed would seem to offer no substantial reason for departing, in this Convention, from the traditional notion that accession is a procedure reserved to non-signatory States. It is believed that the term "accession" "has generally been and ought to be reserved for the action taken by non-signatory States." 1 Hudson, *International Legislation* (1931), p. xlviii.

In this connection it may be well to note that the definition of an accession as an act [*i.e.*, instrument] by which a non-signatory State approves and accepts a treaty clearly rules out any tendency to regard mere signature of a treaty under any circumstances as amounting to "accession". Recently, there has been a tendency to regard signature as amounting to accession in the case where a treaty is left open for signature by States which had no share in its negotiation, and especially if it is left open for a long period or indefinitely. See the report of the Committee of Experts for the Progressive Codification of International Law on the Admissibility of Reservations to General Conventions, *League of Nations Official Journal*, 1927, p. 881, and Basdevant, "*La Conclusion et la Rédaction des Traités*", 15 *Recueil des Cours* (1926), p. 594. When, however, a State which did not participate in the negotiation of a treaty is permitted or invited to sign and ratify it—in other words, when a treaty is left open for signature by outside States—it would seem that, strictly speaking, the process of accession is not involved. 1 Hudson, *International Legislation* (1931), p. xlviii. Such a State simply signs and ratifies the treaty in the same way as the original signatory States do, except that it does so at a later time. Treaties frequently make a distinction between the two procedures, permitting States which did not participate in the negotiations, or certain of them, to sign the treaty up to a fixed date, and thereafter limiting them to accession. For example, the Convention for the Suppression of Counterfeiting Currency, signed April 20, 1929, remained open until December 31st of that year for signature on behalf of any Member of the League of Nations and on behalf of any non-member State which was represented at the conference which elaborated the convention or to which the Council might communicate a copy. After January 1, 1930, on the other hand, the convention was to be open to accession by any of the above-mentioned States on whose behalf it had not been signed. 112 *League of Nations Treaty Series*, p. 371 (Article 20). To be sure, when a non-signatory State for which a treaty is open to signature does not affix its signature until it is in a position to regard the treaty as binding upon it—*i.e.*, if it signs and ratifies simultaneously—it can be said that, except for the fact of the signature of the original instrument itself, there is no practical difference between the effect of such signature and a normal accession. And if the practice of giving accessions subject to ratification were accepted as amounting to accession (see *infra*), it would have to be admitted that there is intrinsically no difference in effect between a deferred signature subject to ratification and such so-called accessions. But whatever the similarity in effect between accession and deferred signatures in cases like those described above, the fact remains that such signatures are not "accessions" either in the traditional sense of the term or within the meaning given to it in this Convention.

The explanation of the term "accession" in this article declares it to be an "act" by which a treaty is "approved and accepted". Those words

are frequently found in instruments of accession; they are used rather than the words "confirmed and approved" found in Article 6, paragraph (a) of this Convention (Ratification), because an acceding non-signatory State—usually one which has had no share in the elaboration of a treaty—can not be said to "confirm" the treaty.

The words "approved and accepted" are to be taken to mean final approval and acceptance; that is, a so-called accession subject to subsequent ratification is not "an accession" within the meaning of that term as here used. In recent years, some States have adopted the practice of "acceding" to treaties subject to ratification, such "accessions" apparently being intended to have "the same legal effect as a signature not yet perfected by ratification." In 1927 the number of "accessions" subject to ratification which had been communicated to the Secretariat for all conventions concluded under League auspices was 21. *League of Nations Document A.12.1927.V.*, note. A number of non-signatory States "acceded" to the Treaty for the Renunciation of War of August 27, 1928, *ad referendum*. See the United States Department of State publication, *Treaty for the Renunciation of War* (1933), p. 110 ff, cited *supra*.

In 1927 the question of "accessions" made subject to ratification was studied by a subcommittee of the First Committee of the League of Nations Assembly, composed of M. Motta (rapporteur), H. H. Mohammend Ali Khan Forrughi, Count Rostworowski, M. Guerrero, and Mr. Skelton. The subcommittee in its report (*League of Nations Document A.95.1927.V.*) stressed the point that accession "as understood in the established practice" exercised "its full effects as soon as notified", and recommended that that practice should be maintained. It observed, however, that the more recent practice of accessions given subject to ratification "offered advantages in certain cases" and that there were "governments which, having been unable to sign an agreement within the time limit fixed, would nevertheless be glad to accede thereto subject to ratification." The subcommittee concluded "that the procedure of accession given subject to ratification should be accepted, but that the practice should not be either encouraged or discouraged." And it advised that the presumption should always be that the accession took effect at once unless the acceding State, when notifying its accession, expressly mentioned that it was subject to ratification. The First Committee adopted the report, and on its recommendation the Assembly, on September 23, 1927, adopted the following resolution:

The procedure of accession to international agreements given subject to ratification is an admissible one which the League should neither discourage nor encourage.

Nevertheless, if a State gives its accession, it should know that, if it does not expressly mention that this accession is subject to ratification, it shall be deemed to have undertaken a final obligation. If it desires to prevent this consequence, it must declare at the time of accession that the accession is given subject to ratification. (*Records of Eighth Assembly, Plenary*, p. 141.)

In 1928, the Sixth International Conference of American States apparently took the same view regarding accessions subject to ratification as that expressed in the resolution of the Assembly of the League. The Convention on Treaties adopted by that conference provides, in Article 19:

. . . The adherence shall be deemed final unless made with express reservation of ratification.

The principles set forth in the Assembly resolution and the Havana Convention are entirely reasonable, and they are not intended to be overruled by this Convention. As pointed out by the League committee, it may be very useful and convenient for a State to be able to deposit an instrument indicating its intention, subject to ratification, to accede. There would seem to be no particular necessity, however, for introducing confusion by designating such an instrument as an "accession". The term "accession" has, in modern practice, come to be associated with an act which is final and effective by itself; unless the original treaty contains a provision to the contrary, an accession normally takes effect from the moment that it is communicated or deposited in the manner prescribed, and from that time on the acceding State is bound by the treaty. This is logical, inasmuch as normally a non-signatory State need take no step with regard to acceding to a treaty unless and until it is in a position to accept the treaty immediately; and this is the principle which generally prevails in modern practice. "Every instrument evidencing the adherence of a Power shall be deposited at Washington," says Article 3 of the Treaty of August 27, 1928 for the Renunciation of War, "and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto." The report of the First Commission of the Hague Conference of 1907 on the draft convention regarding the creation of an International Prize Court said: "We are not dealing with the question of the ratification of an adhesion; the adhering party, by adhering, must be definitively bound." Scott, *The Proceedings of the Hague Peace Conferences of 1899 and 1907, Conference of 1907*, Vol. 1, p. 211. As Basdevant puts it, the practice of acceding subject to ratification is "une forme défectueuse entraînant des complications inutiles: il appartient au gouvernement de prendre les autorisations qui lui sont nécessaires avant d'émettre l'acte d'adhésion." "*La Conclusion et la Rédaction des Traités*," 15 *Recueil des Cours* (1926), p. 595, n. 3. See also the remarks of M. Motta to the League Assembly in 1927, *Records of Eighth Assembly, Plenary*, p. 141. See also the minutes of the remarks of M. Politis to the First Committee of the Assembly in 1928, as follows: "Not long ago, the League of Nations had been asked whether it was possible to accept an adhesion subject to subsequent ratification. That procedure had not been encouraged. It had been definitely indicated that a provisional adhesion was more or less of an anomaly. Diplomatic practice required that a Government should not adhere to a treaty without being sure of Parliamentary approval; an adhesion once given was something

definite by which a country became committed." *Records of Ninth Assembly, First Committee*, p. 66.

For these reasons, as stated above, the term "accession", as used in this Convention, is not applied to instruments recording adherence *ad referendum*, although it is recognized that in some recent practice the term has been so used. It may be suggested that, although present practice indicates no practical distinction between "accession", "adherence", and "adhesion", it might be possible to establish some distinction, and to apply the word "adhesion", for example, to the type of instrument here under discussion (accession *ad referendum*) to distinguish it from an "accession" properly speaking. This would not be inconsistent with the theories of those publicists who would regard "adhesion" as indicating "approval" or "approbation" of the terms of a treaty as contradistinguished from "accession" as evidencing actual "acceptance" thereof.

(b) Unless otherwise provided in the treaty itself, a State may accede to a treaty only after the treaty has come into force and only with the consent of all the parties to the treaty.

COMMENT

TIME OF ACCESSION

The coming into force of a treaty is, in most instances, an essential prerequisite to effective accession to the treaty by non-signatory States, inasmuch as the invitation to or permission for such States to accede is usually contained in a clause of the treaty which, like the other clauses thereof, is ineffective until the treaty has come into force. And without such invitation or permission to accede, non-signatory States are not privileged to do so.

This principle has been recognized by numerous publicists. See, for example, 1 F. de Martens, *Traité de Droit International* (Léo trans., 1883), pp. 536-537; 1 Fauchille, *Traité de Droit International Publie*, pt. 3 (1926), p. 364; and 1 Oppenheim, *International Law* (4th ed., 1928), p. 743. Oppenheim speaks of accession to "an existing treaty." The principle has also been followed generally in practice. It was declared at the Second Hague Conference to be "evident" that an "adhesion may have no effect except, at the earliest, from the time the Convention goes into effect." Scott, *The Proceedings of the Hague Peace Conferences, The Conference of 1907*, vol. 1 (1920), p. 211. In the case of the Treaty of August 27, 1928 for the Renunciation of War, a number of definitive accessions of non-signatory States were deposited at Washington prior to July 24, 1929, the date on which the treaty came into force as a result of the deposit of the last required ratification. These accessions were received, but "the effective date" of their deposit was considered to be July 24, 1929; in other words, they were without effect until the treaty came into force as between the signatory States. *United States Treaty Series*, No. 796, p. 6; *United States Bulletin of Treaty*

Information, No. 5 (July, 1929), p. 23, and *ibid.*, No. 4 (June, 1929), p. 3 n., and No. 2 (April, 1929), p. 3. See also the United States Department of State publication, *Treaty for the Renunciation of War* (1933), p. 110 ff, and the table on pp. 7-8. Again, on September 2, 1930, the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works informed the American Minister at Berne that Yugoslavia had declared her accession to the convention as revised at Rome on June 2, 1928. The Director pointed out, however, that, since the convention was not yet in force, the Union construed "this declaration as implying the adherence of Yugoslavia to the act of Rome as soon as the latter is put into effect." *United States Treaty Information Bulletin*, No. 12 (Sept., 1930), p. 13. See *ibid.*, No. 20 (May, 1931), p. 7. When the Argentine Republic purported to accede to the Covenant of the League of Nations prior to the coming into force of the Treaty of Versailles, Sir Eric Drummond, then Secretary General Designate, wrote to the Argentine Minister in Paris:

Je n'ai pas besoin de vous assurer que c'est avec le plus grand plaisir que j'ai pris note de votre déclaration. Cependant je dois vous faire remarquer que la Société des Nations n'est pas encore constituée légalement et que je ne puis exercer mes fonctions de Secrétaire Général avant l'entrée en vigueur du Traité de Paix.

Dans ces conditions, je vous serais très obligé de bien vouloir m'informer si la communication que vous m'avez adressée signifie que la République Argentine désire faire son adhésion à la Société aussitôt que la commission des ratifications nécessaires au Traité de Paix lui en fournira formellement le moyen. (Hudson, "The Argentine Republic and the League of Nations," 28 *American Journal of International Law*, 1934, pp. 125, 126, citing Sivori, *La Liga de las Naciones, su origen y la obra realizada en la República Argentina*, Buenos Aires, 1928, p. 504.)

As some of the cases just cited indicate, there would seem to be no objection to the deposit of an accession before a treaty comes into force, even though, in general, such accession will remain ineffective until the treaty does come into force. In other words, it may be recognized as a sound principle that a State may signify its intention to accede to a treaty not yet in force, but which, upon coming into force, will be open to its accession, by the communication or deposit of an accession prior to the coming into force of the treaty. Such accession will usually be automatically effective on the date of the coming into force of the treaty.

There have been, in practice, cases which stand as apparent exceptions to the general principle that effective accessions are possible only after a treaty has come into force as between States other than the acceding States. These cases involve treaties the coming into force of which is itself expressly made dependent upon the deposit of accessions. Thus the General Act for the Pacific Settlement of International Disputes (4 Hudson, *International Legislation* (1931), p. 2529), as adopted by the Assembly of the League of Nations in 1928, was not opened to signature and ratification in the usual manner,

but was instead opened at once to accession only. By Article 43 the Act was declared open to accession "by all the Heads of States or other competent authorities of the Members of the League of Nations and the non-Member States to which the Council of the League of Nations has communicated a copy for this purpose," and by Article 44 it was provided that "the present General Act shall come into force on the ninetieth day following the receipt by the Secretary-General of the League of Nations of the accessions of not less than two Contracting Parties."

The report of the Committee on Arbitration and Security, which originally drafted the provisions of the General Act, stated:

During its third session, the Committee considered that there was no advantage in presenting the model collective Conventions A, B and C as the results of negotiations between Government plenipotentiaries. For this reason, the Committee decided to omit the clauses containing the list of heads of States parties to the Conventions, as well as the names of plenipotentiaries, and therefore omitted also the provisions establishing a distinction between the procedure of signature and that of accession. The Convention will be submitted to States for their accession only. (*League of Nations, Document A.20.1928.IX.*, p. 8.)

M. Politis, in reporting for the Third Committee to the Assembly, said that the General Act:

. . . is not a draft which requires to be negotiated upon, or to receive signatures, in order to become an effective instrument. It is a document which can be converted into a Convention as soon as it is accepted in its entirety or in part by two States. It will remain open indefinitely for the accession of all other States. Naturally it is assumed that Governments will first secure the parliamentary approval necessary under their respective constitutions, and that, in this way, the accessions will become valid. (*Records of Ninth Assembly, Plenary*, p. 487.)

And to the Assembly, M. Politis remarked that, by omitting the usual procedure of signature and ratification and providing for entry into force upon the accession of two States, the General Act retained a characteristic "which may appear new to some, but is in conformity with several precedents established by the League for the acceptance of undertakings between Members of the League and between Members and non-Member States." *Ibid.*, p. 169.

Although heartily endorsed by some (see remarks of Dr. Nansen, *ibid.*, p. 180), the comparatively unusual provisions of the General Act did not escape questioning in the First Committee of the Assembly. The Minutes say:

There was a further point on which he [M. Ito] would like some information. M. Politis had stated on the previous day that the General Act was a League of Nations document. He, M. Ito, did not very well understand the precise nature of that document; he did not quite see what distinguished it from any other document of the League. If it were a convention, it must be signed and ratified. If, on the contrary,

it was an important instrument like the Statute of the Permanent Court of International Justice, would it not be necessary to open a Protocol for the signature of the States?

The General Act provided only for *adhesions*. Hitherto the process of adhesion had been contemplated for those States that had not participated in the framing of a Convention or had not signed it in due time. In the General Act, the term *adhesion* was used with an entirely new significance. Was there any advantage in adopting such a method?" (*Records of Ninth Assembly, First Committee*, pp. 65-66.)

In reply, M. Politis adverted to what was probably the chief reason for adopting the provisions found in the General Act; *i.e.*, the desire to avoid the all-too-frequent tendency of States to sign treaties without following up signature with ratification. He

. . . pointed out that the General Act made no innovation; it retained the provisions relating to adhesion to Conventions drawn up by the Committee on Arbitration and Security. That Committee had noticed that the system of lists of Heads of States, of the insertion of the names of the Plenipotentiaries, and of the procedure of signatures was somewhat complicated, and that, neither from the political nor from the practical point of view, did it offer any real advantages. It had thus been decided that it would be better to replace that system by the system of adhesions. There was no longer reason to fear that ratification would be lacking. Adhesion normally suppressed ratification. There would no longer be the risk that countries would give their signature without attaching any great importance to it while awaiting the submission of the question to a Parliament which might perhaps not give its approval. Too often, treaties bearing numerous signatures awaited ratifications which did not come. With the new system a Government would give its adhesion after having obtained the approval which was necessary under the Constitution. . . . Diplomatic practice required that a Government should not adhere to a treaty without being sure of Parliamentary approval; an adhesion once given was something definite by which a country became committed. (*Ibid.*, p. 66.)

Somewhat similar to the provisions of the General Act are those found in treaties which, although signed and subject to ratification by signatory States, are open to accession and are declared to come into force upon the deposit of a certain number of either ratifications or accessions. For example, the International Convention for the Suppression of Counterfeiting Currency of April 20, 1929 (112 *League of Nations Treaty Series*, p. 371) was left open to certain States for their signature subject to ratification until December 31, 1929, and after that date was declared open to their accession. By Article 25 it was provided that the convention should "not come into force until five ratifications or accessions on behalf of Members of the League of Nations or non-Member States have been deposited. The date of its coming into force shall be the ninetieth day after the receipt by the Secretary-General of the League of Nations of the fifth ratification or accession." Compare Articles 27-30 of the Convention of July 13, 1931

for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs. *United States Treaty Information Bulletin*, No. 24 (Sept., 1931), pp. 70, 84; *League of Nations Document* C.455.M.193.1931.XI. Also Articles 22-26 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws, Articles 8-12 of the Protocol relating to Military Obligations in Certain Cases of Double Nationality, Articles 6-10 of the Protocol relating to a Certain Case of Statelessness, and Articles 6-10 of the Special Protocol concerning Statelessness. (All of April 12, 1930.) *League of Nations Document* C.351.M.145.1930.V., Annexes 5-8.

The types of provisions just discussed are still somewhat unusual, and seem to be in conflict with one of the fundamental theoretical reasons why treaties are normally not open to accession until they have come into force; that is, for the reason that the invitation to accede is effective only when the treaty comes into force. Nevertheless, there can be no serious practical objection to them, and, as some of the remarks made in connection with the General Act indicate, they may be both desirable and useful, especially in the case of treaties drafted, not by plenipotentiaries or representatives of States as such, but by experts of the League of Nations or some other international organization. In the latter type of case accession, quite in accord with principle, represents action by non-signatory States which had no part (at least through representatives plenipotentiary) in the elaboration of the treaty. In any event the phrase "*Unless otherwise provided in the treaty itself*," found in the section of this Convention here under discussion, recognizes the propriety of, and is intended to cover, the types of cases just considered. Unless a treaty contains provisions, similar to those above noted, expressly or by clear implication recognizing the possibility of effectively acceding prior to the coming into force of the treaty, the general principle forbidding such action will prevail.

CONSENT OF THE PARTIES

The paragraph of this Convention here under discussion also recognizes the general principle that a State may accede to a treaty only with the consent of all the parties to the treaty. There can be no doubt that States are free to select the other States with which they will enter into treaty relations. It follows, therefore, that if certain States elect to conclude a treaty among themselves, other States can become parties thereto by accession only if the former States permit them to do so. This principle is, of course, equally applicable even if an accession is regarded as constituting, technically, a new treaty between the parties to the original instrument and the acceding State, for, like all treaties, such a treaty presupposes the consent of all the parties thereto. In short, therefore, a State may adhere to a treaty only with the consent of the parties to the treaty. See 1 F. de Martens, *Traité de Droit International* (Léo trans., 1883), p. 537; Roxburgh, *International Conventions and Third States* (1917), p. 47; 1 De Louter, *Le Droit International*

Public Positif (1920), p. 496; Dupuis, *op. cit.*, 2 *Recueil des Cours* (1924), p. 329; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 361; 1 Oppenheim, *International Law* (4th ed., 1928), p. 742; 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), pp. 430-431; 1 Hudson, *International Legislation* (1931), p. xlviii.

This consent is usually contained in a clause of the treaty itself, often referred to as the accession or adhesion clause, which permits or invites other States generally, or certain States, to accede to the treaty; such clauses are quite commonly found in multipartite treaties today. Or consent may be given in a separate instrument concluded by the parties to the original treaty. See, for example, the Protocol of June 14, 1907, regarding adhesions to the Hague Convention of 1899 for the Pacific Settlement of International Disputes. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915), p. xxix; and the several protocols of November 28, 1923, providing for the accession of States not represented at the third or fourth Conference on Private International Law to various conventions concluded at those conferences. 51 *League of Nations Treaty Series*, pp. 209, 215, 221, 227, 233, 239.

In the absence of such separate agreement or of an accession clause in the treaty itself, it would seem that the presumption is that the States parties to the treaty do not consent to accession by outside States, and therefore that the latter may not accede. Thus, at the Hague Conference of 1899, M. Asser stated that if the text of the Convention for the Pacific Settlement of International Disputes remained absolutely silent on the matter of accession "it would by that very fact be a closed convention. . . ." Scott, *The Proceedings of the Hague Peace Conferences, The Conference of 1899* (1920), p. 217. The Permanent Court of International Justice, in rejecting the argument that Poland had in some manner adhered to the Armistice Convention and the Protocol of Spa, pointed out that those instruments made "no provision for a right on the part of other States to adhere to them," and that it was "just as impossible to presume the existence of such a right—at all events in the case of an instrument of the nature of the Armistice Convention—as to presume that the provisions of these instruments can *ipso facto* be extended to apply to third States." "A treaty," the court added, "only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States." *Case concerning certain German Interests in Polish Upper Silesia, Publications of the P. C. I. J.*, Series A, No. 7, pp. 28-29. It may be doubted whether the Havana Convention on Treaties (4 Hudson, *International Legislation* (1931), p. 2378) is in accord with practice when it seemingly reverses the above presumption by providing in Article 19 that "A State not participating in the making of a treaty may adhere to the same if none other of the contracting parties be opposed. . . ."

Although in the absence of an accession clause in a treaty, or of a separate

instrument fulfilling the same purpose, the presumption is that the parties to the treaty are unwilling to extend to outside States the privilege of accession, nevertheless that presumption must yield to evidence that consent of the parties to accession by some or all States, although not expressly recorded, does in fact exist. In other words, no formal agreement among the parties to an instrument is necessary to express their consent to accessions thereto by other States. Thus, there was no formal agreement between the parties to the Hague Convention of 1907 for the Pacific Settlement of International Disputes relative to the adhesion of Poland, Czechoslovakia and Finland thereto, although Article 94 of that convention seems to envisage one, and although practically the same provision in Article 60 of the 1899 Convention was apparently regarded as requiring one. Article 94 of the Convention of 1907 reads: "The conditions on which the Powers which have not been invited to the Second Peace Conference may adhere to the present convention shall form the subject of a subsequent agreement between the contracting Powers." The three states mentioned, having only come into being after the war of 1914–1919, were, of course, among those "not invited" to the 1907 Conference. Article 60 of the Convention of 1899 is the same as the one just quoted, except that the words "represented at the International Peace Conference" take the place of the words "invited to the Second Peace Conference." When it was desired that Powers not represented at the first conference should be allowed to adhere to the Convention of 1899, agreement of the parties to that effect was formally recorded in the Protocol of June 14, 1907, referred to *supra*. The remarks of Anzilotti on the point here under discussion seem eminently reasonable. He says:

L'absence de la clause d'accession fait bien présumer que les parties ne veulent pas assumer d'obligations envers les tiers, mais n'exclut pas d'une façon absolue une volonté différente, surtout au regard d'un Etat ou d'un petit nombre d'Etats déterminés; et comme cette volonté pourrait certainement se manifester dans un accord explicite entre les contractants et le tiers, de même rien n'empêche qu'elle puisse également se manifester *rebus ipsiis et factis*. Ce sera, on peut même dire que c'est certainement à l'heure présente, un cas exceptionnel; mais il serait arbitraire de l'exclure d'une façon absolue. . . . Il s'agit en dernière analyse d'une question de fait qui ne peut être résolue qu'espèce par espèce. (1 *Cours de Droit International*, Gidel trans., 1929, pp. 427–428.)

Since consent of the parties to a treaty to adhesions by non-signatory States may be withheld altogether, it follows that it may be given with respect to such States and subject to such conditions as the parties see fit. Thus:

1. The privilege of acceding to a treaty may be extended to all non-signatory States without distinction—in which case the treaty is said to be an "open" one:

Non-signatory Powers may adhere to the present convention. (The

Hague Convention of 1907 respecting the Laws and Customs of War on Land, Art. 6. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, 1915, p. 104.)

This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be necessary for adherence by *all the other Powers of the world*. (Treaty of August 27, 1928, for the Renunciation of War, Art. 3. 4 Hudson, *International Legislation*, 1931, p. 2522.)

The High Contracting Parties will use every possible endeavor to induce *non-signatory Powers* to accede to the present Convention. (Convention of July 24, 1923, on the Régime of the Straits, Art. 19. 2 Hudson, *op. cit.*, p. 1028.)

2. The privilege of accession may be granted to certain States only:

Non-Signatory Powers which have been invited to the Second Peace Conference may adhere to the present Convention. (Hague Convention of 1907 for the Pacific Settlement of International Disputes, Art. 93. Scott, *op. cit.*, p. 78.)

Non-Signatory Powers which have accepted the Geneva Convention of the 6th July, 1906, may adhere to the present Convention. (Hague Convention of 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Art. 24. *Ibid.*, p. 175.)

States which have not taken part in the war of 1914-1919 shall be permitted to adhere to the present Convention. (Convention of October 13, 1919, on the Regulation of Aerial Navigation, Art. 41. 1 Hudson, *op. cit.*, p. 359.)

3. The privilege of third States to accede may be subordinated to their being invited to do so. In such cases the accession clause usually provides that a designated State or organ shall extend the invitation:

(a) To all States without exception:

Third Powers will be invited by the Government of the French Republic to adhere to the present Treaty duly ratified. (Treaty of February 9, 1920, concerning the Archipelago of Spitzbergen, Art. 10, sec. 7. 1 Hudson, *op. cit.*, p. 436.)

(b) To States which it apparently may use its own discretion in selecting:

The right to accede is given "to States not Members of the League to which the Council of the League may decide officially to communicate the present Convention." (Convention of April 20, 1921, on Freedom of Transit, Art. 5. 1 Hudson, *op. cit.*, p. 625.)

(c) To certain States only:

Powers not signatory to the present Treaty, *which have Governments recognized by the Signatory Powers and which have treaty relations with China*, shall be invited by the United States to adhere to the present Treaty. (Treaty of February 6, 1922, regarding Principles and Policies to be followed in Matters concerning China, Art. 8. 2 Hudson, *op. cit.*, p. 823.)

4. The privilege of acceding to a treaty may be expressly subordinated:

(a) To the express consent of all the parties thereto given in each case:

Toute demande d'accession à la présente Convention . . . ne peut être accueillie que du *consentement unanime des Hautes Parties contractantes*. (Monetary Convention of November 5, 1878, between France, Belgium, Greece, etc., Art. 13. 4 Martens, *Nouveau Recueil Général de Traités* (2d ser.), p. 728.)

(b) To the express consent of a certain number of the parties, originally agreed upon by all of them:

After January 1, 1923, this adhesion [by States which took part in the war of 1914–1919] may be admitted *if it is agreed to by at least three-fourths of the signatory and adhering States* voting under the conditions provided by Article 34 of the present Convention. (Convention of October 13, 1919, on the Regulation of Aerial Navigation, Art. 42. 1 Hudson, *op. cit.*, p. 359.)

(c) To the tacit consent of all the parties, which will be presumed to exist in the absence of express opposition:

Les autres Puissances pourront demander à adhérer dans la même forme, mais leur demande ne produira effet que si, dans le délai d'un an à partir de la notification au Conseil fédéral [of Switzerland], celui-ci n'a reçu *d'opposition de la part d'aucune des Puissances contractantes*. (Geneva Convention of July 6, 1906, Art. 32. 2 Martens, *Nouveau Recueil Général de Traités* (3d ser.), pp. 620, 640.)

The above list sets forth examples of the provisions more or less frequently found in practice. It is, of course, not exhaustive, but it will serve to indicate that the privilege of non-signatory States to accede to a treaty is entirely subject to the control of the parties to the treaty.

In connection with the type of provision referred to in 4, (b) in the above list, it may be well to add an observation at this point. If a treaty contains a clause to the effect that individual accessions shall be permitted if consented to by a certain number of the parties to the treaty—a number less than all of them—that might be regarded as an exception to the general principle of this section which would be covered by the phrase “*unless otherwise provided in the treaty itself*.” Such clauses may, however, be explained in a manner which is perhaps sounder theoretically and which does not recognize them as being exceptions to the general principle that accessions must be consented to by all the parties to a treaty. It is readily evident that all the parties to a treaty may, by provision in the treaty, consent to accessions which are, individually, approved by only some of them. By consenting to such an article, all the parties, in effect, consent to all accessions which are effected in conformity with prescribed conditions.

The term “privilege” of acceding to a treaty has been used in this comment advisedly. It is believed that a State eligible to accede to a treaty as a result of the provisions of an accession clause therein contained, or of a separate

agreement, does not possess a "right" to accede in the sense that it has a legal right to demand that the parties to the treaty shall carry out those provisions and admit it to partnership in the treaty. The parties to the treaty—or the particular State or organ to which they have delegated the authority to act for them—must always be the final judge as to whether or not an outside State has met and complied with all the qualifications and conditions prescribed as prerequisite to the privilege to accede. Likewise, the parties to the treaty must be regarded as having the power by mutual agreement to alter or abrogate an accession clause therein contained, or to put such interpretation upon it as they see fit. If the exercise by the parties of any of the above powers so operates as to cancel their consent to accession to the treaty by a State or entity which was, or believed itself to be, eligible to accede, the latter State or entity simply cannot accede, and is without further rights in the matter.

In this connection it is of interest to note the recommendations of the Advisory Committee of the League of Nations relative to the application by League Members of the policy of non-recognition with respect to the existing régime in Manchuria. *League of Nations Document C.L.117.1933.VII.*, Annex, p. 1 ff. The committee declared that, in deciding not to recognize that régime either *de jure* or *de facto*, the League "had in view that, should 'Manchukuo' manifest its intention of acceding to certain general international conventions, they would take all steps in their power to prevent such accession." Those conventions, according to the committee, fall into the following groups:

I. Closed conventions, under which the parties have to be consulted as to the admission of new members. In such cases Members of the League should simply refuse to consent to the accession of "Manchukuo."

II. Open conventions, which provide that States shall be allowed to accede by unilateral act. Here the State with which the acts of accession are deposited [and the committee suggests that this should include the United States as regards the Treaty of August 27, 1928 for the Renunciation of War] should consult the contracting parties, in the event that "Manchukuo" should attempt to accede. League Members among the contracting parties should then give a negative opinion as to the acceptance of "Manchukuo's" accession, "and the result of the consultation would enable the States with which the acts of accession are deposited to rely in their reply to the applicant, upon the opinion of the other contracting States."

III. Conventions concluded under League auspices. Most of these make the privilege of accession dependent upon decisions of the Council alone, so no action by the contracting parties is necessary. In the case of open conventions, the Secretary General "could not receive any accession from 'Manchukuo'. . . ."

IV. Certain conventions, such as the Hague Conventions for the Pacific Settlement of International Disputes and the Protocol of Signature of the Statute of the Permanent Court of International Justice, which contain accession clauses which operate automatically to exclude "Manchukuo."

In the case of open conventions (group II above) the report of the committee seems to be slightly vague, and indeed the matter of refusing to accept an accession in such cases raises some rather complicated problems. If, in the case of a convention expressly open to accession by non-signatory States without distinction or condition, it were necessary for the contracting parties to consent *each time* to *each* accession, it is evident that the refusal of any of them to give their consent could effectively block accession by a particular State. The better view, however, would seem to be that in such cases the consent of the parties has already been given once and for all in the accession clause itself, which, as Anzilotti puts it, creates as between the contracting States "l'obligation réciproque de stipuler avec le tiers aux conditions données. . . ." 1 *Cours de Droit International* (Gidel trans., 1929), p. 430. This was apparently the view taken at the Hague Conference of 1907, for, according to M. Renault, one of the reasons why the majority of the Drafting Committee accepted the "system of the open door" in preference to an arrangement under which any of the contracting parties would have been in a position to express opposition to accession by a particular State, was because "there is the possibility of a new State, which may be formed to the detriment of another and which would frequently meet with insurmountable opposition on the part of this other. It is true, as was pointed out, that through diplomatic negotiations it might be possible to overcome certain ill-will, but there might be persistent obstinacy." Scott, *The Proceedings of the Hague Peace Conferences of 1899 and 1907, The Conference of 1907*, Vol. 1, (1920), p. 338.

Even if this latter view be correct, the parties to the treaty can, of course, by mutual agreement, as indicated above, alter the accession clause, abrogate it, or so interpret it as to exclude accession by a particular State. Suppose, however, that all of the parties are not willing to agree to such action—suppose, in the case of the open treaties referred to by the League Committee in Group II, some of the contracting States do not oppose acceptance of "Manchukuo's" accession, or even express an opinion in favor of such acceptance. Or, in an ordinary case, suppose some of the parties to a treaty should question the fact that an acceding State had fulfilled the conditions prerequisite to accession, while other States parties contended that it had. In all these cases it would seem that, at least so long as such lack of agreement among the parties continued to exist, the outside State could not effectively accede, for the simple reason that the necessary general consent of all the parties to such accession does not in fact exist. As between the parties themselves, to be sure, there may be a resulting dispute as to whether or not

the parties objecting to the accession have in fact violated their obligations under the accession clause, or as to whether they have correctly interpreted the provisions thereof regarding the conditions and qualifications which a non-signatory must meet before being eligible to accede. These, however, are ordinary questions of treaty application and interpretation which must be settled between the parties themselves in the normal way.

(c) A treaty may designate the organ of a State by which accession should be executed by that State; in the absence of such a designation, an accession may be executed by the head of State or by any other authorized organ of the State.

COMMENT

In former times both the procedure and the instruments of accession were highly formal. Thus the Act of Accession of the King of Sardinia to the convention concluded at Aix-la-Chapelle October 9, 1818, signed at London March 22, 1819 (2 Martens, *Nouveaux Supplémens au Recueil de Traités et autres Actes Remarquables*, p. 384), took the form of a long and formal document signed by the King's Minister supplied with full powers for that purpose, and ratified by the King. The accession, in formal diplomatic style, recorded the fact that France, Great Britain, Russia and Austria had concluded the above-named conventions, that they had invited the King of Sardinia to adhere, and that the latter, desirous of accepting the invitation and giving proof of his friendship etc., had given full powers to his Minister:

. . . pour, en son nom, donner acte de cette accession, le quel, en conséquence, déclare que Sa Majesté le Roi de Sardaigne accède par le présent Acte, envers Sa Majesté le Roi du Royaume Uni de la Grande Bretagne et d'Irlande, à la dite Convention du neuf Octobre 1818, qui est censée insérée ici de mot à mot et s'engage non seulement envers Sa dite Majesté, mais aussi envers les autres Puissances et Etats qui y sont intéressés, à se conformer en tout aux stipulations qui s'y trouvent arrêtées, et qui peuvent concerner Sa Majesté le Roi de Sardaigne.

Apparently a similar instrument was given to each of the parties to the original treaty, and these parties gave in return equally formal acts of acceptance. Consequently, the Act of Accession, which was, as stated, subject to ratification, provided that

L'échange des instrumens de ratification de l'accession d'une part, et de l'acceptation de l'autre part, aura lieu dans l'espace de trois mois.

The Act of Acceptance, incidentally, incorporated the Act of Accession, recited that the King authorized the undersigned, his foreign minister, to accept it, pledged the accepting State to observe the treaty *vis-à-vis* the acceding State, and also provided for the exchange of the ratifications of the respective instruments. See 2 Pradier-Fodéré, *Traité de Droit International Public* (1885), pp. 832-835; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 362.

Again accession was sometimes effected by a formal treaty or convention which combined the acts of accession and acceptance. Thus when, in accordance with Article 9 of the Treaty of November 30, 1831, between France and Great Britain for the Suppression of the Traffic in Slaves (9 Martens, *Nouveau Recueil de Traités* etc., p. 544), those Powers invited Denmark to accede thereto, there was concluded a treaty between France and Great Britain on the one part, and Denmark on the other. (July 26, 1834. 12 Martens, *ibid.*, p. 713.) The preamble recited that, Great Britain and France having invited Denmark to accede, and the latter having accepted the invitation,

Les trois hautes Puissances, dans la vûe d'accomplir ce dessein généreux, et pour donner à l'accession de Sa Maj. Danoise, ainsi qu'à son acceptation par Sa Maj. le Roi des Français et par Sa Maj. Britannique l'authenticité convenable et la solennité d'usage, ont résolu de conclure, à cet effet, un Traité formel, et ont, en conséquence, nommé pour leurs Plénipotentiaires . . . etc.

The body of the treaty announced the accession by the King of Denmark, and the acceptance by the Kings of England and France of the said accession, to the treaty in question, the provisions of which "seront censés d'avoir été convenus, conclus et signés directement entre S. M. le Roi des Français, S. M. le Roi de Danemark, et S. M. le Roi du Royaume-Uni de la Grande Bretagne et d'Irlande." The treaty was, in addition, subject to ratification.

In modern usage, on the other hand, the process of accession is much less formal. Nowadays accession is normally effected simply by the communication or deposit of an act in the form of a unilateral declaration which is not subject to ratification and which is not normally followed by any formal act of acceptance. Basdevant, *op. cit.*, 15 *Recueil des Cours*, p. 594; 1 Fauchille, *op. cit.*, pt. 3, p. 362.

On occasion a treaty may specify the organ of a State by which accession on its behalf is to be executed. Thus the General Act of 1928 provided that it should be "open to accession by all the Heads of States or other competent authorities of the Members of the League of Nations and the non-Member States to which the Council of the League of Nations has communicated a copy for this purpose." 4 Hudson, *International Legislation*, p. 2529, Article 43. Or, conceivably, there might be even more specific provision requiring accession by a certain organ, or in accordance with certain constitutional provisions of the acceding State. In such cases, according to the paragraph of this Convention here under discussion, the accession must be executed by the organ or authority designated in the treaty if it is to be effective internationally. Compare comment on Article 6, paragraph (b) (Ratification), *supra*. Provisions of this nature apparently are seldom inserted in accession clauses, however.

If there is no pertinent provision in a treaty, an effective accession thereto may, under this article, be executed by the head of State or by any other

authorized organ of the State. "Any other authorized organ of the State" may include a collegial executive, such as the Federal Council of Switzerland, a secretary of state or minister for foreign affairs, or even an ambassador or other diplomatic officer. See the various accessions appended at the end of the comment on this article. In this connection it may be noted that, although ratifications are practically invariably executed by heads of States, accessions, for reasons not readily apparent, are sometimes executed by foreign ministers or other officials of the State. Thus, although a British act of ratification would be executed by the King (or Queen), the British accession to the Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field was executed by Her Majesty's Principal Secretary of State for Foreign Affairs. 2 Satow, *Guide to Diplomatic Practice* (1917), p. 283. See also what may perhaps be regarded as the Argentine accession to the Covenant of the League of Nations. The latter was simply a reply by the Argentine President to the invitation to accede, couched in the following form:

I take pleasure in transmitting to Your Excellency the formal ratification of the Argentine Government under the conditions of adhesion expressed in the note of July 18, 1919, addressed to the Secretary-General of the League by our representative in France.

This reply was apparently unaccompanied by any separate document or instrument. Hudson, "The Argentine Republic and the League of Nations", 28 *American Journal of International Law* (1934), p. 127, n. 7, and 128. Mr. Hudson asserts that "the informal character of the response does not render it ineffective; accessions are frequently less formal than ratifications, and even for the latter it would be difficult to say that any particular formality is required, apart from special stipulations." *Ibid.*, p. 131.

(d) An accession becomes effective only when it is deposited or communicated in accordance with any stipulation in the treaty itself providing for the deposit or communication of accessions; in the absence of such a stipulation, an accession becomes effective only when it is notified to all the parties.

COMMENT

Treaties which are open to accession usually contain provisions relative to the deposit or communication of accessions. A frequent provision is to the effect that a State desiring to accede to the treaty shall deposit an instrument of accession with a designated State or agency whose duty it shall be to notify the other parties to the treaty of such deposit. In such cases, an accession is immediately effective when it has been deposited in the manner prescribed, unless the treaty fixes a different date or expressly makes notification of all the other parties a condition precedent to the effectiveness of the accession.

Some typical provisions found in modern treaties follow:

. . . Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto.

It shall be the duty of the Government of the United States to furnish each Government named in the Preamble and every Government subsequently adhering to this Treaty with a certified copy of the Treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such Governments immediately upon the deposit with it of each instrument of ratification or adherence. (Treaty for the Renunciation of War, August 27, 1928, Article 3. 4 Hudson, *International Legislation* (1931), p. 2522.)

The Power which desires to adhere notifies its intention in writing to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall immediately forward to all the other Powers invited to the Second Peace Conference a duly certified copy of the notification, as well as of the act of adhesion, mentioning the date on which it received the notification.

The present Convention shall come into force . . . in the case of the Powers . . . which adhere, sixty days after the notification . . . of their adhesion has been received by the Netherland Government. (Hague Conventions of 1907, except that relative to the Creation of an International Prize Court.)

A power which desires to accede shall notify its intention in writing to the British Government, and transmit simultaneously the act of accession, which will be deposited in the archives of the said government.

The said government shall forthwith transmit to all the other powers a duly certified copy of the notification, together with the act of accession, and communicate the date on which such notification was received. The accession takes effect sixty days after such date. (Declaration concerning the Laws of Naval Warfare, signed at London, February 26, 1909, Article 70. 3 *American Journal of International Law* (Supplement) (1909), p. 219.)

ART. 10. . . . Accession will be notified to the Secretary-General of the League, who will notify all Powers concerned of the accession and of the date on which it was notified.

ART. 11. The present Convention shall come into force in respect of each Party on the date of the deposit of its ratification or act of accession. (Convention of September 30, 1921, on the Suppression of Traffic in Women and Children, 1 Hudson, *op. cit.*, p. 726.)

This adhesion shall be notified through the diplomatic channel to the Government of the French Republic, and by it to all the signatory or adhering States. The adhesion will come into effect from the date of the notification to the French Government. (Convention of September 10, 1919, on the Liquor Traffic in Africa, Article 10. 1 Hudson, *op. cit.*, p. 352.)

On occasion, usually in cases where the accession of a number of States at one time is contemplated, provision has been made for a protocol or *procès-*

verbal "to receive and record the said adhesions." See the Protocol regarding Adhesion to the 1899 Hague Convention for the Pacific Settlement of International Disputes. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915), p. xxix. Compare the various protocols of November 28, 1923, regarding the "adhesion" of States not represented at the third or fourth Conferences on Private International Law to conventions there concluded. 51 *League of Nations Treaty Series*, Nos. 1228-1233. The *procès-verbal* of accessions is signed on behalf of the acceding States, and certified copies thereof are transmitted to the contracting parties to the treaty. See the *Procès-verbal* of Adhesion to the 1899 Convention for the Pacific Settlement of International Disputes, Scott, *op. cit.*, p. xxx.

If the accession clause of a treaty prescribes the manner in which non-signatory States may effect accessions thereto, may they accede in a different manner? As Anzilotti points out (1 *Cours de Droit International* (Gidel trans., 1929), p. 432), the consent of the parties to a treaty to an accession thereto is essential, and the parties normally have, in the accession clause, consented only to accessions effected in the manner prescribed. Consequently accessions, to be effective, must be effected in that manner. This is the principle here recognized by the insertion of the word "only".

In this connection it may be mentioned that in the *Upper Silesia Case* the Permanent Court of International Justice seemed to imply that there might be tacit accessions to a treaty. *Publications of the P. C. I. J.*, Series A, No. 7, pp. 28-29. Under this Convention, a tacit accession would not be possible if the treaty prescribed a different and a definite method for effecting accessions, unless, of course, it could be established by evidence that the parties to the treaty had mutually agreed to supersede the provisions in the treaty. The important thing to be kept in mind is that, should the question ever arise as to whether or not a non-signatory State has acceded to a treaty, there must be some means of establishing evidence of its intention actually to accept and be bound by the treaty, and of the intention of the parties to consent to or permit such accession. Generally and practically speaking, the most reliable evidence of such a nature is the accession clause of a treaty and full compliance therewith by an acceding State. See, on this point, Roxburgh, *International Conventions and Third States* (1917), pp. 47-51.

It is evident that, if a treaty is to be properly observed, the parties thereto must know the States with respect to which they are bound by the treaty. Consequently, the parties to a treaty must be informed when outside States accede to the treaty. Clearly the purpose of the various treaty provisions quoted above was to assure prompt notification to all the parties to a treaty of a State's accession thereto. To be sure, the provisions quoted do not condition the effectiveness of an accession upon its being notified to all the parties, but it may be said that the parties to the treaties containing those provisions agreed to accept constructive notice in the form of notification to some one State or agency. And furthermore, each of the provisions quoted

contemplates prompt notification of accessions to all parties by the depository State or agency. Suppose, however, that a treaty, although open to accession, contains no such clauses providing for the deposit or communication of accessions or for the date of their taking effect. In such a case it seems logical, in view of what has just been said, to provide that, if a State undertakes to accede to the treaty, its accession will become effective when, and only when, it is notified to all the States which are at that time parties to the treaty. (Or, in the comparatively few cases where an accession can, and does, take place before a treaty comes into force, to all States which have previously signed, ratified or acceded to the treaty.) Thus the Havana Convention on Treaties (Article 19) provides that a State's adherence is "to be communicated to all" the contracting parties.

(e) When an accession becomes effective, the acceding State thereupon becomes a party to the treaty upon a basis of equality with other parties.

COMMENT

An accession to a treaty properly communicated or deposited by a State entitled to accede to the treaty—in other words, an effective accession—normally results in making the acceding State a "party" to the treaty in the sense in which that term is defined in Article 2, paragraph (c) of this Convention. A non-signatory State which has effectively acceded to a treaty is thereafter bound by the provisions of that treaty, both as regards rights and obligations, in exactly the same manner and degree as is any signatory state which is a party thereto, subject, of course, to any reservations which it may properly have made at the time of its accession. This is recognized by practically all writers. Thus Pradier-Fodéré states that accession is "une acceptation formelle, solennelle et entière, par une Puissance tierce, de toutes les parties d'un traité, avec des droits égaux à ceux des parties contractantes. . . . L'accession place l'Etat qui la donne sur la même ligne que les parties principales qui ont conclu et signé le traité, elle lui confère les mêmes droits comme elle lui impose les mêmes obligations réciproques envers tous les Etats intéressés: la Puissance qui accède devient partie contractante directe, en obtenant par son accession tous les droits et en se chargeant de toutes les obligations qui lui seraient échus ou qui auraient été mises à sa charge, si elle eût signé immédiatement le document principal." 2 *Traité de Droit International Public* (1885), p. 829. See also 1 F. de Martens, *Traité de Droit International* (Léo trans., 1883), p. 537; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 360; Dupuis, *op. cit.*, 2 *Recueil des Cours* (1924), p. 329; 1 Oppenheim, *International Law* (1928), p. 742. The accession clauses of instruments sometimes contain statements, in fact superfluous, to the same effect. For example, paragraph 4 of Article 70 of the Declaration of London reads: "In respect of all matters concerning this Declaration, acceding powers shall be on the same footing as the signatory

powers." 3 *American Journal of International Law* (1909), Supp., p. 219. And Article 1 of the Convention creating the Inter-American Union of Electrical Communications (2 Hudson, *International Legislation* (1931), p. 1292) declares that: "Those States which have not taken part in this Convention may adhere thereto, and will have the same rights and obligations as the signatories stipulate in the articles hereinafter set forth."

It may be urged that, juridically speaking, the accession clause in the original treaty constitutes an offer by the original contracting parties to non-signatory states to conclude with the latter a treaty exactly identical with that already in force between themselves, and that the act of accession constitutes an acceptance of that offer. The result, therefore, would be that the acceding State does not become a party to the original treaty at all, but to a new treaty identical with the original one. See Roxburgh, *International Conventions and Third States* (1917), pp. 45-46. "Adhesion is equivalent to a convention concluded by the adhering Power with all the Powers which have already become contracting Powers", says the report of the First Commission of the Hague Conference of 1907 upon the proposed convention to create an international prize court. Scott, *Proceedings of the Hague Peace Conferences, The Conference of 1907*, Vol. 1 (1920), p. 210. Whatever may be said for this view from the standpoint of strict legal theory, however, the fact remains that the acceding State acquires exactly the same rights and becomes subject to the same obligations as any one of the original contracting parties, and so is in a juridical position which is no different practically from that which it would occupy had it itself been an original signing and ratifying State—except, perhaps, as regards the time at which it acquired those rights and obligations. Cf. 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 430.

As an example of an unusual case in which acceding States apparently did not acquire the complete status of parties bound reciprocally as to both rights and obligations with respect to all the other parties to the treaty, both original and acceding, the following may be cited. In order to open the Convention of July 17, 1905, relating to Civil Procedure (99 *British and Foreign State Papers*, p. 990) to accession by States not represented at the Fourth Conference on Private International Law, the original parties to that convention signed a protocol to that effect on July 4, 1924. 51 *League of Nations Treaty Series*, p. 227. France signed and ratified that protocol subject to a reservation worded as follows: "The French Government have signed the present Protocol in order to permit of the adhesion to the Convention of July 17, 1905, of states not represented at the Fourth Conference on Private International Law. It is understood, however, that this Convention shall not be applicable as between France and the new States adhering to the Convention." *Ibid.*, p. 231.

A treaty may expressly provide for accessions to parts thereof, rather than

to all of it. Thus Article 38 of the General Act of 1928 for the Pacific Settlement of International Dispute (4 Hudson, *International Legislation* (1931), p. 2529) reads:

Accessions to the present General Act may extend:

A. Either to all the provisions of the Act (Chapters I, II, III, and IV);

B. Or to those provisions only which relate to conciliation and judicial settlement (Chapters I and II), together with the general provisions dealing with these procedures (Chap. IV);

C. Or to those provisions only which relate to conciliation (Chapter I), together with the general provisions concerning that procedure (Chapter IV).

The Contracting Parties may benefit by the accessions of other Parties only in so far as they have themselves assumed the same obligations.

EXAMPLES OF ACCESSIONS

ENRIQUE OLAYA HERRERA, Presidente de la República de Colombia,

Por cuanto la ley número veintinueve de mil novecientos treinta autoriza al Gobierno para adherir a un pacto internacional que a la letra dice:

[Here follows the text of the treaty.]

Por tanto, y vista la aprobación que el Congreso Nacional ha impartido al precedente Tratado, he venido en aceptarlo y aprobarlo, en ordenar que se deposite en Washington el presente ejemplar de la mencionada ley, como prueba de adhesión a él y en disponer que se tenga como ley de la República, comprometiendo para su observancia el honor nacional.

Dado, firmado de Mi mano el presente instrumento de adhesión, sellado con el sello de la República y refrendado por el Ministro de Estado en el Despacho de Relaciones Exteriores, en Bogotá, el día diez de abril del año mil novecientos treinta y uno.

[SEAL]

ENRIQUE OLAYA HERRERA

El Ministro de Relaciones Exteriores,
RAIMUNDO RÍVAS

[*Treaty for the Renunciation of War*, United States Department of State, Publication No. 468 (United States Government Printing Office, Washington, 1933), p. 144.]

Der Bundespräsident der Republik Österreich erklärt hiemit, dem am 27. August 1928 in Paris von Bevollmächtigten des Deutschen Reiches, der Vereinigten Staaten von Amerika, Belgiens, der Französischen Republik, des Britischen Reiches, Italiens, Japans, Polens und der Tschechoslowakischen Republik unterzeichneten Antikriegspakt, welcher also lautet:

[Here follows the text of the treaty.]

nach verfassungsgemäss erfolgter Genehmigung des Nationalrates namens der Republik Österreich beizutreten und verspricht in ihrem Namen dessen gewissenhafte Erfüllung.

Zu Urkund dessen ist die vorliegende Beitrittsurkunde vom Bundespräsidenten unterfertigt, vom Bundeskanzler gegengezeichnet und mit dem Staatssiegel der Republik Österreich versehen worden.

Geschehen zu Wien, den 28. November 1928.

[SEAL]

Der Bundespräsident:

HAINISCH

Der Bundeskanzler.

SEIPEL

[*Ibid.*, p. 125.]

EMILIO PORTES GIL, Presidente Provisional de los Estados Unidos Mexicanos, a todos los que las presentes vieren, sabed:

Que el día veintisiete de agosto de mil novecientos veintiocho, se concluyó y firmó en la ciudad de París, Francia, por medio de Plenipotenciarios debidamente autorizados al efecto, un Tratado sobre renuncia de la guerra, entre varias naciones, siendo el texto y la forma del mencionado Tratado, los siguientes:

[Here follows the text of the treaty.]

Que de acuerdo con lo previsto por el artículo III del preinserto Tratado, este Ejecutivo de mi cargo juzgó conveniente la adhesión de México al mismo, por lo que solicitó de la Cámara de Senadores de los Estados Unidos Mexicanos la aprobación consiguiente, la cual fue otorgada el veintitrés de octubre de mil novecientos veintinueve.

Y que en uso de la facultad que me concede la fracción décima del artículo octogésimo noveno de la Constitución Federal, y con aprobación del Senado de la República me adhiero, en nombre de los Estados Unidos Mexicanos, al Tratado sobre renuncia de la guerra, firmado en París el veintisiete de agosto de mil novecientos veintiocho.

En fe de lo cual, expido las presentes, firmadas de mi mano, autorizadas con el Gran Sello de la Nación y refrendadas por el señor don Genaro Estrada, Sub-secretario de Relaciones Exteriores, Encargado del Despacho, en el Palacio Nacional de México, el día primero de noviembre de mil novecientos veintinueve.

GIL

*El Subsecretario de Relaciones Exteriores,
Encargado del Despacho*
G. ESTRADA

[SEAL]

[*Ibid.*, p. 225.]

Nous HAAKON, Roi de Norvège, faisons savoir:

Désirant profiter de la faculté d'adhésion réservée aux Etats non signataires par l'article III, alinéa 2, du Traité relatif à la renonciation à la guerre comme instrument pour le règlement des différends internationaux, signé à Paris le 27 août 1928, Traité dont la teneur suit:

[Here follows the text of the treaty.]

Nous avons résolu d'adhérer par les présentes au dit Traité, et promettons de concourir à son application.

En foi de quoi Nous avons signé la présente Lettre d'adhésion et y avons fait apposer le sceau du Royaume.

Fait au Palais Royal d'Oslo, le vingt-deux février mil-neuf-cent-vingt-neuf.

HAAKON R

[SEAL]

JOH LUDW MOWINCKEL

[*Ibid.*, p. 233.]

LE CONSEIL FÉDÉRAL de la CONFÉDÉRATION SUISSE, après avoir vu et examiné le Traité de Renonciation à la Guerre,

conclu à Paris, le 27 août 1928, Traité auquel les Chambres Fédérales ont décidé d'adhérer par arrêté du 7 juin 1929 et dont la teneur suit:

[Here follows the text of the treaty.]

DECLARE que la Suisse adhère au Traité ci-dessus qui aura force de loi dans toutes ses parties et entrera en vigueur entre elle et les autres puissances contractantes immédiatement après le dépôt, à Washington, du présent instrument d'adhésion, promettant, au nom de la

Confédération Suisse, de l'observer consciencieusement, en tout temps, en tant que cela dépend de lui.

En foi de quoi, la présente déclaration d'adhésion a été signée par le Président et la Chancelier de la Confédération Suisse et munie du sceau fédéral.

Ainsi fait à Berne, le quatre octobre mil neuf cent vingt-neuf. (4 octobre 1929).

AU NOM DU CONSEIL FÉDÉRAL SUISSE:

Le Président de la Confédération,

DR HAAB.

Le Chancelier de la Confédération,

KAESLIN

[SEAL]

[*Ibid.*, p. 293.]

DECLARATION

Le soussigné, Commissaire du Peuple p.i. aux Affaires Etrangères de l'Union des Républiques Soviétistes Socialistes, déclare que l'Union des Républiques Soviétistes Socialistes adhère au Traité, condamnant le recours à la guerre, conclu à Paris le 27 Août 1928, rédigé comme suit:

[Here follows the text of the treaty.]

En foi de quoi le Commissaire du Peuple p.i. aux Affaires Etrangères de l'Union des Républiques Soviétistes Socialistes, dûment autorisé à cet effet a signé la présente Déclaration d'adhésion.

Fait à Moscou, le "6" Septembre 1928.

MAXIME LITVINOFF

(*Ibid.*, p. 272.)

DECLARAÇÃO

O abaixo assinado, Enviado Extraordinario e Ministro Plenipotenciario da Republica Portuguesa em Washington, devidamente autorizado para esse effeito, tem a honra de declarar formalmente, por ordem e em nome do seu Governo, que o Governo da Republica Portuguesa, usando da faculdade que lhe confere o Decreto com força de Lei No. 16. 155, de vinte seis de Outubro mil novecentos e vinte oito, annexo a esta Declaração por copia autenticada, adhere ao Tratado assinado em Paris em vinte sete de Agosto de mil novecentos e vinte oito entre a Allemanha, os Estados Unidos da America, a Belgica, a França, o Imperio Britannico, a Italia, o Japão, a Polonia e a Checoeslovaquia, renunciando à guerra como instrumento de politica nacional, de que fica appenso a esta Declaração o texto autenticado. Legação de Portugal em Washington em vinte oito de Fevereiro de mil novecentos e vinte nove.

[SEAL]

ALTE

[*Ibid.*, p. 252.]

The President and Federal Council of the Swiss Confederation having communicated to the Government of H. M. the Queen of the United Kingdom of Great Britain and Ireland a Convention signed at Geneva on the 22nd August, 1864 between . . . which convention is word for word as follows:

"And the Swiss Confederation having, in virtue of Article 9 of the said Convention, invited the Government of H. B. M. to accede thereto:

"The undersigned, H. B. M. Principal Secretary of State for Foreign Affairs, duly authorized for that purpose, hereby declares that the Government of H. B. M. fully accedes to the Convention aforesaid.

"In witness whereof he has signed the present Act of Accession, and has affixed thereto the seal of his arms.

"Done at London, the 18th day of February, in the year of our Lord 1865."

SEAL AND SIGNATURE

[2 Satow, *Guide to Diplomatic Practice* (1917), p. 283; 55 *British and Foreign State Papers*, p. 43.]

ARTICLE 13. USE OF THE TERM "RESERVATION"

As the term is used in this Convention, a reservation is a formal declaration by which a State, when signing, ratifying or acceding to a treaty, specifies as a condition of its willingness to become a party to the treaty certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty.

COMMENT

POSSIBILITY OF MAKING RESERVATIONS

It seems to be established in practice that reservations may not be made at all with respect to one type of treaty, to wit, international labor conventions. This view was maintained in a memorandum submitted by the Director General of the International Labor Office to the Secretariat of the League of Nations at the time the Council requested the Committee of Experts for the Progressive Codification of International Law to submit a report on the admissibility of reservations to general conventions. See *League of Nations Document C.212.1927.V*. The memorandum draws attention to the "peculiar legal character" of the labor conventions, differing, as they do, from ordinary treaties in their mode of preparation, conclusion and application, and it points out that, "so far as they are concerned, the question of admissibility of ratifications subject to reservations presents itself in a special form." In the first place, it is argued, even though it be admitted that, under international law, reservations to a treaty are permissible if accepted, expressly or tacitly, by the high contracting parties thereto, still, in the case of international labor conventions, "such consent is unobtainable." Labor conventions are not drawn up by or on behalf of contracting States alone; they are the work of the International Labor Conference in which there are non-governmental representatives, and hence the acceptance of a reservation by all of the States concerned would not suffice "for the rights which the treaties have conferred on non-governmental interests in regard to the adoption of international labour conventions would be overruled if the consent of the Governments alone could suffice to modify the substance and detract from the effect of the conventions." Indeed, it is

said, even acceptance of a reservation by the International Labor Conference itself would still be ineffective, because, if the reservation be merely interpretative of the convention the conference cannot give effect to it, since, under the peace treaties, interpretation of the labor conventions is reserved to the Permanent Court; and, on the other hand, if the reservation would amount to a modification of the text as originally formulated, its adoption by the conference would simply amount to the creation of a new convention and would result in annulling previous ratifications, "since the Conference's decisions are not binding on the States Members of the International Labour Organization." "Obviously, therefore," says the memorandum, "legal arguments force us to deny the admissibility of reservations on the occasion of the ratification of international labour conventions." Furthermore, the additional point is made that it is the very object of the labor conventions to safeguard labor against the detrimental influences of international competition, and that this object can only be achieved if the application of the conventions is uniform and the obligations established by them are mutual and equal. The memorandum concludes that, "in view of the foregoing considerations, it is fair to say that, while, generally speaking, the ratification of collective treaties with reservations is a procedure of doubtful legality, in the special case of international labour conventions it meets with definite and insurmountable objections." And, finally, the memorandum indicates that the above theoretical views have been made to prevail in practice. In 1920 Poland wished to ratify with reservations the Washington Conventions on the Employment of Women before and after Confinement, on Night Labor for Women, and on Unemployment; and in 1921 India wished to do likewise with respect to the Convention on Minimum Age for the Employment of Children in Industry. Both governments, however, gave up the idea after correspondence with the International Labor Office. The Director reports that the correspondence was put before all members of the International Labor Organization as well as before the conference; that the view held by the International Labor Office as to the inadmissibility of reservations "met with no opposition"; and that "it may be assumed that recourse to this procedure is no longer a practical question."

It is safe to say that international labor conventions are in a class by themselves as regards the question of the possibility of making reservations. Other treaties, however, sometimes contain provisions relative to the possibility of making reservations to them. Such provisions are not common, but perhaps they have increased in number in recent years. Cf. 1 Hudson, *International Legislation* (1931), p. li. For example, a treaty may contain a stipulation expressly forbidding the making of any reservations thereto. Thus Article 65 of the Declaration of London of 1909 provided: "The provisions of the present Declaration form an indivisible whole." As to this provision, the drafting committee, of which M. Renault was reporter, said:

This Article is of great importance, and is in conformity with that which was adopted in the Declaration of Paris.

The rules contained in the present Declaration relate to matters of great importance and great diversity. They have not all been accepted with the same degree of eagerness by all the Delegations. Concessions have been made on one point in consideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory and a legitimate expectation would be falsified if one Power might make reservations on a rule to which another Power attached particular importance. (8 *American Journal of International Law*, (1914), Supplement, pp. 88, 142.)

Likewise, Article 1 of the Covenant of the League of Nations provided for accessions thereto "without reservation."

Again, a treaty may contain provisions which purport to define, limit or restrict in some manner the possible reservations which may be made thereto, although not forbidding them altogether. Thus the Conference on the Simplification of Customs Formalities, in a protocol (2 Hudson, *International Legislation*, 1931, p. 1120) which was to be regarded "as an integral part" of the convention of November 3, 1923, recorded the reservations which had been made to Articles 10 and 11 of the convention by certain of the signatories, and then limited subsequent reservations to those articles to such as might be approved by the Council of the League of Nations. The provision in the protocol reads as follows:

Any exceptions which may subsequently be formulated by other Governments, at the time of their ratification or accession, with reference to Article 10, Article 11, or any particular provisions of those Articles, shall be accepted, for the period referred to in the first paragraph above, and subject to the conditions laid down in the third paragraph, if the Council of the League of Nations so decides after consulting the technical body mentioned in Article 22 of the Convention.

The Convention of June 7, 1930, providing a Uniform Law of Bills of Exchange and Promissory Notes (*League of Nations Document C.346.M.142.1930.II*) carried an annex listing various possible reservations, and Article 1 of the convention provided:

This undertaking shall, if necessary, be subject to such reservations as each High Contracting Party shall notify at the time of its ratification or accession. These reservations shall be chosen from among those mentioned in Annex II of the present Convention.

This provision was interpreted by the drafting committee to mean that "the acceptance of the Uniform Law may not be made subject to any reservations other than those indicated in Annex II of the Convention." *League of Nations Document C.360.M.151.1930.II.*, p. 126. See also, in this connection, Article 39 of the General Act for the Pacific Settlement of International Disputes (4 Hudson, *International Legislation*, 1931, p. 2529), which reads, in part, as follows:

1. In addition to the power given in the preceding article, a Party, in acceding to the present General Act, may make its acceptance conditional upon the reservations exhaustively enumerated in the following paragraph. . . .

The convention and several protocols adopted by the Conference for the Codification of International Law in 1930 each contained a clause to the effect that any high contracting party might, when signing or ratifying the instrument, or acceding thereto, append an express reservation excluding any one or more of the provisions of specifically named articles only. It is to be noted, however, that in each case the articles named included all except the formal clauses. See 24 *American Journal of International Law* (1930), Supplement, pp. 196, 201, 206, 211.

Provisions similar to those referred to above will presumably be observed, and will therefore have a tendency to eliminate or to reduce the number of reservations made to the treaty in which they are inserted. Consequently, the use of them is to be encouraged. It is not clear, however, that a provision forbidding reservations altogether, or one restricting them in some way, will necessarily effectively exclude all reservations or all but the kind specified. Such a provision would not of course bind a State not yet a party to the treaty in which it is inserted, so it would not prevent such State from proposing to become a party subject to a reservation not permitted under the provision. Likewise it would seem that there is nothing to prevent all of the signatories and parties to the treaty from voluntarily choosing to ignore the provision and to consent to such reservation. In short, as Professor Hudson has remarked concerning the provision found in the Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, "in such a case, it may be improbable that other reservations will be accepted, though perhaps they are not excluded if affirmatively agreed to by all states." 1 *International Legislation* (1931), p. li.

Apart from international labor conventions and perhaps also the relatively few treaties which contain provisions which purport to limit or restrict the making of reservations, however, the possibility of making reservations to treaties seems to be unchecked. Certain it is that, whatever may be the objections to the making of reservations to treaties, the practice of making them has far from disappeared. It is the purpose of this and the following three articles to lay down rules which will regulate that practice. The presence of these articles in this Convention, however, is, of course, not to be taken as signifying an intention to encourage the making of unnecessary reservations.

EXPLANATION OF THE TERM "RESERVATION"

Attempts to formulate a formal definition of a reservation seem to have been relatively few. Mr. Hunter Miller, who has made one of the few detailed studies of reservations to treaties, concludes that a reservation may be defined as

. . . a formal declaration relating to the terms of the treaty made by one of the contracting Powers and communicated to the other Power or Powers at or prior to the delivery of the instrument of ratification of the declarant. (*Reservations to Treaties*, Washington, 1919, p. 76.)

Professor Hudson has defined a reservation, "properly speaking," as "an exception of particular provisions of an instrument from those provisions by which a state agrees to be bound; in many cases, it refers to the application, or the effect of the application, of particular provisions." 1 *International Legislation* (1931), p. 1. In somewhat similar manner, Anzilotti employs the term reservation in the sense of "une déclaration de volonté par laquelle l'Etat, tout en admettant le traité dans son ensemble, exclut de son acceptation certaines dispositions déterminées par lesquelles il ne sera pas, pour autant, lié." 1 *Cours de Droit International* (Gidel trans., 1929), p. 399. Compare also Strupp's definition of a reservation as a "déclaration de volonté faite par un Etat qui entend se soustraire aux obligations résultant de certaines dispositions ou d'une certaine interprétation d'un traité." *Eléments du Droit International Public* (1927), p. 192. The *Dictionnaire Diplomatique* of the *Académie Diplomatique Internationale* (Paris, 1933, vol. II, p. 560) contains the following definition:

En droit international, on appelle réserves des stipulations par lesquelles des Etats contractant des traités internationaux conviennent de restreindre ou d'annihiler, pour ce qui les concerne, la portée de certaines clauses de ces instruments.

Those definitions which limit the concept of a reservation to a declaration by which a State indicates its intent not to accept, or its refusal to be bound by, certain specific provisions of a treaty have been criticized as being too narrow. See, e.g., Genet, "Les 'Réserves' dans les Traités," 10 *Revue de Droit International, de Sciences Diplomatiques et Politiques* (1932), p. 97. Likewise those which refer to a reservation as an amendment have given rise to objection.

It has seemed desirable to explain carefully the meaning of the term "reservation" as it is used in this Convention.

1. A formal declaration

This means, primarily, that a reservation to a treaty, as that term is here used, must be in the form of a *written* (or printed) statement appearing upon the treaty itself, included in some formal act or instrument whereby the State making the reservation formally approves or accepts the treaty subject to the reservation, or recorded in some formal instrument collateral to the treaty.

(a) A reservation may take the form of a statement endorsed upon the original treaty itself, usually above, beside or below the signature of the representative or representatives of the State on behalf of which the reservation is made. (Examples: the reservations at signature to the Hague Conventions of 1907, 3 Martens, *Nouveau Recueil Général de Traités*, 3d ser., pp. 408-413, 431-436, 482-486, 529-532, 553-556, 579, 599-603, 625-629, 657-662, 740-744; the reservations endorsed upon various treaties adopted

at the Sixth Pan American Conference [the reservations were apparently appended to each separate instrument, although signatures were affixed to the Final Act only], 4 Hudson, *International Legislation*, 1931, pp. 2368, 2374, 2378, 2384, 2401, 2411–2412, 2415; the reservations at signature to the General Convention of Inter-American Conciliation and the General Treaty of Inter-American Arbitration, *Proceedings of the International Conference of American States on Conciliation and Arbitration*, Washington, 1929, pp. 652, 670–675.)

(b) Or a reservation may be included in the instrument of ratification or of accession of a State. (Examples: the United States' ratification of the extradition treaty with Portugal of May 7, 1908, Miller, *Reservations to Treaties*, 1919, pp. 45–46; the United States' ratification of the convention with Great Britain regarding boundary waters of January 11, 1909, *ibid.*, pp. 48–49; the United States' ratification of the General Act of Algeciras of April 7, 1906, *ibid.*, pp. 127–129; the United States' ratification of the Hague Convention of 1907 for the Pacific Settlement of International Disputes, *ibid.*, p. 143; the United States' accession to the Hague Convention of 1907 concerning the Rights and Duties of Neutral Powers in War, *ibid.*, p. 150.)

(c) Or, finally, a reservation may be recorded in a separate formal instrument collateral to the treaty, such as a protocol or a *procès-verbal* of signature, a *procès-verbal* of the exchange or deposit of ratifications, a protocol of accession, etc. (Examples: the Protocol to the Convention on the Suppression of Counterfeiting Currency, 4 Hudson, *International Legislation*, 1931, p. 2705; the Protocol to the Convention on the Simplification of Customs Formalities (Article 6), 2 *ibid.*, p. 1120; the Protocol of Signature of the Sanitary Convention of December 3, 1903, Miller, *Reservations to Treaties*, 1919, pp. 112–117; the Protocol of Signature of the Convention of June 21, 1926, Revising the International Sanitary Convention of January 17, 1912, *United States Treaty Series*, No. 762, pp. 57–64; the *Procès-verbal* of the exchange of ratifications of the treaty between the United States and Corea of May 22, 1882, Miller, *op. cit.*, p. 43; the Protocol of the exchange of ratifications of the German-Austrian treaty of December 11, 1871, *ibid.*, p. 35; the *Procès-verbal* of the deposit of ratifications of the treaty between the United States, the British Empire, France and Japan relating to their insular possessions and insular dominions in the region of the Pacific Ocean, *United States Treaty Series*, No. 669, p. 8; the Protocol of the deposit of the United States' ratification of the General Act of Brussels of July 2, 1890, Miller, *op. cit.*, p. 103; the *Protocole d'Adhésion* by which Great Britain adhered to the Sanitary Convention of April 15, 1893, 85 *British and Foreign State Papers*, p. 18.)

Reservations recorded in some one of the above ways probably need not be, although they often are, repeated or recorded in another manner. Thus, a reservation at signature, made in a manner described above, probably need not be, although it usually is, repeated in the instrument of ratification of the

State making it. 1 Hudson, *International Legislation* (1931), p. xlix. Or again, a reservation recorded in an instrument of ratification, if duly communicated to all the other States concerned, probably need not be included in a *procès-verbal* of the deposit or exchange of ratifications. See, to this effect, the following from a despatch from the United States Minister at The Hague, under date of November 30, 1909, discussing the procedure followed at the first deposit of ratifications of the Hague Conventions of 1907:

In accordance with the Department's original instructions No. 34, of February 25 last, the reservations and understandings under which the United States ratifies the Convention for the Pacific Settlement of International Disputes and the Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts were at the time of the deposit verbally called to the attention of the representatives of the other powers making the deposit. Mention of these reservations and understandings was not made in the *procès-verbaux* in as much as from previous conferences with the bureau of the protocol it appeared unnecessary and it was decided at the time of the deposit, that, inasmuch as these reservations and understandings are included in the instruments of ratification, mention of them in the *procès-verbaux* would be superfluous. The Austrian Minister alone decided to indicate in writing beside his signature his Government's reservation because it is not found in the instrument of ratification. (Miller, *Reservations to Treaties*, 1919, pp. 139-140.)

On the other hand, a particular reservation may, of course, appear in more than one of the instruments above discussed. Thus, reservations made at signature are quite generally repeated in the instrument of ratification, and may also be recorded in the *procès-verbal* of the deposit of ratifications. In the case of the Sanitary Convention of 1903, for example, the United States' reservation was set forth in the *procès-verbal* of signature, in the United States' instrument of ratification, and in the *procès-verbal* of the deposit of ratifications. Miller, *op. cit.*, p. 111 ff, at pp. 116, 121 and 122.

Conditions or interpretations recorded in some way other than those above described do *not* constitute "formal declarations" and hence will not acquire the technical status of reservations unless expressly maintained elsewhere in some one of the formal records discussed above. An exchange of notes at signature or ratification may constitute an instrument collateral to a treaty, and conditions or interpretations stipulated in such notes but not mentioned in an instrument of ratification or in a *procès-verbal* of the deposit or exchange of ratifications may be reservations. But see Miller, *op. cit.*, p. 89; Wright, "Interpretation of Multilateral Treaties," 23 *American Journal of International Law* (1929), p. 94 ff.

A reservation, to be actually in force and effective as such, must be a "formal declaration" of a State in still another sense; *i.e.*, the sense of being an expression of the will of the treaty-making authority of the State. If a reservation may be said to be, in effect at least, a part of the treaty accepted

by the declarant State, such reservation evidently should, ultimately at least, be the expression of the will of, or have the approval of, the full treaty-making authority of that State, just as any other provision of the treaty. Both theory and practice seem to sustain such a view. Thus Miller, in discussing the elements of his definition of a reservation, one of which also is that it must be a "formal declaration," says that by "formal declaration" he means

. . . that the declaration must be made on behalf of the declaring Power by the treaty-making branch of the Government. In the United States this is "the President, by and with the advice and consent of the Senate," acting by two-thirds of the Senators present.

It is thus incorrect to say that a reservation on behalf of the United States may be *made* by the Senate—it may be *initiated* or *proposed* by the Senate, just as it may be *initiated* or *proposed* by the President.

A reservation on the part of the United States made upon the *signature* of a treaty, *before* its submission to the Senate, is one which is initiated or proposed by the President.

If such reservation is not disagreed to or modified by the Senate resolution regarding ratification, and the President thereafter ratifies the treaty, the instrument of ratification also incorporates the reservation, which is thus a formal declaration by the United States.

And likewise a reservation *proposed* by the Senate and incorporated in its resolution regarding ratification and thereafter accepted by the President and incorporated in the instrument of ratification, is a formal declaration by the United States. (*Reservations to Treaties*, 1919, pp. 79-80.)

Miller further points out that, although practically the same effect as of a formal reservation may be achieved by other methods, no declaration which has not received the approval of the full treaty-making authority and been included in some one of the instruments mentioned above can be considered, technically, as having the status of a reservation. Herein lies the technical distinction between reservations and interpretative notes, executive constructions, etc. *Ibid.*, pp. 80-90.

Professor Wright, like Mr. Miller, observes that, just as in the case of the treaty proper, "the President and Senate must *each* consent to amendments, reservations or interpretations. Attempts of either to act separately have been unavailing." "Amendments and Reservations to the Treaty," 4 *Minnesota Law Review* (1920), p. 15. See also the same author's *Control of American Foreign Relations* (1922), p. 46, where he says that reservations "must be consented to by all the organs constituting the treaty power of each state." Cf. Anderson, "The Ratification of Treaties with Reservation," 13 *American Journal of International Law* (1919), p. 527.

The view held by these writers has the sanction of the Supreme Court as expressed in the case of *Fourteen Diamond Rings v. United States* (1901), 183 U. S. 176. The Court there held that a declaration of the Senate, not

assented to by the President nor accepted by the other party, could not be regarded as a reservation forming part of the treaty. The Court said:

We need not consider the force and effect of a resolution of this sort. . . . The meaning of the treaty can not be controlled by subsequent explanations of some of those who may have voted to ratify it.

And Mr. Justice Brown, in concurring, added:

It can not be regarded as part of the treaty, since it received neither the approval of the President nor the consent of the other contracting power. . . . The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory on the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty. . . . But it could not in my opinion, ratify the treaty and then adopt a resolution declaring it not to be its intention to admit the inhabitants of the Philippine Islands to the privileges of citizenship of the United States. Such resolution would be inoperative as an amendment to the treaty, since it had not received the assent of the President or the Spanish commissioners.

The binding force of reservations made by the President without the consent of the Senate, on the other hand, has likewise been contested. Interpretative notes signed by the plenipotentiaries just prior to the exchange of the ratifications of the treaty of peace with Mexico in 1848, and upon the exchange of ratifications of the Clayton-Bulwer Treaty in 1850, were subsequently considered by the United States to be of no effect. Wright, *Control of American Foreign Relations* (1922), p. 47; also article cited, 4 *Minnesota Law Review*, p. 16. Cf. Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), pp. 85-89, and 5 Moore, *Digest of International Law* (1906), p. 203 ff. Moore says: "Obviously nothing could legally be added to or subtracted from a treaty by a mere executive agreement without the advice and consent of the Senate, and no attempt to do this has professedly been made."

It may be well to digress at this point and, without now considering the question as to which States must consent to a reservation to a particular treaty, to remark that there is considerable authority for the view that, just as it is the full treaty-making authority of the State which must ultimately participate in the making of effective reservations on its own behalf, so it is that same authority which must, in the end, participate in the acceptance of or consent to reservations made by other States. This again, of course, would seem to be a logical result of the idea that a reservation actually in effect is assimilable to a provision of the treaty itself. Professor Wright evidently takes this view, for he expresses the opinion that it is doubtful whether the United States would be bound by a reservation submitted by a foreign Power unless not only the President but the Senate as well had had at least an opportunity to object thereto. "Undoubtedly," he says, "when foreign states make reservations the Senate ought to be given an opportunity

to object to such reservations. . . . It does not appear that all reservations attached to deposit of ratifications of the Hague Convention were submitted to the Senate and question might arise as to their validity, though undoubtedly, after a considerable lapse of time, the foreign nation would be entitled to assume tacit acceptance of its reservation." Foreign nations, he adds, have "recognized that reservations or amendments, not consented to by the whole treaty power, do not bind the United States unless there is reason to suppose that such action had taken place." *Control of American Foreign Relations* (1922), pp. 48, 51, 53; also article cited, 4 *Minnesota Law Review*, p. 17, n. 14. Miller likewise reaches the conclusion that "assent to a reservation must be made by the treaty-making branch of a Government. . . ." *Reservations to Treaties* (1919), p. 160; also p. 94.

American practice seems to accord with this view. Thus, on February 3, 1801, the United States Senate gave its consent to ratification of the treaty with France of September 30, 1800, subject to the condition that Article 2 thereof should be expunged and replaced by a new one proposed by the Senate. The President included the Senate reservation in the instrument of ratification, and ratifications were exchanged on July 31, 1801. The French instrument of ratification accepted the modifications proposed by the United States, but added the words: "Provided that by this retrenchment the two States renounce the respective pretensions, which are the object of the said Article." Thereupon, although the ratifications had already been exchanged without protest, President Jefferson resubmitted the matter to the Senate with the following statement:

Gentlemen of the Senate:

Early in the last month, I received the ratification, by the first Consul of France, of the convention between the United States and that nation. His ratification not being pure and simple, in the ordinary form, I have thought it my duty, in order to avoid all misconception, to ask a second advice and consent of the Senate, before I give it the last sanction, by proclaiming it to be the law of the land.

TH. JEFFERSON

December 11th, 1801.

The Senate promptly, by the prescribed two-thirds majority, declared that it considered the convention fully ratified. Miller, *Reservations to Treaties* (1919), pp. 11-14. Professor Wright goes so far as to express the opinion that, had the Senate objected to the French reservation, and had notification of such objection been promptly given, the United States would have been "relieved . . . of responsibility under the treaty, in spite of the fact that ratifications had been exchanged." *Control of American Foreign Relations* (1922), p. 50.

The reservation made by France upon deposit of her ratification of the General Act of Brussels of July 2, 1890, was made known to the United

States prior to its ratification of that agreement. The Senate was informed thereof, and in giving its advice and consent to ratification it expressly authorized "the acceptance of the partial ratification of the said General Act on the part of the French Republic . . .," and this fact was indicated in the instrument of ratification. Miller, *op. cit.*, pp. 94-111. Thus the full treaty-making authority of the United States accepted the French reservation.

In 1932, the Secretary of State informed the Director General of the Pan American Union that the reservations made by the Dominican Republic to the Havana Convention on Consular Agents were "'unacceptable to the Executive and will not be laid before the Senate of the United States whose advice and consent to their acceptance would in any event be required,'" and that consequently "'the Government of the United States of America does not regard the convention as ratified by the Dominican Republic to be in effect between the United States of America and that Republic.'" *United States Treaty Information Bulletin*, No. 38 (November, 1932), p. 22.

It may be well to point out, in this connection, that, although practice would seem to indicate that a reservation shall be made by, or shall be approved by, the full treaty-making authority of a State, nevertheless, international law does not prescribe what organs or authorities shall constitute that treaty-making authority, nor does it place a burden upon other States to go behind representations or actions by responsible officials of a state which are of a nature to establish a reasonable presumption that the formalities prescribed by that State's own constitution relative to the making of treaties have been complied with. Compare the comment on Article 21 of this Convention.

2. When signing, ratifying or acceding to a treaty

Inasmuch as a reservation to a treaty implies a qualified acceptance of the treaty, it would appear, logically, that a State might, so far as the question of *time* is concerned, propose a reservation at any time prior to that at which the treaty comes into force with respect to it. Miller's definition of a reservation states that it is a formal declaration "communicated to the other contracting Power or Powers at or prior to the delivery of the instrument of ratification of the declarant." Miss Majorie Owen remarks that practice seems to establish the principle that a reservation may be introduced at any point in the making of a treaty. "Reservations to Multilateral Treaties," 38 *Yale Law Journal* (1928-1929), p. 1086 ff, at p. 1090. Dr. James Brown Scott, in his introduction to the *Reports to the Hague Conferences of 1899 and 1907* (1917), p. xxviii, says that "it is believed that it is immaterial whether the reservation be made before, at, or after signing, as until a Power has ratified and deposited ratifications of the Convention it is not bound." Logically it seems possible that, even where a State had deposited an unqualified instrument of ratification, it could subsequently withdraw it, if

the treaty had not yet come into force with respect to it, and propose a qualified acceptance of the treaty instead.

Irrespective of when they may be *proposed*, reservations to treaties are practically invariably *made*—i.e., formally recorded in some one of the ways discussed above—at the time of signature, ratification or accession. This is the usual practice, and the privilege of States, normally, to make reservations at those times is recognized by most publicists. Cf. Malkin, "Reservations to Multipartite Conventions," 7 *British Year Book of International Law* (1926), p. 141 ff, 143, and the several cases discussed in the article; Miller, *Reservations to Treaties* (1919), cases discussed; 1 Oppenheim, *International Law* (4th ed., 1928), pp. 727–728; Owen, article cited, 38 *Yale Law Journal* (1928–1929), pp. 1096–1097 and n. 41 (list of treaties to which reservations were made at signature), p. 1098 and n. 53 (list of treaties to which reservations were made at ratification), p. 1099, n. 55; 1 Hudson, *International Legislation*, pp. xlix-l; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), pp. 312–314, 331–335, 363–364. For reservations to The Hague Conventions of 1907 made at signature, ratification or accession, see the table of signatures, ratifications, adhesions and reservations to the conventions and declarations of the Second Peace Conference, in Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915), p. 236 ff.

It is believed, then, that Article 13 of this Convention merely recognizes and crystallizes general practice. Under it a State desiring to make reservations to a treaty may—and if the reservations are to be effective as such, *must*—formally maintain them at the time it signs, ratifies or accedes to the treaty. This provision, of course, has reference only to the time when reservations can be made; whether or not a reservation made at one or another of those times will be effective (or, to be more exact, whether or not the signature, ratification or accession given subject to the reservation will be effective) is another question, involving the matter of consent, which will be discussed in the comment on the three succeeding articles. The provision that reservations must be made when signing, ratifying or acceding is likewise not to be understood as preventing the formal recording of a number of type reservations in an annex or in a protocol of signature signed by all the States concerned, with the provision that States parties to the treaty may at any time put all or certain of them into effect by following a prescribed procedure of notification. The reservations in such cases are still formally recorded at signature. See the provisions in Article 1 of the Convention providing a Uniform Law of Bills of Exchange and Promissory Notes. *League of Nations Document C.360.M.151.1930.II.*, p. 27.

As regards procedure:

A. *When signing*

This has reference to the time when the representatives of a State affix their signatures to the completed formal instrument constituting the treaty.

A representative of a State may make a reservation on its behalf at such time in the following ways:

(a) The representative may spread the actual terms of the reservation upon the treaty itself. He may do this by writing them out himself above, beside or below his signature in such a way that it is plain that the reservation appertains to his signature and not that of the representative of some other State. Or he may hand in his reservation in advance and have it printed or engrossed upon the instrument at the place where his signature is to be affixed. See, to this effect, the following remarks of the Chairman of the International Conference of American States on Conciliation and Arbitration (Mr. Frank B. Kellogg):

Gentlemen of the Conference, those states desiring to make reservations to the convention which will be signed tomorrow, will please hand them in to the Secretary General at the earliest possible moment. . . . If the reservations are handed to the Secretary General at the earliest moment, he will be able to have them printed in the convention; otherwise they will be written in in longhand when the convention is signed. (*Proceedings of the International Conference of American States on Conciliation and Arbitration*, 1929, pp. 155-156. See also p. 158.)

(b) The representative may, in one or the other of the ways just described, spread upon the treaty, not the actual terms of the reservation, but, where a treaty is concluded under such conditions that formal records are kept of the proceedings of the negotiators, merely a reference to the point in the recorded proceedings where those terms can be found. Thus, beside the signatures of the United States delegates to the Hague Convention of 1899 for the Pacific Settlement of International Disputes appears a statement: "Under reservation of the declaration made in the Plenary Session of the Conference of July 25, 1899" (trans.). See 26 Martens, *Nouveau Recueil Général de Traités* (2d ser.), p. 947.

The declaration was presented in the full session of the Conference on July 25, read by the Secretary of the Conference and unanimously directed to be spread upon the minutes, and added to the Convention by a reference opposite the signatures of the American Plenipotentiaries. (Holls, *The Peace Conference at The Hague*, New York, 1900, p. 271.)

It should be remarked, however, that, although permissible, the practice of recording reservations at signature in this manner is not desirable because it necessitates having access to, and possibly a troublesome search in, the records of the proceedings referred to in order to ascertain just what a State's reservation really is. Cf. Malkin, article cited, 7 *British Year Book of International Law* (1926), pp. 159-160.

(e) Finally, the representative may have the terms of the reservation included in a separate and collateral formal instrument, such as a protocol or *procès-verbal* of signature signed by himself and by the representatives of the other States at the same time that they sign the treaty proper.

B. *When ratifying*

This has reference, of course, to an act of international significance and effect; *i.e.*, the presentation of a ratification for exchange or deposit, or the communication of notice of ratification. At such time a reservation on behalf of a State may be made in the following ways:

(a) The reservation may be included in the instrument of ratification (or in the notice of ratification where ratifications are neither exchanged or deposited). If a reservation is included in an instrument of ratification it need not be—provided the other State or States concerned have due notice of it—repeated in the *procès-verbal* of the exchange or deposit of ratifications, if there is one. See the dispatch cited in Miller, *Reservations to Treaties* (1919), pp. 139–140, and quoted *supra*. The *procès-verbaux* of the exchange of ratifications of bilateral treaties frequently do not contain reservations which are included in the instruments of ratification—(usually identical)—of the parties. See, for example, the *procès-verbaux* of the exchange of ratifications of the following treaties: Convention between the United States and Great Britain of July 3, 1815, Miller, *op. cit.*, pp. 16–17; Treaty between the United States and the North German Confederation of February 22, 1868, *ibid.*, pp. 32–33; Treaty between the United States and Portugal of May 7, 1908, *ibid.*, p. 47; Treaty between the United States and Nicaragua of August 5, 1914, *ibid.*, pp. 66–67; Treaty between the United States and Denmark of August 4, 1916, *ibid.*, pp. 70–71.

(b) The reservation may be set forth in a protocol or *procès-verbal* of the deposit or exchange of ratifications duly signed by the representative of the State making the reservation, and by the representatives of the other States concerned or by the representative of a depository Government or agency acting in their behalf. This would seem to be especially necessary where the reservation is not included in the instrument of ratification of the State making it. Cf. the statement regarding the action of the Austrian Minister contained in the dispatch cited in Miller, *Reservations to Treaties* (1919), pp. 139–140. Even where the reservation is included in the instrument of ratification, however, it may be, and sometimes is, repeated in the *procès-verbal* of exchange or deposit. See, for example, the *procès-verbaux* of exchange or deposit of ratifications of the following treaties: Treaty between the United States and Corea of May 22, 1882, *ibid.*, p. 43; Convention between the United States and Great Britain regarding boundary waters, of January 11, 1909, *ibid.*, p. 50; Treaty of commerce and navigation between the United States and Japan, of February 21, 1911, *ibid.*, pp. 62–63. See also the Protocol of the deposit of the United States' ratification of the General Act of Brussels of July 2, 1890, *ibid.*, pp. 103–104. For citations to examples of similar instruments containing reservations, see *supra*.

C. *When acceding*

Here, again, reference is made only to an act of international significance

or effect; *i.e.*, the presentation of an accession for deposit or the communication of notice of accession.

At such time a reservation may be made in practically the same manner as at ratification. (See above.) In other words the reservation may be included in the accession (or in the notice of accession where accession is effected in the manner envisaged in the latter part of Article 12, paragraph (d) of this Convention). Such reservation may be recorded in a protocol or *procès-verbal* of accession. See, for examples, the United States' accession to the Hague Convention of 1907 concerning the Rights and Duties of Neutral Powers in Naval War, Miller, *Reservations to Treaties* (1919), p. 150, and the *Protocole d'Adhésion* recording the "adhesion" of Great Britain to the International Sanitary Convention of April 15, 1893, 85 *British and Foreign State Papers*, p. 18. Apparently Great Britain later deposited a ratification along with the other contracting Powers. See the protocol of the deposit of ratifications signed at Berlin, February 1, 1894. 86 *Ibid.*, p. 73.

3. Terms which will limit the effect of the treaty

Only if the terms of the stipulation attached by a State to its signature or ratification of, or accession to, a treaty are of such a nature that they will, when in force, limit the effect of the treaty as between that State and the other party or parties to the treaty, is it a reservation under the above definition. The phrase "limit the effect" implies a diminution or restriction of the consequences which would ordinarily flow from the legal relationship established by the treaty if there were no reservation. Therefore, if a particular stipulation attached by a State to its acceptance of a treaty does not envisage such a diminution or restriction of the consequences which would normally result from the relationship established by the treaty between it and the other party or parties, then it is *not* a reservation as that term is used in this Convention.

With this in mind, it becomes evident that certain types of conditions may fall within our definition, while others may not; in other words, although every reservation is a condition, every condition is not necessarily a reservation. It is necessary to examine the terms of the condition in each case in order to determine whether or not it is a reservation.

When a State conditions its acceptance of a treaty upon its being in some way exempted from the normal operation thereof, upon its enjoying freedom of action when, under the treaty, its action would be prescribed, its acceptance is clearly subject to what this Convention terms a reservation. Such a condition plainly envisages a diminution of the results which would otherwise flow from the jural relationship established by the treaty between the reserving State and the other party or parties. Reservations of this type may, for example, take the form of a declaration indicating specific articles or provisions of the treaty which the declarant State "reserves"; *i.e.*, does not accept and will not regard as binding upon it. Thus, the United States

acceded to Hague Convention XIII of 1907 "subject to the reservation and exclusion of its Article XIII . . .", and China acceded to the same convention "with reservation of Paragraph 2 of Article 14, Paragraph 3 of Article 19, and of Article 27." Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915), pp. 218-219. Or such reservations may take the form of declarations to the effect that the declarant State will not observe, or regard itself as bound by, the provisions of the treaty in certain instances which would otherwise come within the scope of the treaty. For example, in the case of a treaty providing for arbitration or some other method of handling international disputes, a State may declare that it will not be bound by the treaty with respect to certain specific disputes, with respect to disputes arising at a certain time, with respect to certain types of disputes, etc. See, as examples, the reservations attached to the signatures of the General Treaty of Inter-American Arbitration, *Proceedings of the International Conference of American States on Conciliation and Arbitration* (1929), pp. 670-675. And compare the provision in the General Act of 1928 for the Pacific Settlement of International Disputes that States might make reservations and that (Art. 39):

2. These reservations may be such as to exclude from the procedure described in the present Act:

(a) Disputes arising out of facts prior to the accession either of the Party making the reservation or of any other Party with whom the said Party may have a dispute;

(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States.

(c) Disputes concerning particular cases or clearly specified subject matters, such as territorial status, or disputes falling within clearly defined categories."

Reservations whereby States avoid the obligation to apply the treaty in a part of their territory where it would otherwise apply fall within the type of reservation here under discussion. And so, finally, do such declarations as the following (not to be taken, however, as an exhaustive or limitative list of possible reservations falling more or less clearly within this type):

La délégation des Etats-Unis déclare que son Gouvernement se trouve dans la nécessité de s'abstenir de toute action concernant les tarifs, parce que la transmission des radiotélégrammes ainsi que celle des télégrammes dans les Etats-Unis est exploitée, soit entièrement, soit en partie, par des compagnies commerciales ou particulières. . . .

Le Gouvernement du Canada se réserve la faculté de fixer séparément, pour chacune de ses stations côtières, une taxe maritime totale pour les radiotélégrammes originaires de l'Amérique du Nord et destinés à un navire quelconque, la taxe côtière s'élevant aux trois cinquièmes et la taxe de bord aux deux cinquièmes de cette taxe totale. (*Protocole Finale of the Radiotelegraphic Convention*, London, 1912. 105 *British and Foreign State Papers*, p. 227.)

Le Royaume-Uni de la Grande-Bretagne et d'Irlande adhère à la Convention Sanitaire Internationale, conclue à Dresde le 15 Avril, 1893,

et à ses Annexes, sous la réserve toutefois que, dans le Royaume-Uni, les personnes bien portantes qui arrivent à bord d'un navire infecté ne soient pas soumises à une observation, mais seulement à une surveillance médicale dans leur domicile. (*Protocole d'Adhésion* of Great Britain to the International Sanitary Convention, Dresden, 1893. 85 *British and Foreign State Papers*, p. 18.)

(a) With regard to debts arising from ordinary contracts between the citizen or subject of a nation and a foreign Government, recourse shall be had to an arbitration only in the specific case of a denial of justice by the courts of the country where the contract was made, the remedies before which courts must first have been exhausted.

(b) Public loans secured by bond issues and constituting the national debt shall in no case give rise to military aggression or the material occupation of the soil of American nations. (Reservation in the accession of Nicaragua to Hague Convention II of 1907. Scott, *Hague Conventions and Declarations of 1889 and 1907*, 1915, p. 94.)

3. The Government of the United States of America reserves to itself the right to decide whether from the standpoint of the measures to be applied a foreign district is to be considered as infected and to decide what measures shall be applied to arrival in its own parts under special circumstances." (Part of the United States' reservations to the Convention of June 21, 1926, revising the International Sanitary Convention of January 17, 1912. *United States Treaty Series*, No. 762, p. 140.)

The United States signed and ratified the Convention last cited subject to the following conditions (*ibid.*, pp. 139-140):

1. The ratification of this international sanitary convention is not to be construed to mean that the United States of America recognizes a régime or entity acting as government of a signatory or adhering power when that régime or entity is not recognized by the United States as the government of that power.

2. The participation of the United States of America in this international sanitary convention does not involve any contractual obligation on the part of the United States to a signatory or adhering power represented by a régime or entity which the United States does not recognize as representing the government of that power until it is represented by a government recognized by the United States.

Do those conditions constitute reservations within the meaning here given to that term? It would seem that section 1, at least, does not. It is not necessarily the effect of a multipartite law-making treaty that each of the parties thereto automatically recognizes the governments of all the other parties thereto. Hudson, "Recognition and Multipartite Treaties," 23 *American Journal of International Law* (1929), p. 126 ff, pp. 128-130. Consequently, it cannot be said that the first section of the United States' declaration would "limit the effect" of the treaty as between the United States and other parties, and therefore it does not come within the scope of the above definition of a reservation. On the other hand, it can be said that the normal effect of a multipartite treaty is that each party thereto is bound by its provisions with respect to every other party thereto. The second section of

the United States' declaration limits that effect to the extent that it purports to enable the United States to become a party to the treaty without being bound *vis-à-vis* any other party thereto whose government it happens not to recognize. In the particular instance this limitation was probably intended to result only in the United States not being bound *vis-à-vis* the Soviet Union, but the declaration is generally worded so that the United States would not be bound *vis-à-vis*, or would be released from its obligations under the treaty *vis-à-vis*, any party from whose government it chose or might choose to withhold recognition. A similar reservation attached by the United States to its signature of the Convention of July 13, 1931, for the Limitation of the Manufacture of Narcotic Drugs, and aimed primarily at the Soviet Union, gave rise to a declaration attached by Salvador to its accession deposited on April 7, 1933. The Salvadorean statement declared that such a reservation amounted to an infringement of the sovereignty of Salvador, whose government happened at the time not to be recognized by the United States, and added that the narcotics convention did "not offer a suitable occasion to formulate such political reservations as have called forth this comment." See *League of Nations Official Journal*, 1933, p. 654; *United States Treaty Information Bulletin*, No. 44, pp. 11 and 12. Certainly such a restriction upon the consequences normally flowing from participation in a multipartite treaty constitutes a "limitation upon its effect", and so is, within the meaning here ascribed to the term, a reservation.

When a State signs, ratifies or accedes to a treaty subject to the condition that it, or a particular part of it, shall be given a certain specified interpretation, such condition also is a reservation. By the very act of formulating such a condition the declarant State recognizes by implication that there are other possible interpretations which might otherwise be placed upon the treaty and which it wishes definitively ruled out so far as it is concerned. Such a reservation, therefore, restricts the effect of the treaty because, in the absence of the reservation, the other parties would have had the right to rely upon, and to seek to make prevail, some one of the other possible interpretations. As examples of this type of reservation, reference may be made to the following:

The President of the United States ratified the Treaty with Corea of May 22, 1882, subject to the resolution of the Senate that "it is the understanding of the Senate in agreeing to the foregoing ratification that the clause 'nor are they permitted to transport native produce from one open port to another open port', in Article VI of the said treaty is not intended to prohibit and does not prohibit American ships from going from one open port to another open port in Corea or Chosen to receive Corean Cargo for exportation, or to discharge foreign cargo." (Miller, *Reservations to Treaties*, 1919, p. 42.)

The United States acceded to Hague Convention XIII of 1907 "with the understanding that the last clause of Article III thereof implies the duty of a neutral power to make the demand therein mentioned

for the return of a ship captured within that jurisdiction." (*Ibid.*, pp. 150-151.)

The United States' ratification of the Treaty between the United States, the British Empire, France and Japan relating to their insular possessions, etc., in the Pacific Ocean, was subject to the reservation that—"The United States understands that under the statement in the preamble or under the terms of this treaty there is no commitment to armed force, no alliance, no obligation to join in any defense." (*United States Treaty Series*, No. 669, p. 8.)

In some cases the "limitation upon the effect" of the treaty which a particular condition will have may seem somewhat vague or unapparent. This is especially true when the condition assumes the form of a somewhat vague declaration of purposes or policies such as those to which the United States subjected its ratification of the General Act of Algeciras of April 7, 1906. One of those declarations was:

That the Senate understand that the participation of the United States in the Algeciras Conference, and in the formulation and adoption of the General Act and Protocol which resulted therefrom, was with the sole purpose of preserving and increasing its commerce in Morocco, the protection as to life, liberty and property of its citizens residing or travelling therein, and of aiding by its friendly offices and efforts in removing friction and controversy which seemed to menace the peace between powers signatory with the United States to the treaty of 1880, all of which are on terms of amity with this Government; and without purpose to depart from the traditional American foreign policy which forbids participation by the United States in the settlement of political questions which are entirely European in their scope. (Miller, *Reservations to Treaties*, 1919, p. 128.)

Miller, speaking of that declaration, points out that it relates solely to the purposes prompting the United States to participate in the work of the Algeciras Conference, but adds: "Still it may be said to relate indirectly to the terms of the Treaty in its possible bearing upon the duties of the United States thereunder." (*Ibid.*, p. 127.) Something similar might be said of the following reservation attached by the United States to its acceptance of the Hague Conventions of 1899 and 1907 for the pacific settlement of international disputes:

Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or policy or internal administration of any foreign State; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions. (*Ibid.*, pp. 135, 144.)

Of these and all other cases where there may be some doubt entertained as to whether the terms of a declaration "will limit the effect of the treaty" in its application between the declarant State and other parties, it may be said

that the doubt should be resolved in favor of the view that they will or might, and that they therefore constitute reservations within the meaning of that term as here used and can, therefore, be made only in accordance with the rules prescribed for the making of reservations contained in the three subsequent articles.

If, however, there are borderline cases in which the doubt is to be resolved in favor of the view that a particular declaration constitutes a reservation because it will, or may, "limit the effect of the treaty", there are other cases where it is patent that the declaration embodies terms which will *not* produce such a result. Such declarations or conditions are *not*, therefore, reservations as that term is here used. They are *not* reservations even though they are in fact designated as such. See, for example, the declaration attached by the Argentine delegation to the Convention on the Pan American Union of February 20, 1928, which reads (4 Hudson, *International Legislation*, 1931, p. 2428):

The Argentine delegation declares, pursuant to express instructions of its Government, that it approves and will sign the project of Convention; but that it now wishes to formulate the reservation that it regrets that the economic principles which it upheld in the Committee have not been included in this Convention.

Or, again, see the so-called "Reservation of the Delegation of Salvador" appended to the Convention on Treaties of the same date (*ibid.*, p. 2384):

The Delegation of Salvador not only casts its negative vote to Article 13, but it also votes against the Convention and does not sign it.

Such declarations obviously are not reservations in any ordinary sense of the term, and certainly are not reservations within the meaning here ascribed to the term.

States sometimes make the effectiveness of their ratifications of, or accessions to, treaties conditional upon the occurrence of certain specified events. For example, State X may ratify a treaty but at the same time declare that its ratification thereof shall not be effective unless and until States A, B and C also ratify the treaty. Thus, in the case of the Convention on the Abolition of Import and Export Prohibitions and Restrictions, a number of States ratified the convention upon the express condition that the entry into force thereof with respect to them should be "subject to its ratification" by certain other specified signatory States. 97 *League of Nations Treaty Series*, p. 393 ff, p. 397 note; also 3 Hudson, *International Legislation*, (1931), p. 2160. See also the Convention on Supervision of International Trade in Arms and Ammunition and in Implements of War of June 17, 1925, 3 Hudson, *op. cit.*, p. 1634, n. 1. Such conditional ratifications are sometimes said to be subject to "reservations". Such conditions do *not*, however, constitute reservations within the meaning of that term as it is ordinarily used or as it is here defined. The distinction between such conditions and reservations

properly so called is emphasized in a memorandum of the Director of the International Labor Office. *League of Nations Document C.212.1927.V*. After maintaining that *reservations* to international labor conventions are inadmissible, the Director adds:

It should, however, be explained that certain international labour conventions have been ratified subject to the specific condition that the ratifications in question should only become operative when certain States named should also have ratified. These ratifications do not really contain any reservation, but merely a condition which suspends their effect; when they do come into force, their effect is quite normal and unrestricted. Such conditional ratifications are valid, and must not be confused with ratifications subject to reservation which modify the actual substance of conventions adopted by the International Labour Conference.

In other words, the terms of such conditions will not, once the ratifications to which they are attached become effective, "limit the effect" of the treaties concerned in any way. See also, to the effect that these conditions are not reservations, Morellet, "At What Moment do the International Labour Conventions become Applicable," 16 *International Labour Review* (1927), p. 755 ff, at p. 770; and Hudson, 1 *International Legislation*, p. xlviii and n. 5, where it is said: "A conditional ratification is not to be confused with a ratification subject to a reservation. A reservation is not infrequently said to be a condition, but the distinction should be strictly observed."

Is it possible that the terms of a reservation may go too far in the direction of "limiting the effect" of a treaty? In other words, are there limits beyond which reservations may not go? This seems likely. Thus, a ratification of a treaty subject to a reservation of all the substantive provisions thereof, leaving only the formal clauses, would, like a parliamentary motion to strike out all after the enacting clause, amount in effect to a rejection of the treaty. Such a ratification could not be said to be subject to a reservation, for "a declaration which is in substance a rejection of the treaty can not be called a reservation." Miller, *Reservations to Treaties* (1919), p. 79. At the International Conference on Customs and other Similar Formalities the representative of Poland announced his intention of making reservations as to Articles 3, 10, 11 and 16 of the convention drafted by the conference. Thereupon M. Serruys of the Economic Committee of the League of Nations pointed out that, although some reservations were to be expected, still the Polish delegate

. . . had made so wide a reservation as to include at least one question of principle and three questions of application. . . . In his opinion, no reservations could be made on clauses containing questions of principle. . . . The question of the publication of import and export prohibitions was, for instance, essential for the commercial world, and to make a reservation regarding it would be to run counter to one of the vital principles which the Conference was seeking to establish in the Convention.

In conclusion he desired to point out to M. Rasínski that certain reservations made by a State to a Convention could not be of such a nature as to render null and void the principal obligations assumed by that State and particularly onerous the obligations assumed by other States which had adopted the Convention as a whole and did not thereby obtain reciprocal advantages. (*League of Nations Document C.66.M.24.1924.II.*, p. 123.)

In this same connection, it may be pointed out that a peculiar problem arises when a State reserves a clause in a treaty which does not require performance of certain acts by the parties themselves, but which instead provides for the organization and functioning of an international organ or agency. This situation arose in the case of Cuba's reservation to Article 23 of the Statute of the Permanent Court of International Justice as revised in the Protocol on the Revision of the Statute. Article 23 as revised read:

The Court shall remain permanently in session except during the judicial vacation, the dates and duration of which shall be fixed by the Court.

Members of the Court whose homes are at more than five days' normal journey from The Hague shall be entitled, apart from the judicial vacations, to six months' leave every three years, not including the time spent in travelling.

Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court. (1 Hudson, *International Legislation*, 1931, p. 585.)

When, on January 5, 1931, the Cuban ratification containing a reservation to that article was deposited at the Secretariat of the League, the Secretary-General, in accordance with the established practice of the Secretariat, communicated the reservation (along with another one which Cuba made to paragraph 4 of the Protocol of Revision) to all the signatories of the protocol and invited the "Governments concerned to inform him whether they were able to accept the reservations made by Cuba." A number of replies were received which indicated that, although there was no objection to the reservation to paragraph 4 of the protocol, inasmuch as the force of that paragraph was already spent at the time Cuba made the reservation, there were, on the other hand, definite objections on the part of a number of States to Cuba's reservation of the revised Article 23. The general tenor of these objections was to the effect that acceptance of the Cuban reservation would not have the effect of freeing Cuba from any obligations arising out of the article in question, but would, instead, result in preventing altogether the coming into force of the article. That, in effect, would amount to a modification, at the request of a single State, of an instrument already accepted by a large number of signatories. *Records of Twelfth Assembly, First Committee*, p. 136 (Annex 12). As a result of these objections Cuba's ratification could not be accepted as effective, with the result, in this case, that the Protocol of Revision could not come into force. Subsequently, therefore, Cuba

withdrew her reservations and gave an unqualified ratification to the protocol. See Hudson, "The Cuban Reservations and the Revision of the Statute of the Permanent Court of International Justice," 26 *American Journal of International Law* (1932), pp. 590-594.

It seems highly probable that, just as in the two cases last discussed, the objection of other States whose consent would be necessary will generally suffice to prevent the making of too extensive or undesirable reservations. Under the rules laid down in the three subsequent articles of this Convention it will not be possible for a State to make reservations to a treaty without consulting any but its own interests, and it seems altogether reasonable to suppose that the necessity of securing the assent of the other State or States concerned will serve as a real and effective limitation upon undesirable or destructive reservations. Therefore, without in any sense denying that there may very well be limits beyond which a reservation may not go, it is suggested that they are, as Miller puts it, "difficult to define", and that any attempt to define them more specifically in this article would probably have resulted in its being insufficiently inclusive.

4. In so far as it may apply in the relations of that State with the other State or States which may be parties to the treaty.

In this Convention the term reservation is applied only to those formal declarations the terms of which, if effective, will limit the effect of the treaty as between the State making the reservation and the other party or parties to the treaty, but not as between the other parties *inter se*.

Of course, where there are only two parties to a treaty, a reservation by one of them, whatever its nature, necessarily affects the treaty as it applies to and between both parties. But when there are more than two parties, a declaration or condition, to be a reservation as that term is here defined, must be of such a nature that it will affect only the relations under the treaty between the reserving State and the other parties to the treaty, but will not alter the relations under the treaty between the parties other than the reserving State. In other words, a reservation made by State A to a treaty between States A, B, C and D will limit the effect of the treaty as between States A and B, A and C, and A and D, but will in no wise limit the relations under the treaty of States B and C, B and D or C and D.

The effect of this element of the explanation contained in this article is to establish a distinction between a reservation and an amendment in the case of multipartite treaties. An *amendment* to a multipartite treaty would alter the treaty for *all* the parties in their relations *inter se*; a *reservation*, on the other hand, and as just stated, would limit the effect of the treaty *only* as it applies between the State making the reservation and each of the other contracting parties. Thus, if a multipartite treaty is *amended* so as to strike out Article X thereof, Article X disappears for all the parties and binds none of them. On the other hand, if State A *reserves* Article X, Article X remains in

the treaty and applies in the relations *inter se* of all parties other than State A; it simply does not apply in the relations of State A with the other parties. Or again, suppose the multipartite treaty were *amended* by adding to Article X the words: "This article shall not apply to State A." In that case every party to the treaty could as of right demand every other party to the treaty not to require observance of Article X by State A. But if State A made a *reservation* of Article X, State D could not demand State B to observe State A's reservation in its relations with State A, it being simply a matter affecting the relationship under the treaty between State A and each of the other parties. This distinction between a reservation and an amendment has at times been neglected.

See, in connection with the above, the following from Albert H. Washburn's article on "Treaty Amendments and Reservations" (5 *Cornell Law Quarterly*, 1919-1920, p. 247 ff, p. 257):

One basic idea seems to underlie the reservations recently adopted by the Senate. Not one of them partakes of the nature of an amendment in the sense that it seeks to affect the relations of the other signatory powers to each other. A proposal to strike out by way of amendment a given article would, if subsequently agreed to, mean that such article would be inoperative as to all the high contracting parties. By simply attaching a reservation the United States assumes no obligation to be bound by the provision in question. The article would still have vitality as against all the other nations, but it would not be binding upon the United States. In the sense that a reservation is thus employed, to give the language of the treaty a construction which is not binding on all the high contracting parties except in their relations to us, we have a distinction which may be said to differentiate a reservation from an amendment. . . .

Article 6 of the Havana Convention on Treaties reads:

In international treaties celebrated between different States, a reservation made by one of them in the act of ratification affects only the application of the clause in question in the relation of the other contracting States with the State making the reservation. (4 Hudson, *International Legislation*, p. 2381.)

See also 1 Hudson, *op. cit.*, p. 1; Owen, article cited, 38 *Yale Law Journal* (1928-1929), pp. 1094-1095.

Of course, if all the parties to a treaty reserve a particular article, the effect will be the same as an amendment. In substance that is what occurred in connection with the Hague Convention of 1899 for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864. Article 10 of that convention was reserved upon signature by Great Britain, the United States, Italy and Germany. With the article reserved by the principal naval Powers, it was decided, in the interest of uniformity, that it might as well be excluded entirely, and the Dutch Government as bureau government reached an understanding with *all* the signatory Powers to the

effect that Article 10 should be excluded from their ratifications. Consequently the instruments of ratification either had Article 10 crossed out in the copy of the treaty attached, or contained the words: "Article 10 is excluded from this ratification." This was practically the same as if every State had reserved Article 10 in its ratification, and, as Miller points out, was not, *in form*, an amendment. The *effect*, however, was that of an amendment. See, regarding this case, Miller, *Reservations to Treaties* (1919), pp. 136-137; Malkin, article cited, 7 *British Year Book of International Law* (1926), pp. 155-156.

In the case of bipartite treaties, as distinguished from that of multipartite treaties, any change in the agreement necessarily affects the relations under the treaty of all the parties there are, *inter se*. Therefore, in the case of bipartite treaties, the distinction between reservations and amendments is one of form only. See, to this effect, Miller, *op. cit.*, pp. 76-77, where he says:

Accordingly, in a treaty between two powers only, the difference between a reservation of any nature and an amendment, is purely one of form. In an agreement between two Powers there can only be *one* contract. The whole contract is to be sought in all the papers, and whether an explanation or interpretation or any other kind of declaration relating to the terms of the treaty is found in the treaty as signed or in the instruments of ratification is wholly immaterial. There are only two contracting Parties and each has contracted only with the other and each has accepted an identic instrument of ratification from the other, which together with the signed treaty, constitute one agreement.

It may be said, in general, that a treaty is normally intended to apply reciprocally in respect to the relations thereunder of the States parties thereto. In other words, States usually assume obligations under a treaty because and in consideration of other States' assuming like or equal obligations thereunder toward them. Consequently, if a particular State attempts, by a reservation, to relieve itself of certain of its obligations under a treaty toward the other parties thereto, it may ordinarily be assumed that those other parties consent to its doing so with the implied understanding that they shall likewise be relieved of those same obligations *vis-à-vis* the State making the reservation. As a general principle, therefore, a reservation to a treaty is to be regarded as reciprocally limiting the effect of the treaty in so far as it may apply in the relations of the State making the reservation with the other State or States which may be parties to the treaty. Or, stated more simply, a reservation is usually to be considered as applying reciprocally as between the State making it and each of the other parties to the treaty. See, in this sense, Wright, article cited, 4 *Minnesota Law Review*, p. 28; 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 400; 1 Hoijer, *Les Traités Internationaux* (1928), p. 54; Fenwick, *International Law* (1924), p. 326. See also the decision of the British Prize Court in

the case of the *Marie Glaeser*. In that case the German claimant sought to rely upon Article 3 of Hague Convention VI of 1907. Great Britain had accepted the convention without reservation, but Germany had signed and ratified it "under reservation of Article 3 and of Article 4, paragraph 2." Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1915), p. 145. Under those circumstances Sir Samuel Evans, President of the court, refused to consider Great Britain as bound by Article 3 of the convention and to allow the German claimant the benefit of Article 3, holding that "it was not necessary to have regard to the Convention of 1907 at all with reference to this particular case, because the circumstances are similar to those described in article 3 of the sixth convention. To that Article Germany did not agree; she made a reservation in respect of it; and therefore she would not in any event be entitled to any benefit which might accrue from the terms and the conditions laid down in that article." Law Reports, Probate Division, 1914, p. 218 and 1 Lloyd's Reports of Prize Cases (London, 1915-1922), p. 56. The French prize courts took a similar view in like cases. See Garner, *Prize Law During the World War* (New York, 1927), pp. 399-302.

In the above paragraph an effort has been made to indicate that the general principle there discussed is to be regarded as applicable in the "usual" or "normal" case, where there is no clear indication of a contrary intention of the parties concerned. It is believed, however, that the principle cannot be regarded as applicable to every case in which a reservation is made to a treaty. It would seem that the effect which a reservation by one party to a treaty is to be considered as having upon the effect of the treaty in its application between that party and the other party or parties, must depend in some degree upon the terms of the reservation itself. Thus, if State A accepts a treaty with a reservation which in terms expressly and clearly provides that State A alone shall be exempt from certain provisions of the treaty, the other parties not being so exempt *vis-à-vis* State A, and if the reservation in that form is duly accepted by the States whose consent thereto is necessary, it seems reasonable to conclude that the States concerned have consented to State A's having a special status without insisting that, in their relations under the treaty with State A, they enjoy reciprocally the exemptions demanded by State A. In short, if the reservation by its express terms is clearly intended to be non-reciprocal in application, and if it is thus accepted by the other States concerned, there is no evident reason why the general principle referred to in the preceding paragraph should apply. If a State by express and clear terms asks for a special privilege for itself alone in its relationship with other States parties to a treaty, and if the other States concerned agree thereto without taking any steps whatsoever to ensure to themselves the enjoyment of the same privilege in their relations under the treaty with the reserving State, it may reasonably be assumed that they do not insist upon reciprocity any more than they would be assumed as doing so if the text of the treaty itself specifically granted a

special privilege to one State which was not granted to all the other parties. As an example of a reservation which was not intended to, and which could not, apply reciprocally as between the State making it and other parties to the treaty, reference may be made to the Persian reservation to the International Sanitary Convention signed at Paris, December 3, 1903. The *procès-verbal* of the deposit of ratifications of that convention (107 *British and Foreign State Papers*, p. 346) contains the following:

La ratification de Sa Majesté le Schah de Perse est déposée avec la déclaration suivante, à savoir: "Qu'il demeure entendu que le pavillon qui flottera sur la station sanitaire d'Ormuz sera le pavillon persan et que les gardes armés qui seraient nécessaires pour assurer l'observation des mesures sanitaires seront fournis par le Gouvernement persan."

On occasion, and to avoid any doubt, where States have been desirous of assuring the reciprocal application of reservations as between a reserving State and other parties to a treaty, they have not relied upon the existence of any general principle guaranteeing such reciprocity of application but have made express provision therefor. Thus, although the Norwegian delegate at the conference of signatories of the Permanent Court Protocol argued that if the United States expressly reserved to itself the right of withdrawal of its adherence, the other signatories, if they accepted such a reservation, would automatically acquire reciprocally the right to withdraw their acceptance of the United States' adherence, and although apparently other delegates felt that such would be the result of a "natural insistence upon reciprocity", nevertheless it was apparently considered safer to make a specific counter-reservation of such a right. Wright, "The United States and the Permanent Court of International Justice," *International Conciliation*, No. 232, pp. 341, 353. In the convention and protocols adopted at the Codification Conference at The Hague in 1930, express provision was made that "the provisions thus excluded by reservation cannot be applied against the Contracting Party who has made the reservation nor relied upon by that Party against any other Contracting Party." 24 *American Journal of International Law* (1930), Supplement, pp. 196, 202, 212. The protocol to the Convention on Customs Formalities (2 Hudson, *International Legislation*, p. 1120) provided that "The other Contracting States, while stating their acceptance of the reserves so formulated, declare that they will not be bound, in regard to the States which have made the said reserves, as regards the matters to which they relate, until the provisions in question are applied by the said States." And Article 8 of the General Treaty of Inter-American Arbitration provides: "The reservations made by one of the High Contracting Parties shall have the effect that the other Contracting Parties are not bound with respect to the Party making the reservations except to the same extent as that expressed therein." *Proceedings of the International Conference of American States on Conciliation and Arbitration* (Washington, 1929), p. 666.

ARTICLE 14. RESERVATIONS AT TIME OF SIGNATURE

Unless otherwise provided in the treaty itself:

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when signing only with the consent of all other signatories.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when signing only with the consent of all other States which sign before the date fixed.

(c) If a treaty is open for signature at any time in the future, a State may make a reservation when signing, if it signs before the treaty has been brought into force, only with the consent of all the States which become signatories before the treaty is brought into force; if it signs after the treaty has been brought into force, only with the consent of all the States which have become signatories or parties prior to the time of signature by that State.

(d) If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty.

GENERAL COMMENT ON ARTICLES 14, 15, AND 16

Generally speaking, Articles 14, 15 and 16 are designed to give effect, in so far as practicable, to the following general principle: A State which wishes to make a reservation to a treaty may do so only if all other States which are parties to the treaty, or which, as signatories, are likely to become parties, consent to its so doing; lacking such consent, the State desirous of making the reservation must either abandon that desire and accept the treaty without the reservation or else remain outside the treaty entirely. That principle is based upon the following considerations.

In the case of bipartite treaties, the distinction between a reservation and an amendment is one of form only. See Comment on Article 13; Miller, *Reservations to Treaties* (1919), pp. 76-77. Hence, when a State proposes to make a reservation to a bipartite treaty, whether at the time of signature or of ratification, it seeks in effect to write into the treaty at that time a new provision. Unless, however, all the provisions in a bipartite treaty are acceptable to both the States concerned there is no mutual agreement and hence no treaty to be either signed or ratified. It follows, therefore, that a State may make a reservation to a bipartite treaty, either at signature or at ratification, only if the other State concerned consents to its so doing; lacking such consent the treaty necessarily fails unless the State proposing to make the reservation abandons it. Cf. Miller, *op. cit.*, p. 76.

When a State proposes to make a reservation to a multipartite treaty, whether at signature, ratification, or accession, it seeks in effect to write into the treaty at that time "certain terms which will limit the effect of the treaty in so far as it may apply in the relations of that State with the other State or

States" which are or which become parties to the treaty. It proposes, in effect, to insert in the treaty a provision which will operate to exempt it from certain of the consequences which would otherwise devolve upon it from the treaty, while leaving the other States which are or which become parties to the treaty fully subject to those consequences in their relations *inter se* and possibly even in their relations *vis-à-vis* the State making the reservation. It seems clear that a State should be permitted to do this only with the consent of all other States which are parties, or which, as signatories are likely to become parties to the treaty, and this because, as has been said, States are willing in general to assume obligations under a multipartite treaty only "on the understanding that the other participating Powers are prepared to act in the same way and that general benefit will thus result." A multipartite treaty is "an agreement in which each party finds a compensation for the obligations contracted in the engagements entered into by the others." *League of Nations Document A.10.1930.V.*, p. 2. Consequently, were a State permitted to write a reservation into a multipartite treaty over the objection of any State already a party to the treaty (*i.e.*, a signatory or acceding State actually bound by the treaty), the latter State might regard the consideration which prompted it to become a party as so far impaired by the reservation that it would denounce the treaty and withdraw therefrom. Likewise were it possible to insert the reservation in the treaty despite the objection of a State which, though not yet a party, is a signatory of the treaty or (where the treaty is still open for signature) is eligible and ready to become a signatory, the latter State might take the view that what it regarded as the usefulness or value of the treaty for it was so far destroyed by the reservation that it would never ratify the treaty or would, had it not yet signed, withhold its signature. In either case, since a choice must be made, reason and the necessity for preserving multipartite treaties as useful and effective instruments of international coöperation indicate that the preference should be given to the States which find the treaty satisfactory as it stands, and that the inconvenience, if any, of non-participation in the treaty should fall upon the State which seeks to restrict its effectiveness by reservations.

In connection with what has just been said, the following statement in the memorandum addressed to the Secretary-General of the League of Nations by the British Government in regard to the Austrian signature with reservations of the Opium Convention of February 19, 1925, is of interest:

4. It may be said that such conventions [*i.e.*, multipartite conventions] are, in their essence, a matter of offer and acceptance. Individual States may well undertake particular obligations which are inconvenient or disadvantageous to themselves as part of a general bargain on the understanding that the other participating Powers are prepared to act in the same way and that general benefit will thus result.

5. But if individual States are to be entitled, without consultation with other signatories, to accept an agreement as a whole while declining to adopt those of its provisions which may be unwelcome to them, there

is a danger that such a practice would tend to defeat the purposes for which multi-lateral agreements are entered into. (*League of Nations Official Journal*, 1926, pp. 612-613.)

Cf. also, the following statement by Malkin:

At first sight it might be thought that, as no State is obliged to sign any convention unless it wishes to do so, any State is entitled to accept as much or as little of a convention as it may think fit, and is therefore in a position to make any reservations which it considers desirable, irrespective of the other contracting parties and without obtaining their consent. But such a view is not, it is suggested, consistent with sound principle. Multilateral conventions are after all only a form of contract in which the consideration for the acceptance of the contract by any one party is its acceptance by the others. In all conventions of this nature there are probably provisions which do not appeal much to certain signatories but which they are prepared to accept as a return for securing the acceptance of other provisions, to which they attach importance, by the other parties to the convention. If, however, any party is entitled, without the consent of the other signatories, to pick out of the convention any provisions to which it objects and exclude them by means of a reservation from the obligations which it accepts, it is obvious, not only that the object of the convention might be largely defeated, but that the consideration indicated above is impaired or even destroyed; the other signatories are not in fact getting what they bargained for. (Malkin, "Reservations to Multilateral Conventions," 7 *British Year Book of International Law*, 1926, p. 142.)

It is to be said that the word "signatory" in any of the provisions of Articles 14, 15 or 16 should not be understood as referring to a State which has signed a treaty but which has never become a party thereto and which has given definite indication, either expressly or by clear implication, that it has no intention of becoming a party to it. It is unlikely that such a signatory would raise any objection if another State attempted to make a reservation to the treaty, but in any case its consent should not be regarded as necessary and any objection that it might make should not be considered. The provisions of Articles 14, 15 and 16 are designed to ensure the acceptance of reservations to a treaty by all States which are, or which, as signatories, are likely to become, parties to the treaty, and which consequently may be affected by the reservation in their relations under the treaty; there is no reason why reservations should require the consent of States which have clearly indicated an intention not to become parties.

Finally, it may be remarked that it has not seemed advisable to be too rigid or dogmatic in specifying how the consent required in Articles 14, 15 and 16 is to be indicated. Some observations relative to that point are made in the comment to the various paragraphs, but in large degree the circumstances of any particular case should be taken into account in determining the existence or lack of the consent required. In general, it may be said that express consent duly recorded in any instrument is always desirable, but

consent given by implication is commonly recognized as sufficing. See 1 Hudson, *International Legislation* (1931), pp. xlix—l; Marjorie Owen, "Reservations to Multilateral Treaties," 38 *Yale Law Journal* (1928-29), pp. 1102-1105, 1113; Malkin, article cited, 7 *British Year Book of International Law* (1926), p. 159. The Havana Convention on Treaties (4 Hudson, *op. cit.*, p. 2378) recognizes (Article 6) that the consent of a State to reservations may be regarded as given if it, "informed of the reservations expressly accepts them, or having failed to reject them formally, should perform action implying its acceptance." The real point is that "however tacit the consent, consent there must be. And hence it follows that there must be communication of the proposed reservations." Owen, article cited, p. 1113.

Unless otherwise provided in the treaty itself.

This phrase is introductory to each of the Articles 14, 15 and 16; the subsequent paragraphs of those articles are, therefore, subject to the condition that the rules therein laid down are to be applied in the case of a particular treaty only in case the treaty itself contains no provisions relative to the making of reservations. Such provisions are not common, but perhaps they have increased in number in recent years; in any event where there are such, they supersede the provisions in Articles 14, 15 and 16 of this Convention with respect to the treaty in which they occur.

For example, the Protocol of the Convention on the Simplification of Customs Formalities, which convention was open for signature until a certain date, provided that reservations to Articles 10 and 11 of the convention might be made at the time of ratification or accession "if the Council of the League of Nations so decides after consulting the technical body mentioned in Article 22 of the Convention." (For the convention and protocol, see 2 Hudson, *International Legislation* (1931), pp. 1094, 1120.) Such a provision would supersede Article 15 paragraph (b) and Article 16 paragraph (a) of this Convention, the consent of the Council of the League taking the place of that specified in those provisions as necessary in the case of a ratification or an accession with reservations.

Another example which may be mentioned is afforded by Article 17 of the Convention concerning Economic Statistics (4 Hudson, *op. cit.*, p. 2575) which provides as follows:

The Governments of Countries which are ready to accede to the Convention under Article 13, but desire to be allowed to make any reservations with regard to the application of the Convention, may inform the Secretary-General of the League of Nations to this effect, who shall forthwith communicate such reservations to the Governments of all countries on whose behalf ratifications or accessions have been deposited and enquire whether they have any objection thereto. If within six months of the date of the communication of the Secretary-General no objections have been received, the reservation shall be deemed to have been accepted.

Such a provision would supersede Article 16 paragraph (a) of this Convention, which, in the absence of such provision, would require consent not only of States on whose behalf ratifications or accessions had been deposited, but of all other signatory States as well.

Still another example which may be mentioned is the case of a treaty which is left open for signature until a certain date and which contains an express provision to the effect that a State may sign the treaty with reservations within the period specified provided the reservations are consented to by all States which have previously signed the treaty. Such a provision would supersede Article 14 paragraph (b) of this Convention, and a State signing the treaty in question subject to reservations would not, therefore, have to obtain the consent of the States which signed after it did and before the end of the period during which the treaty was open for signature.

Other cases similar to those just mentioned by way of illustration are all intended to be covered by the phrase "unless otherwise provided in the treaty itself."

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when signing only with the consent of all other signatories.

COMMENT

This paragraph envisages cases where all the States which are to become actual signatories of a treaty sign it on the same date, there being no opportunity given for affixing signatures after that date. It refers to bipartite treaties, which are nearly always signed on the same date by the two States which negotiated them. It refers likewise to multipartite treaties which are not expressly opened to signature over a period of time, but which, instead, are signed on a given date by all the States eligible to and prepared to sign them at that time, States not affixing their signatures at that time being compelled to remain non-signatories. In either case, the paragraph provides that a State may make a reservation when signing the treaty only if the other State or States likewise signing the treaty on the same date consent to its so doing. In other words, if, in the case of a bipartite treaty, State B objects to State A's signing with a reservation, State A must either abandon the reservation or else not sign the treaty. If, in the case of a multipartite treaty, any one or more of the other States signing the treaty object to State A's signing with a reservation, State A must either sign without the reservation or else not become a signatory.

The rule is justified in the case of a bipartite treaty for the reason already indicated above, to wit, that when a State proposes to make a reservation upon signing a bipartite treaty it seeks in effect to write into the proposed treaty a new provision, and that unless all the provisions in a bipartite treaty are acceptable to both the States concerned there is no mutual agreement and hence no treaty to be signed. It follows that where the signatures are affixed to a bipartite treaty on different dates, the same rule would apply.

In the case of a multipartite treaty, were it possible for one State, when signing the treaty, to write into it a reservation despite objection thereto by other States affixing or proposing to affix their signatures at the same time, one or more of the latter States might, for the reasons suggested in the general comment *supra*, decide to withhold signature or at least not to proceed to ratification. Such a result, as already indicated, would not be desirable; if any State is to be excluded from the treaty, it should be the one which seeks by means of reservations to alter in some way the effectiveness thereof in its own interest. The rule here laid down is in accord with that view.

This rule seems to be supported by practice. As is well known, China did not sign the Treaty of Versailles after objection was made to her proposal to sign it with reservations. On May 6, 1919, the Chinese delegation, at a plenary session of the Peace Conference, gave notice of its intention to make a reservation regarding that part of the treaty containing the Shantung provisions, and on May 26 it notified the President of the conference, M. Clemenceau, that it would sign the treaty subject to such reservation. On June 24 the Secretary-General of the conference informed the Chinese delegation that reservations to the treaty were not permissible, and the same reply was made to all subsequent attempts on the part of the Chinese delegation to find some acceptable method of formulating their reservation. As late as three hours before the signing of the treaty, the Chinese proposed that they be permitted to sign with a reservation worded so that it would simply state that the fact of their having signed the treaty should not be understood to preclude China from asking at a subsequent time for reconsideration of the Shantung question. "The Secretary-General reported that none of the Council would consent to this. The Chinese delegation therefore refrained from signing the Treaty." 6 Temperley, *A History of the Peace Conference of Paris* (1924), p. 388.

At the conference which drafted the Convention of May 4, 1910, for the Suppression of the White Slave Traffic, Germany abandoned a proposed reservation which was objected to by other States participating in the conference. Germany had first proposed that Article 6 of the convention be amended by adding a paragraph allowing parties to the convention to execute *commissions rogatoires* directly by their diplomatic and consular officers if treaties between the States concerned permitted, or if the State in whose territory the *commission rogatoire* was to be executed did not object. When this amendment was voted down, the German delegation announced that they would sign the treaty with a reservation embodying practically the same provision. Objection was made to the reservation, however, on the ground that it would be improper to permit a State to write into a reservation a provision which had been excluded from the text of the convention. Ultimately, therefore, Germany abandoned that reservation, and instead simply made a reservation upon signature of the whole of Article 6. 115 *Archives Diplomatiques* (1910), p. 75 ff; Malkin, article cited, 7 *British Year Book of International Law* (1926), pp. 151-152.

The Protocol of Signature of the International Sanitary Convention of December 3, 1903, contains the following:

Dr. Duca Pacha, delegate of the Ottoman Empire, reads the following declaration:

"The Ottoman delegates, in behalf of their Government, declare that they are authorized to accede *ad referendum* and subject to the reservations made by them in the protocols and process-verbale as also when votes were taken to points numbered 1, 2, 3, 4, 5, 7 and 9 in Mr. Proust's report and maintained their protest as to points number 6, relative to the modification of the Supreme Board of Health of Constantinople; 8, relative to the obligation placed on the Supreme Board of Health of Constantinople to carry out the decisions of the Conference; 10, relative to the creation of an International Health Office, which questions the Imperial Ottoman Government does not consider as being within the province of the Conference and in the discussion of which the Ottoman delegates refrained from taking part.

"The Ottoman delegates likewise maintained their protests made in the plenary session of November 16, 1903 concerning the declaration of the sanitary condition of the pilgrimage of Hedjaz, declare that they protest against any foreign physician being sent to Hedjaz to accompany pilgrims of their nationality."

Mr. Barrère, President of the Conference, states that under those conditions the Ottoman delegates could sign only the protocol of signature. (Miller, *Reservations to Treaties*, 1919, pp. 113-114.)

Finally, in this connection it may be noted, also, that it was evidently the view of the American delegation to the Hague Peace Conference of 1899 that it could sign the Convention for the Pacific Settlement of International Disputes with a reservation only if the other signatory States consented. Regarding this, Andrew D. White recorded in his *Autobiography* (Vol. 2, p. 340):

All night long I have been tossing in my bed and thinking of our declaration of the Monroe Doctrine to be brought before the conference today. We all fear that the conference will not receive it, or will insist on our signing without it or not signing at all.

Furthermore, although there may be relatively few cases where, as a result of objection by other signatories to its signature with reservation, a State has either abandoned the reservation or else foregone signing a treaty, it can be said that in practice reservations at signature have generally been made in such manner and under such circumstances as to lend support to the rule here laid down. That is, reservations at signature have usually been so made as to indicate that the other signatories did, as a matter of fact, consent thereto either expressly or by implication, and there seem to be no precedents to suggest that such consent is not necessary. See, in this sense, Malkin, article cited, 7 *British Year Book of International Law* (1926), p. 159.

States have sometimes made reservations at signature simply by appending to their signatures, where all the other States signing the treaty could readily see and read them, the complete terms of their reservations. Where

this has been done, and the other States have affixed their signatures at the same time, the latter fact may in itself be taken to indicate that the other signatory States consented to the making of the reservations. It is not important that at the time of signing some States necessarily signed immediately before and some immediately after the State making the reservations; the significant fact is that, under the circumstances, and even if they had no previous knowledge of the proposed reservations, all States signing the treaty presumably had notice of the reservations and made no objection thereto. See 1 Hudson, *International Legislation* (1931), p. xlix and n. 3.

Frequently, in the case of multipartite treaties concluded at large conferences, the reservations made by States at the time of signature have been previously announced at one of the formal sessions of the conference or commissions and duly recorded in the *procès-verbaux* or minutes. Thus, at the First Hague Peace Conference the four reservations attached to signatures of the Convention for the Pacific Settlement of International Disputes were previously announced in the form of declarations at meetings of the plenary conference or of one of the commissions and duly recorded in the proceedings. The records of the plenary session of the conference held on July 25, 1899, for example, contain the following statement:

The President then reads the following declaration:

The delegation of the United States of America on signing the Convention for the pacific settlement of international disputes, as proposed by the International Peace Conference, makes the following declaration:

[Here follows the text of the United States declaration].

The President places on record this declaration of the United States of America. (Scott, *The Proceedings of the Hague Peace Conferences, The Conference of 1899*, New York, 1920, pp. 99-100.)

When, subsequently, the treaty was signed on behalf of the United States, the full text of the United States reservation was not appended to the signatures of the American plenipotentiaries, but instead only the following statement: "Under reservation of the declaration made in the Plenary session of the Conference of July 25, 1899." (Translation.)

At the Second Hague Peace Conference the procedure was similar to that followed at the First Conference. Each State, when a convention was voted upon, gave its vote subject to the reservations it desired to make; the reservations were duly recorded in the proceedings and were repeated or referred to at the time of signing. In the case of the Convention for the Pacific Settlement of International Disputes, for example, the proceedings, following the announcement of reservations by a number of States, read as follows:

The President: The Conference records reservations and declarations.

It proceeds to the vote on the draft as a whole; it is unanimously adopted with the reservations mentioned above. (Scott, *The Proceedings of the Hague Peace Conferences, The Conference of 1907*, Vol. 1, pp. 329, 330.)

The reservation made by the United States to the General Act of Algeciras of 1906 was first presented in the form of a declaration to the plenary conference, and the delegates subsequently appended to their signatures the words: "Sous réserve de la déclaration faite en séance plénière de la Conférence le 7 Avril, 1906." Miller, *Reservations to Treaties* (1919), pp. 125-126. The Convention of May 4, 1910, for the Suppression of the White Slave Traffic was signed by Germany with a reservation of Article 6 and by Brazil with a reservation of Article 5; the records of the meeting of the conference held two days before the date of signature read as follows:

L'ensemble de la Convention est adopté à l'unanimité. Toutefois il est bien entendu que l'Allemagne ne signera que sous réserve de l'article 6 et le Brésil sous réserve de l'article 5. (7 Martens, *Nouveau Recueil Général de Traités*, 3d ser., p. 250.)

In cases similar to those just referred to it seems evident that the reservations made at signature were consented to by the other signatories, if not expressly, at least by clear implication. This would seem to be true not only where the treaty was signed by all the signatories on the same date—the type of case especially under consideration here—but also where it was signed by them within a certain period of time, as was done in the case of the Hague Conventions of 1899 and 1907. In either case, so long as the treaty was open for signature by only those States which actually participated in the conference, it can certainly be said that the States signing the treaty did so after ample notice of, and apparently without making any objection to, the reservations affixed to the signatures. See, in this connection, the following statement in the report of the Committee for the Progressive Codification of International Law on the Admissibility of Reservations to General Conventions:

It no doubt frequently happens that, in the course of the negotiation of a treaty, agreement is reached between the contracting parties regarding a reservation which is put forward by one of them and accepted by the others. In such a case the former party may naturally, when appending its signature to the act concluded, mention and maintain its reservation. The other contracting parties, when they also append their signatures, signify thereby that they have accepted the reservation and consent thereto. (*League of Nations Document C.357.M.130.1927. V.*, p. 2.)

Finally reservations made at signature have sometimes been recorded in a protocol or *procès-verbal* of signature signed by all the States which signed the treaty. In such cases there was express consent by all signatories to the reservations. As examples of protocols of signature containing reservations made by signatory States, see the Protocol of Signature of the International Sanitary Convention of December 3, 1903, Miller, *Reservations to Treaties* (1919), p. 112; the *procès-verbal* of signature of the Sanitary Convention of January 17, 1912, 108 *British and Foreign State Papers*, p. 275; the *Protocole*

Final to the International Radiotelegraphic Convention of July 5, 1912, 105 *British and Foreign States Papers*, p. 227; the Protocol to the International Convention relating to the Simplification of Customs Formalities, 2 Hudson, *International Legislation* (1931), p. 1120; the Protocol to the Convention on the Suppression of Counterfeiting Currency, 4 *ibid.*, p. 2705. (The latter two conventions were left open for signature during a specified period; the protocols were also left open for signature.)

It will be recalled that in order to constitute a "reservation", as the term is used in this Convention, there must be a "formal declaration", and that such a "formal declaration" may be made at the time of signature in one of three ways. It will also be recalled that those three ways correspond to those just mentioned above in this comment; that is, (1) endorsement of the terms of the reservation upon the treaty; (2) endorsement thereon of a reference to the point in the formal records of the proceedings of the conference where the terms of the reservation were previously recorded; or (3) inclusion of the reservation in a separate formal instrument collateral to the treaty and signed by the same States which sign the treaty proper. It follows, therefore, that when the rule here under discussion states that if a treaty is signed by all the signatories on the same date, a State may make a reservation when signing only with the consent of all other signatories, such consent may be indicated in some one of the ways discussed above. That is, the consent required may be regarded as having been given if the other signatory States, without protest, have signed, along with the State making the reservation, a treaty upon which the reservation has been endorsed in full or by reference, or a separate formal instrument collateral to the treaty wherein express account is taken of the reservation.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when signing only with the consent of all other States which sign before the date fixed.

COMMENT

This paragraph envisages the case when all of the States eligible to sign a treaty do not—or at least need not—sign the treaty on the same date, opportunity being given them to sign it at any time up to a certain date, after which they can no longer become signatories. It has reference to multipartite treaties which are left open for signature during a fixed period of time. As to the practice of leaving treaties open for signature, see the following from the report of the Committee for the Progressive Codification of International Law on the matter of admissibility of reservations to general conventions:

In the first place, the practice arose between Powers negotiating a general treaty of allowing a certain period for the signature of the Act which they drew up on a particular date but which they did not all sign on that date (*cf.* the Red Cross Convention of 1864). . . .

Subsequently, in treaties revising a previous treaty, the contracting parties admitted that the Powers signatory of the original treaty might sign the new treaty even if they had not taken part in the revision (*cf.* the Second Geneva Red Cross Convention of 1906); and ultimately the stage has been reached of leaving certain treaties open unconditionally for varying periods for signature by Powers that did not even participate in the elaboration of the treaty. Such was the case of the Opium Convention of February 19, 1925. (*League of Nations Document C.357.M.130.1927.V.*, p. 2.)

The rule here laid down is that, when a treaty is left open for signature until a fixed date, none of the States signing the treaty at any time before that date may do so with reservations unless all of the other States which likewise sign the treaty within the period fixed consent to its so doing. It would operate as follows: Suppose a treaty is opened for signature on January 1, 1934, to remain open for signature until January 1, 1935. State D wishes to sign the treaty on July 1, 1934, but with a reservation not hitherto agreed to. It should not be permitted to do so if any State which signed the treaty prior to that time objects, and the headquarter government or authority would not be justified in allowing it to sign with the reservation unless at least the consent of prior signatories were obtained. If all prior signatories consent, State D may affix its signature with the reservation, but, at least unless the consent of all other possible signatories can be and is secured in advance, State D cannot definitely be counted as a signatory until after January 1, 1935, for its signature with a reservation must be consented to by all States which actually sign the treaty up to and including January 1, 1935. If any State which signs the treaty after State D has done so, but before January 2, 1935, objects to State D's signature with reservation, that signature must be regarded as of no effect and State D cannot be regarded as a signatory.

The logic of this rule is perfectly clear in the case of a treaty which is left open until a certain date for signature by only such States as participated in the elaboration of the treaty. Under the rule laid down in paragraph (a) above, if the treaty had not been left open but had instead been signed on a particular day at the end of the conference at which it was drafted, no one of the States participating in the conference could have signed with a reservation unless all of the other States signing the treaty consented. The reasons for that rule would seem to apply with equal force when, simply for reasons of convenience and in order to permit as many of the negotiating States as possible to participate in the treaty, the period during which signatures may be affixed is extended over a period of a few months. As pointed out by the Committee for the Progressive Codification of International Law, the opening of a treaty during a certain period for signature by those States which took part in its elaboration "must be regarded as only a sort of tolerance and courtesy among States and nothing more; a signature given in such conditions is in reality ante-dated." *League of Nations Document C.357.M.130.1927.V.*, p. 2.

The Hague Conventions of 1899 were opened for signature on July 29, 1899, and were left open for signature by States represented at the Peace Conference until December 31, 1899. Some time prior to the latter date, the British Government notified the Netherland Government, as the head-quarter government, that it desired to affix its signature to the Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare with a reservation of Article 10 thereof. The Netherland Government refused to accept the British signature with the reservation "on the ground that, since the conventions were to be dated July 29, 1899, although they might be signed up to December 31, it resulted that the only reservations which could be admitted were those which had been expressly made before July 29 and had been recorded in the minutes of the conference, and had therefore been brought officially to the notice of the other delegations. If this were not so, any state might sign one of the conventions with a reservation as regards its most important provisions and thus be relieved of a heavy obligation, while the other Powers, who had already signed without any reservation, would nevertheless be bound by those obligations *vis-à-vis* of the State in question. The Dutch Government, therefore, could not accept the reservation without referring it to the other signatories, but they were willing to do so and recommend its acceptance." Malkin, article cited, 7 *British Year Book of International Law* (1926), p. 156. The actual correspondence in this case appears not to be published. It seems plain, however, that the Netherland Government was of the opinion that it could not permit Great Britain to sign the convention with its reservation without first securing consent to its doing so from the States which had already signed the convention. Whether the Netherland Government took the view that the British signature with reservations could be regarded as definitive if consented to by only those States which signed prior to it and irrespective of the consent of any States which might sign after it, is not clear from the above account. In any event, Great Britain did not sign the convention until December 29, 1899, after "all the other signatories" had agreed to its reserving Article 10. Subsequently, on the suggestion of the Netherland Government, Article 10 was excluded from the ratifications of all signatories. See Miller, *Reservations to Treaties* (1919), pp. 136-137; Holls, *The Peace Conference at the Hague* (New York, 1900), pp. 128-130.

When a treaty is left open until a definite date for signature not only by States which participated in its elaboration but by other States as well, it would seem that the rule here proposed should still apply. The States which drafted the treaty having elected to permit certain or all other States to become actual signatories like themselves rather than, as they could have done, to permit them only to accede to, but not to sign, the treaty, there would seem to be no reason for making any distinction between signatories. Consequently under the rule here laid down no distinction is made; a State, whether it be one of those which participated in the elaboration of the treaty or one

which did not, may make a reservation when signing the treaty only with the consent of all other States which sign the treaty before the expiration of the period during which it is open for signature, including both those States which did and those which did not take part in the drafting of the treaty.

Pushed to its logical conclusion, the above principle might operate as follows: Suppose States A, B, C, D and E meet in conference and elaborate a treaty which they agree to leave open for six months for signature by other States. A, B, C, D and E sign the treaty at the same time at the close of the conference, E with the consent of A, B, C and D, signing with a reservation. State X (which of course had no part in the elaboration of the treaty) signs the treaty within the six month period and objects to E's signature with reservation, thereby nullifying the effect of that signature. This may seem somewhat startling; certainly no such case appears to have occurred and it may be doubted whether one is likely to occur. As a practical matter, a State in the position of the hypothetical State X would in all probability have no objection to a reservation which was acceptable to all the States which actually framed the treaty, and it would scarcely press its objection to the reservation if those States were opposed to its doing so. Theoretically, however, there seems to be no compelling reason for regarding State X as in any sense different from the other signatories, any one of which could have effectively objected to State E's signature with reservations. It is to be presumed that State X's participation in the treaty was regarded as desirable or the treaty would not have been opened for its signature. It is likewise to be presumed that State X's participation in the treaty without reservation is at least as desirable, if not more so, than State E's participation subject to reservation. Consequently, if a choice must be made between them, it seems to accord with the considerations already discussed to exclude State E in favor of State X.

The case of a reservation at signature by a State which did not participate in the elaboration of the treaty occurred in connection with the Convention on Traffic in Opium and Drugs opened for signature at Geneva on February 19, 1925 (3 Hudson, *International Legislation*, 1931, p. 1589). Article 33 of the convention provided that it should bear the date February 19, 1925, and should be "open for signature until the 30th day of September, 1925, by any State represented at the Conference at which the present Convention was drawn up, by any Member of the League of Nations, and by any State to which the Council of the League of Nations shall have communicated a copy of the Convention for this purpose." A number of States signed the convention on February 19, 1925, and others appended their signatures during the period it was open for signature. On September 30, 1925, the last day of the period, Austria, which had not been represented at the Opium Conference, signed the convention, but with reservations in respect of certain of its clauses.

The fact of the Austrian signature with reservations was communicated to

the other signatories of the treaty. The British Government thereupon addressed a memorandum to the Secretary-General of the League of Nations setting forth the circumstances of the case. The British Government pointed out that a reservation made under the circumstances indicated above, without the previous knowledge or assent of the other signatories, involved an important question of principle; it suggested that the Council consider the matter and that the question of principle involved be submitted to the Committee of Experts for the Progressive Codification of International Law for investigation and report. *League of Nations Official Journal*, 1926, pp. 612-613. The British suggestion was adopted by the Council at its meeting in March, 1926. At the same meeting the representative of Austria described the circumstances in which Austria had signed with reservations, and explained that the "Austrian Government fully realised that its reservations must be accepted by the other signatory Powers, as would have been the case if a representative of Austria attending the Conference had signed subject to a reservation." *Ibid.*, p. 521.

In 1927 the Committee of Experts for the Progressive Codification of International Law submitted to the Council an inconclusive report on "Admissibility of Reservations to General Conventions" prepared for it by a subcommittee composed of Messrs. Fromageot, Diena and McNair. *League of Nations Official Journal*, 1927, p. 880; *League of Nations Document C.211.1927.V*; also in *Document C.357.M.130.1927.V*. This report, in part, states:

A signature appended in these circumstances [i.e., after the close of a conference and by a State which did not participate in the elaboration of the treaty] constitutes nothing more than an "accession"; the Power signing in this way simply associates itself with the Powers which concluded the Treaty. It therefore accepts the latter under the same conditions as the contracting parties; what they accepted it accepts. It cannot make any addition or modification, for such addition or modification would not be covered by the reciprocal agreement which constitutes the treaty concluded by the contracting Powers.

It no doubt frequently happens that, in the course of the negotiation of a treaty, agreement is reached between the contracting parties regarding a reservation which is put forward by one of them and accepted by the others. In such a case the former party may naturally, when appending its signature to the act concluded, mention and maintain its reservation. The other contracting parties, when they also append their signatures, signify thereby that they have accepted the reservation and consent thereto.

But when the treaty declares, as we have seen above, that it permits signature by Powers which have not taken part in its negotiation, such signature can only relate to what has been agreed upon between the contracting Powers. In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotia-

tions. If not, the reservation, like the signature to which it is attached, is null and void.

Although not clear, the above report apparently states that a signature with reservations on behalf of a State which had no part in the elaboration of a treaty must be consented to at least by all States which did participate in the elaboration of the treaty and which sign it—whether before or after the State making the reservation presumably making no difference. It is not evident as to whether the consent of other States which did not take part in the drafting of the treaty but which also sign it within the period during which the treaty is open for signature is regarded as necessary. The lack of absolute precision on these points is probably to be explained by the fact that in the specific case under consideration Austria's signature with reservations was affixed on the very last day of the period during which the treaty was open for signature, presumably after all the other signatures had been affixed, and that apparently all the other signatories of the treaty had in fact been represented at the Opium Conference except only two members of the British Empire (the Union of South Africa and New Zealand), the Sudan, and Latvia. Of course, the question as to whether or not a signatory State which had no part in the elaboration of a treaty could effectively object to and prevent a signature with reservations by a State which did participate therein was not before the Committee of Experts at all.

In connection with the rule here under discussion reference may be made to the International Sanitary Convention for Air Navigation opened for signature at The Hague on April 12, 1933. The convention was signed on behalf of twelve countries, not including the United States, and was left open for signature until April 12, 1934. Article 67 of the convention provides in part that a signature of the convention can not be accompanied with a reservation which has not previously been approved by the high contracting parties which are already signatories. If this be regarded as an express provision that consent to signature with reservations need be had only from those States which are already signatories of the treaty at the time the State making the reservation affixes its signature, it would, as explained above in the discussion of the qualifying phrase "Unless otherwise provided in the treaty itself", supersede the requirement laid down in Article 14 paragraph (b) which requires that a signature with reservations must have the consent of all those States which sign within the period during which the treaty is open for signature, whether before or after the State making the reservation. In any event, when the United States desired to sign the convention subject to reservations, the Netherlands Government as headquarter government, according to unpublished correspondence, apparently took the view that under Article 67 the only consent necessary was that of States which had already signed the treaty. The following, however, appears in *United States Treaty Information Bulletin*, No. 54 (March, 1934), p. 10:

The American Minister to the Netherlands has been instructed to

sign the convention subject to two reservations. The text of these reservations has been furnished to the 12 governments signatory to the convention and to all those states which have not yet signed the convention in order that they might signify their approval. The Netherland Government has advised this Government that all of the 12 original signatories have stated that they have no objection to the reservations. In addition to the approvals given by the original signatories the following states have also signified their approval: China, Costa Rica, Ecuador, Egypt, Germany, Greece, Haiti, Iraq, Irish Free State, Lithuania, New Zealand, and Portugal.

The American Minister thereupon signed the convention, with the two reservations referred to, on April 6, 1934. *Treaty Information Bulletin*, No. 55 (April, 1934), p. 6. It is not known whether any other States signed between that date and April 12, 1934.

Without attempting either an exhaustive or a precise description of how the consent required in paragraph (b) is to be indicated, the following observations may be made. When State A is among those signing the treaty when it is first opened for signature and it appends a reservation to its signature, State A's signature with the reservation may be regarded as having the consent of all other States which, without objecting thereto, sign the treaty at the same time. It will likewise be regarded as having the consent of all States subsequently signing the treaty or the treaty and the protocol without protest; States signing after State A may be presumed to have read and agreed to everything appearing in or on the instruments which they signed voluntarily, including State A's reservation. When, on the other hand, State A is not among the original signatories but instead desires to sign the treaty with reservations after other States have already signed it, the consent of those prior signatories must first be secured. Such consent may be implied where State A merely seeks to append to its signature a reservation which it had previously stated and recorded, without objection being made thereto, in the proceedings of a conference in which the prior signatories were likewise participants. When, however, State A seeks to subject its signature to a reservation which had not been thus previously agreed to, it seems desirable that the consent of the prior signatories should be given expressly. It is possible that under certain circumstances their consent might be implied from a failure to object after notification of State A's proposed reservation, for example, but ordinarily such consent should and can be expressly given. This might be done, for example, by an exchange of notes between State A and the prior signatories either directly or through a head-quarter government, as was done in the case of the Hague Convention of 1899 and the International Sanitary Convention for Air Navigation discussed above. Or it might be done by drawing up and signing a protocol or *procès-verbal* expressly recording State A's reservation and consent thereto. Finally, if, with the consent of all prior signatories duly given, State A affixes its signature to the treaty and appends its reservation thereto, consent

of subsequent signatories will be regarded as given by implication if, without protest, they sign the treaty (or the treaty and a protocol recording the reservation).

(c) If a treaty is open for signature at any time in the future, a State may make a reservation when signing, if it signs before the treaty has been brought into force, only with the consent of all the States which become signatories before the treaty is brought into force; if it signs after the treaty has been brought into force, only with the consent of all the States which have become signatories or parties prior to the time of signature by that State.

COMMENT

The preceding paragraphs of this article, for reasons indicated, permit a State to sign a treaty with reservations only if all the other States becoming signatories of the treaty consent. Paragraph (c), for the same reasons, gives effect to the same principle in so far as it is practicable to do so. It is evident, however, that, when a treaty is left open for signature at any time in the future, it becomes a practical impossibility to make a signature with reservations contingent upon the consent of all States becoming signatories, because, if that were done, there might in some cases never be a time when a signature with reservations could be regarded as consented to and counted as definitive. So long as there remained a possibility that another State might affix its signature at some time in the future, a previous signature with reservations would have to be regarded as tentative. It is necessary, therefore, for obvious practical reasons, to establish some point in time at which a signature with reservations, having received the consent of a definite number of States, can be regarded as definitive and effective.

The first part of the paragraph envisages the case where a State desires to sign with reservations a treaty which is open for signature at any time in the future and which, at that time, has not yet, for want of necessary signatures or ratifications perhaps, been brought into force. The rule laid down is to the effect that a State may do so only with the consent of all other States which have become signatories of the treaty before the date on which it comes into force, including, of course, both those States which signed before and those which sign after the State in question. It would operate in exactly the same way as the rule in paragraph (b), the date of the coming into force of the treaty simply being substituted for the fixed date referred to in that paragraph. The date of the coming into force of the treaty is selected as the critical date, because, as stated above, in the case of a treaty left open for signature at any time in the future, it is necessary to select some definite time after which consent of further signatories will not be required with regard to a previous signature with reservations, and because that date seems to be a convenient and logical one for the type of case here envisaged. It may be presumed that normally the greater number of States eligible to sign a treaty,

and certainly those having the greater interest in it, will sign it promptly and before the date when it is brought into force. Such States should certainly have a voice in determining whether or not reservations are to be introduced into the treaty. And, on the other hand, since it may be necessary, in the case of a treaty left open for signature at any time in the future, to deprive some signatories of a voice in that matter, it seems that in the case here envisaged it may properly be those which for one reason or another delay signing the treaty, not only until after the date when the State making the reservation is prepared to sign, but also until after the treaty has actually come into force.

For the manner in which the consent required in the first part of paragraph (c) may be indicated, see comment to paragraph (b).

When a State desires to sign with reservations a treaty which is left open indefinitely for signature, but delays attempting to do so until after the treaty has actually come into force, it accords with considerations already discussed to permit it to do so only with the consent of all other States which have acted more promptly with respect to the treaty than it; *i.e.*, those that have already signed or become parties to the treaty. That is the rule laid down in the second part of paragraph (c). Certainly States already parties to the treaty (*i.e.*, signatories or acceding States actually bound) should not have the treaty which they have undertaken to perform altered by reservations without their consent. Likewise, the States which, although not yet parties, signed the treaty before the State which wishes to sign with reservations, should not, without their consent, be confronted with a reservation written into the treaty which may be of such nature as to cause them to refrain from ever becoming parties. And, it being necessary in the circumstances to deprive some possible signatories of the right to object to reservations, it may properly be done with respect to States which are even more dilatory about signing the treaty than the State which makes the reservation.

In connection with the latter part of paragraph (c) it may be recalled that the Protocol of Signature of the Statute of the Permanent Court of International Justice is an instrument left open for signature at any time in the future by Members of the League of Nations and by States mentioned in the Annex to the Covenant. When, in 1926, the United States was prepared to sign the protocol with reservations, it had already been brought into force for a number of States but there were some signatories which had not yet ratified it. The United States Senate consented to the signature of the United States being affixed to the protocol only if the reservations which it insisted upon were accepted by "the Powers signatory to such Protocol . . . through an exchange of notes," and the Secretary of State in a letter of April 17, 1926, informed the Secretary-General of the League of Nations that the signature of the United States could not be affixed until its reservations were "accepted by an exchange of notes between the United States and each one of the forty-eight States signatory to the Statute of the Permanent Court.

...” At the time apparently only thirty-seven of the signatories had ratified the protocol. It was evidently the view of the United States Government that its signature with reservations should be consented to, not only by the States already parties to the protocol, but also by all other previous signatories as well. See, for the facts above referred to, *League of Nations Official Journal*, 1926, p. 629; *Minutes of the Conference of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice*, p. 71; Hudson, *The Permanent Court of International Justice* (1934), pp. 211, 213, and list of dates of signatures and ratifications of the Protocol of Signature on p. 579.

As to the manner in which the consent required in this part of the paragraph might be indicated, see the comment on paragraph (b). It may be repeated that, in the type of case here envisaged, it would ordinarily be desirable that the consent of the States already parties or signatories to the treaty be indicated expressly. There would seem to be no reason why such consent could not be expressed in an exchange of notes between the State desiring to sign with reservations and the States parties or signatories to the treaty. See the letter of April 17, 1926, addressed to the Secretary-General of the League by the Secretary of State of the United States. *Minutes of the Conference of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice*, p. 71. It may be noted, however, that when the United States proposed that its reservations to the Protocol of Signature of the Statute of the Permanent Court be consented to by an exchange of notes between the United States and each of the States signatory to the protocol, the Council of the League expressed the opinion that, the Protocol of Signature being a multilateral instrument, “the special conditions on which the United States desire to accede to it should also be embodied in a multilateral instrument,” and that they could not “appropriately be embodied in a series of separate exchanges of notes.” *League of Nations Official Journal*, 1926, pp. 535-536; Hudson, *The Permanent Court of International Justice* (1934), p. 213.

(d) If a State has made a reservation when signing a treaty, its later ratification will give effect to the reservation in the relations of that State with other States which have become or may become parties to the treaty.

COMMENT

A State will be regarded as having “made” a reservation at signature within the meaning of this paragraph if it has made it with the consent prescribed in paragraphs (a), (b), or (c) of this article, as the case may be, or in accordance with any special procedure prescribed in the particular treaty itself.

A reservation duly made at signature becomes, in effect, a part of the treaty finally agreed upon by the State signing with the reservation and the

other signatories (or parties) to the treaty. Cf. 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 400. Consequently any subsequent ratification of or accession to the treaty automatically embraces the reservation. "Such reservations" (i.e., reservations made upon signature), says Miller, "are of necessity formally accepted by every Power which subsequently ratifies the treaty. Every Power has had formal notice thereof, to the same extent as of the text of the treaty itself. . . . To refer to our own procedure, such reservations are always submitted to the Senate for they form part of the treaty submitted to it, to which the resolution of advice and consent refers." *Reservations to Treaties* (1919), p. 94. See also Owen, article cited, 38 *Yale Law Journal* (1928-29), pp. 1090, 1097; 1 Anzilotti, *op. cit.*, p. 400. It follows, of course, that the State which has itself made the reservation at signature need not, although in practice it usually does, repeat the reservation at the time it ratifies the treaty. 1 Hudson, *International Legislation* (1931), p. xlix. Its later ratification, like that of any other ratifying State, will automatically include the reservation and consequently will give effect to it in the relations between it and such other States as already have become or which subsequently become parties to the treaty.

To be sure, it has sometimes been maintained that if a State which made a reservation at signature failed expressly to maintain it upon ratification, the reservation should be regarded as having been withdrawn. See 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 314 (but see p. 334); Wright, "Amendments and Reservations to the Treaty," 4 *Minnesota Law Review* (1919-20), p. 23, n. 27. But such a principle cannot be regarded as in accord with the theory that a reservation upon signature properly made and consented to becomes, in effect, a part of the treaty signed by the State making the reservation. If that theory be correct, it follows that where other States become parties to a treaty which a particular State has signed with a reservation before that State itself has ratified the treaty, they must be considered as having already accepted the reservation, the latter to become effective as between them and the State which made it whenever the latter ratifies the treaty. Indeed, they may have been induced to become parties to the treaty in the belief that their relations thereunder with the particular State which signed with the reservation would be qualified by that reservation. It seems that only greater confusion in a matter already confusing enough would result if a State might, simply by maintaining silence at the time of ratification, cancel a reservation which it had written into a treaty upon signature with the express or implied consent of all other signatories or parties.

ARTICLE 15. RESERVATIONS AT TIME OF RATIFICATION

Unless otherwise provided in the treaty itself,

(a) If a treaty is signed by all the signatories on the same date, a State may make a reservation when ratifying only with the consent of all other

States which are signatories and of all the States which have acceded to the treaty prior to the ratification by that State.

COMMENT

As to the significance and effect of the introductory phrase "unless otherwise provided in the treaty itself," see the comment on Article 14. See that comment, also, for the theoretical considerations regarded as justifying each of the rules there laid down. The same considerations apply with equal force in respect to the provisions of Article 15. There is no need, therefore, to discuss those considerations again in detail. It seems sufficient to say that, for reasons explained in the comment on Article 14, each of the paragraphs in Article 15 is designed to prevent the writing of a reservation into a treaty without the consent of all other States which are likely to be affected by it and which might find the value of the treaty for them destroyed or seriously impaired were the reservation to become a part of the treaty. Those other States are the States which have already become parties to the treaty or which, as signatories, are likely to become parties. As in the case of Article 14, Article 15 gives preference to those other States as against a State seeking to ratify the treaty with reservations, and places the inconvenience of non-participation in the treaty upon the latter if it insists upon maintaining a reservation which is unacceptable to any of the former.

In their application to multipartite treaties which designate some particular State or authority as depository of ratifications, the provisions of Article 15 are to be understood as meaning that such State or authority is not to permit the definitive deposit of a ratification which is subject to a reservation unless and until the consent specified has been indicated. Cf. 1 Hudson, *International Legislation* (1931), p. 1.

Paragraph (a) envisages treaties which have been signed by all States which become signatories on a given date. It refers, therefore, to bipartite treaties, which were signed on a given date by the two States concerned. (The same rule applies, however, in the case of a bipartite treaty which was signed by one State on a certain date, and by the other State on a later date; a reservation upon ratification of a bipartite treaty must always be consented to by the other State concerned.) It refers, likewise, to multipartite treaties which were signed on the same date by all States becoming signatories, no opportunity having been given for affixing signatures subsequent to that date. In either case, the paragraph provides that if one of the States which signed the treaty subsequently seeks to make a reservation thereto at the time it proposes to ratify the treaty, it may do so only if the other signatory or signatories consent to its so doing. Further, in the case of a multipartite treaty which has already been brought into force at the time a particular signatory proposes to ratify it with a reservation, consent to its doing so must be had not only of all the other signatories, including both

those which have and those which have not ratified the treaty, but also of any States which may have acceded to the treaty prior to that time. A State which accedes to a treaty becomes a party thereto with exactly the same status as a signatory which ratified the treaty (see comment on Article 12); it is logical, therefore, to accord it the same privileges in the matter of consenting to or objecting to reservations which other States seek to write into the treaty as are accorded a State which became a party to the treaty by the process of signature followed by ratification.

It is apparently well established that, in the case of bipartite treaties, one signatory may make a reservation when ratifying a treaty only if the other signatory consents and accepts the reservation, and that, in the absence of such consent and acceptance, the treaty fails. This is implicit in Article 6 of the Havana Convention on Treaties, which provides:

In case the ratifying State makes reservations to the treaty it shall become effective when the other contracting party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform action implying its acceptance.

Hunter Miller, after examining a number of cases of bipartite treaties between the United States and other States to which reservations were made upon ratification, states:

One conclusion supported by *all* of the foregoing precedents is that the declaration, whether in the nature of an explanation, an undertaking, an interpretation, or reservation of any kind, *must be agreed to by the other Party to the treaty*. In default of such acceptance, the treaty fails, as in the case of the Naturalization Treaty with Turkey of 1874, which, so to speak, failed twice; in 1875, when we refused to accept the Turkish interpretation, and in 1889, when the Ottoman Government refused to accept the "understanding" of the Senate. (*Reservations to Treaties*, 1919, p. 76. For the facts in the case of the treaty of Aug. 11, 1874, between the United States and Turkey, referred to in the above passage, see *ibid.*, pp. 36-40.)

See also, Marjorie Owen, "Reservations to Multilateral Treaties," 38 *Yale Law Journal* (1928-29), pp. 1090-1094.

The consent of one signatory of a bipartite treaty to a reservation made at ratification by the other has frequently been expressly recorded. This has sometimes been done by inserting the reservation in the protocol or *procès-verbal* of exchange signed by the representatives of both signatories at the time they exchanged ratifications. For example, in the case of the treaty of May 22, 1882, between Korea and the United States (1 Malloy, *Treaties, etc.*, p. 334) the United States inserted in its instrument of ratification a reservation to the effect "that the clause, 'nor are they permitted to transport native produce from one open port to another open port,' in Article VI of said treaty is not intended to prohibit and does not prohibit American ships from going from one open port to another open port in Korea or

Chosen to receive Korean cargo for exportation, or to discharge foreign cargo." At the time of exchange of ratifications, Mr. Lucius H. Foote, acting on behalf of the United States, called the attention of the Korean representative to the American reservation, and, the latter assenting thereto, the following *procès-verbal* of exchange was drawn up and signed:

We, the Plenipotentiaries of the United States of America, and of the Kingdom of Chosen, expressly delegated and with full powers, have exchanged the ratifications of the Treaty concluded at IwChun on the, twenty-second (22nd) day of May, Eighteen Hundred and Eighty-two between our respective governments. It being first definitely understood that the clause 'Nor are they permitted to transport native produce from one open port to another open port,' in Article VI of said Treaty, is not intended to prohibit, and does not prohibit American ships from going from one open port to another open port in Korea, or Chosen, to receive Korean cargo for exportation, or to discharge foreign cargo. Done in duplicate at Seoul this nineteenth day of May, Eighteen Hundred and Eighty-three.

[Seal.]
[Seal.]

LUCIUS H. FOOTE
(Signature in Chinese.)

Miller, *Reservations to Treaties* (1919), pp. 40-43; *U. S. Foreign Relations*, 1883, p. 242; Washburn, "Treaty Amendments and Reservations," 5 *Cornell Law Quarterly* (1919-1920), p. 261. Similarly, a reservation in the form of an "understanding" contained in the United States' ratification of the convention of January 11, 1909, with Great Britain regarding boundary waters was explicitly accepted in the Protocol of Exchange signed by the American Secretary of State and the British Ambassador. 3 *Treaties, etc. between the United States and other Powers*, pp. 2607-2616; Miller, *op. cit.*, pp. 47-50. See, also, the case of the Treaty of Commerce and Navigation between the United States and Japan (February 21, 1911), Miller, *op. cit.*, pp. 56-63.

One signatory of a bipartite treaty has sometimes expressly indicated in its own instrument of ratification its consent to and acceptance of a reservation made by the other signatory at ratification. This was done, for example, by the United States in the case of the convention of July 3, 1815, with Great Britain. See Miller, *Reservations to Treaties* (1919), pp. 14-17. On November 24, 1815, the British Government made a declaration to the United States which recounted the fact that, since the convention had been signed, it had been determined to intern Napoleon at St. Helena, and which continued as follows (1 Malloy, *Treaties, etc.*, p. 628; Miller, *op. cit.*, pp. 14-15):

It has therefore become impossible to comply with so much of the third article of the treaty as relates to the liberty of touching for refreshment at the island of St. Helena, and the ratifications of the said treaty will be exchanged under explicit declaration and understanding that the vessels of the United States cannot be allowed to touch at, or hold

any communication whatever with, the said island, so long as the said island shall continue to be the place of residence of the said Napoleon Bonaparte.

The United States Senate consented to ratification of the convention "subject to the exception contained in the letter and declaration of Anthony St. John Baker, his Britannic Majesty's Chargé d'Affaires, dated the twenty-fourth day of November, one thousand eight hundred and fifteen," and the United States ratification read, in part, as follows (Miller, *op. cit.*, p. 16):

Now, Therefore, be it known that I, James Madison, President of the United States of America, having seen and considered the foregoing Convention have, by and with the advice and consent of the Senate, accepted, ratified, and confirmed the same, and every clause and article thereof, subject to the exception contained in a declaration made by the authority of His Britannic Majesty on the 24th day of November last, a copy of which Declaration is hereunto annexed.

Cf. the cases of the treaty of February 22, 1819, between the United States and Spain, and the treaty of May 13, 1818, between the United States and Bolivia, discussed in Miller, *op. cit.*, pp. 17-22 and 27-32, respectively.

Consent to reservations made at ratification by one signatory of a bipartite treaty has occasionally been expressly indicated in an exchange of notes between it and the other signatory. The United States Senate has sometimes specified that this procedure should be followed in connection with reservations formulated by it when consenting to the ratification of a particular treaty. Thus, the resolution of advice and consent of the Senate to ratification of the treaty of August 4, 1916, between the United States and Denmark read, in part, as follows:

Provided, however, that it is declared by the Senate that in advising and consenting to the ratification of the said Convention, such advice and consent are given with the understanding, to be expressed as a part of the instrument of ratification, that such Convention shall not be taken and construed by the High Contracting Parties as imposing any trust upon the United States with respect to any funds belonging to the Danish National Church in the Danish West Indian Islands, or in which the said Church may have an interest, nor as imposing upon the United States any duty or responsibility with respect to the management of any property belonging to said Church, beyond protecting said Church in the possession and use of church property as stated in said Convention, in the same manner and to the same extent only as other churches shall be protected in the possession and use of their several properties;

And Provided Further, that the Senate advises and consents to the ratification of the said Convention on condition that the attitude of the United States in this particular, as set forth in the above proviso, be made the subject of an exchange of notes between the Governments of the two High Contracting Parties, so as to make it plain that this condition is understood and accepted by the two Governments, the purpose hereof being to bring the said Convention clearly within the Constitutional Powers of the United States with respect to church establishment and freedom of religion.

The specified exchange of notes took place on January 3, 1917, and the United States' instrument of ratification, dated January 16, 1917, contained a statement to that effect in addition to setting forth the Senate "understanding." See Miller, *Reservations to Treaties* (1919), pp. 67-71; also 3 *Treaties, etc. between the United States and other Powers*, pp. 2558-2566. Cf. Owen, article cited, 38 *Yale Law Journal* (1928-29), pp. 1092-1093.

Even though consent has not been expressly indicated in one of the ways referred to above, consent of one signatory to reservations included in the instrument of ratification of the other can be regarded as given by implication if ratifications have actually been exchanged; "the acceptance by each of the other act of ratification evidences their agreement upon any reservations or changes, the acceptance of which has been made a condition of ratification." Anderson, "The Ratification of Treaties with Reservations," 13 *American Journal of International Law* (1919), p. 526. This would be equally true in the case of a multipartite treaty where, as sometimes, though rarely, occurs, there is an actual exchange of ratifications as between each and every signatory State. Cf. Miller, *Reservations to Treaties* (1919), pp. 90-92.

The consent required in this paragraph may be indicated in any of the ways referred to above in the case of a reservation made upon ratification of a bipartite treaty.

As in the case of bipartite treaties, so also in the case of multipartite treaties, practice seems in general to support the rule here laid down. Reservations made upon ratification of multipartite treaties signed by all the signatories on the same date have been made under circumstances indicating that those signatories have given their consent thereto. The General Act relative to the African Slave Trade, for example, was signed at Brussels, on July 2, 1890, by seventeen Powers. (82 *British and Foreign State Papers*, p. 55.) A protocol drawn up on January 2, 1892, recorded the deposit of a number of ratifications not already deposited on July 2, 1891, and contained the following passages (84 *ibid.*, pp. 53-56; translation in Miller, *op. cit.*, pp. 98-99):

Son Excellence Carathéodory Effendi dépose l'instrument des ratifications de Sa Majesté l'Empereur des Ottomans sur l'Acte Général et la Déclaration du 2 Juillet, 1890.

Son Excellence déclare, conformément à une communication qui a été portée à la connaissance des Puissances Signataires, sans soulever d'objection de leur part, que le Gouvernement Impérial Ottoman interprète l'Article XXXIV de l'Acte Général en ce sens que les inscriptions prescrites par cet Article seront faites, en ce qui concerne les navires Ottomans, en caractères et en chiffres Tures. La Sublime Porte, toutefois, n'a pas d'objection à ce qu'une traduction en caractères Latins soit ajoutée aux inscriptions faites en caractères Tures.

Il est donné acte à M. le Ministre de Turquie de sa déclaration.

Son Excellence, M. Bourée dépose l'instrument des ratifications du

Président de la République Française sur l'Acte Général et la Déclaration du 2 Juillet, 1890.

Son Excellence déclare que le Président de la République, dans ses ratifications sur l'Acte Général de Bruxelles, a provisoirement réservé, jusqu'à une entente ultérieure, les Articles XXI, XXII et XXIII, ainsi que les Articles XLII à LXI.

Les Représentants des Puissances donnent acte à M. le Ministre de France du dépôt des ratifications du Président de la République Française, ainsi que de l'exception portant sur les Articles XXI, XXII, et XXIII, et sur les Articles XLII à LXI.

This protocol was signed on behalf of sixteen of the seventeen signatories of the General Act, including Portugal, although the latter State was not yet prepared to deposit its ratification. The Turkish reservation, according to the protocol, had previously been made known to *all* the signatories and had met with no objection. The French reservation was clearly agreed to by the sixteen signatories of the General Act which signed the protocol—*i.e.*, by all the signatories except the United States. And when, shortly thereafter, the United States ratified the General Act it expressly gave its consent to the French reservation. The Senate resolution of advice and consent (of January 11, 1892), read, in part, as follows (2 Malloy, *Treaties, etc.*, p. 1991; Miller, *op. cit.*, p. 95):

Resolved Further, that the Senate advise and consent to the acceptance of the partial ratification of the said General Act on the part of the French Republic, and to the stipulations relative thereto, as set forth in the protocol signed at Brussels, January 2, 1892.

And the United States instrument of ratification contained the following (Miller, *op. cit.*, p. 102):

And Whereas, the Senate of the United States by their resolution of January 11, 1892 (two-thirds of the Senators present concurring therein), did likewise advise and consent to the acceptance of the protocol signed at Brussels, the second day of January, 1892 (the original draft of which protocol is hereunto annexed), setting forth the partial ratification of the said General Act on the part of the French Republic.

Now, Therefore, be it known that I, Benjamin Harrison, President of the United States of America, having seen and considered the said General Act and said Protocol of January 2, 1892, do hereby, in pursuance of the aforesaid advice and consent of the Senate, ratify and confirm the same and every article and clause thereof.

The resolution of the United States Senate advising and consenting to ratification of the General Act of Brussels referred to in the preceding paragraph, in addition to authorizing acceptance of the French partial ratification, contained a reservation on behalf of the United States to "be inserted in the protocol to be drawn up at the time of the exchange of ratification of this treaty on the part of the United States." 2 Malloy, *Treaties, etc.*, p. 1991; Miller, *Reservations to Treaties* (1919), pp. 95-96. The entire Senate resolution was, accordingly, inserted in the protocol which was drawn up to

record the deposit of the United States ratification and which was signed by the Foreign Minister of Belgium and the United States Minister at Brussels. The protocol, after setting forth the Senate resolution, declared:

This resolution of the Senate of the United States having been preparatively and textually conveyed by the Government of His Majesty the King of the Belgians to the knowledge of all the signatory Powers of the General Act, the latter have given their assent to its insertion in the present Protocol which will remain annexed to the Protocol of January 2nd, 1892.

Acknowledgment of this is given to the Minister of the United States. (2 Malloy, *Treaties, etc.*, p. 1992; Miller, *op. cit.*, p. 104. French text in 84 *British and Foreign State Papers*, p. 57-58.)

The protocol, therefore, noted the express assent of all the other signatories of the General Act to the reservation made by the United States.

The International Sanitary Convention of January 30, 1892, was signed by fourteen States. (84 *British and Foreign State Papers*, p. 12.) On July 30, 1892 there was opened at Rome a *procès-verbal* of deposit of ratifications. (85 *ibid.*, pp. 19-22.) This instrument recorded the successive deposits of ratifications of the various signatories of the convention; it set forth, also, reservations made by three of those signatories at the time of ratification—that of Turkey, incidentally, being stated to be one “que les Puissances Contractantes ont toutes préalablement admise.” Although provisionally closed on February 13, 1893, after ratifications of thirteen of the fourteen signatories of the convention had been deposited, the *procès-verbal* was reopened to record the deposit of the ratification of Portugal on November 18, 1893. Only then was it finally closed and signed on behalf of the fourteen States signatories of the Sanitary Convention. The consent of all the signatories of the convention to ratification thereof by three of their number subject to the reservations inserted *in extenso* in the *procès-verbal* was thereby expressly indicated. Cf. Malkin, “Reservations to Multilateral Conventions,” 7 *British Year Book of International Law* (1926), pp. 145-146.

The International Sanitary Convention of April 3, 1894, was signed at Paris by thirteen States. (24 Martens, *Nouveau Recueil Général de Traités* (2d ser.), p. 516.) On October 30, 1897, the same thirteen States signed a declaration (*ibid.*, p. 553) which amended the original convention, and which also read, in part, as follows:

III. Les Gouvernements signataires consentent à ce que les ratifications du Gouvernement de Sa Majesté Britannique ne contiennent pas l'annexe 3 de la Convention. Les dispositions de cette annexe ne seront pas appliquées, en conséquence, aux navires de guerre ou de commerce de la Grande-Bretagne et d'Irlande et de l'Inde Anglaise.

This instrument formally recorded the consent of the other signatories to a restricted ratification of the convention by Great Britain. Cf. Malkin, *loc. cit.*, p. 147.

The French Government, designated as depository of the ratifications of the International Sanitary Convention of December 3, 1903 (97 *British and Foreign State Papers*, p. 1085), informed signatories which desired to deposit ratifications subject to reservations that it was unable to receive for deposit such qualified ratifications; that it could only communicate the proposed reservations to all the signatories, and, if they were accepted unanimously by the latter, make special mention of them in the *procès-verbal* of the deposit of all ratifications which was eventually to be drawn up. Malkin, *loc. cit.*, p. 148. In a note to this effect addressed to the Secretary of State of the United States, the French Chargé in Washington pointed out that the inclusion of a proposed reservation in the *procès-verbal* of deposit could

. . . only be allowed if the signatories to the said *procès-verbal* agree to it.

In consequence, the draft of *procès-verbal* (which you will find herewith and I shall thank you for its return), has been prepared in the Department of Foreign Affairs; it takes notice of the various statements which three of the contracting States desire to have noted before any exchange of ratification shall take place.

This instrument is about to be submitted to the approval of all the Governments concerned.

If its text is accepted by the Federal Government I shall be thankful to Your Excellency if you would suitably instruct His Excellency the Ambassador of the United States to affix his signature thereto at the proper time. (Miller, *Reservations to Treaties*, 1919, p. 120.)

On April 6, 1907, all but two of the signatories of the convention of 1903 deposited their ratifications and signed the *procès-verbal* of deposit. The *procès-verbal* (107 *British and Foreign State Papers*, p. 346) stated that the States signing it "took act that" the ratifications of the United States, Great Britain and Persia were subject to certain reservations, the terms of which were set forth *in extenso*. In this manner the consent of eighteen of the twenty signatories of the convention of 1903 to the reservations mentioned was formally recorded. Furthermore, although Spain and Portugal did not then ratify the convention and sign the *procès-verbal* of deposit of ratifications, they had originally, as had all of the other States which signed the convention, signed a protocol of signature wherein the British and American reservations had been set forth. (Text in Miller, *Reservations to Treaties*, 1919, pp. 112-117.) It may be said, therefore, that they had already assented to the British and American reservations. Indeed it may be doubted whether it was necessary to restate those reservations at ratification after they had been made at signature, or whether it was necessary that they should again be consented to by the signatories depositing ratifications, as the French Government apparently held. See Article 14, paragraph (d), and comment. (This would seem to be true in the case of the American reservation, at least; apparently Great Britain abandoned a part of the

reservations which it had made at signature when it ratified the convention.) If the above view is correct, then the reservations made upon ratification of the Sanitary Convention of 1903 were consented to by all the signatories thereof, except only that the Persian reservation—which, unlike the others, had not been previously agreed to at the time of signature, and which, in any event, was one of no great importance—was not expressly assented to by Spain and Portugal.

The General Act of Algeciras was signed by twelve Powers on April 7, 1906. (99 *British and Foreign State Papers*, p. 141.) The representatives of the United States made a reservation when signing the Act, and the United States Senate, when giving its advice and consent to ratification, proposed an additional reservation. Both reservations were included in the United States' instrument of ratification. (Text in Miller, *Reservations to Treaties*, 1919, pp. 127–128.) The *procès-verbal* of deposit of ratifications (99 *British and Foreign State Papers*, pp. 169–171) was signed by all the States signatories of the General Act. It declared that all the ratifications had, upon examination, been found in “bonne et due forme.” It also contained the following statement:

Le Chargé d’Affaires des Etats-Unis déclare que la ratification du Président des Etats-Unis d’Amérique est faite sous réserve de la déclaration présentée par le premier Délégué de son Pays à la séance de clôture de la Conférence le sept avril, mille neuf cent six, et de la résolution adoptée par le Sénat américain le douze décembre, mille neuf cent six; déclaration et résolution qui sont insérées dans l’instrument de ratification et dont lecture a été donnée.

Consequently, the reservations made by the United States may be regarded as having been assented to by the other signatories of the General Act.

The Convention revising the General Act of Berlin and the General Act and Declaration of Brussels (8 *League of Nations Treaty Series*, p. 25) was signed at St. Germain-en-Laye on September 10, 1919, by the United States, Belgium, the British Empire, France, Italy, Japan and Portugal. Article 15 of the convention provided, in part, as follows:

The present Convention shall be ratified as soon as possible.

Each Power will address its ratification to the French Government, which will inform all the other Signatory Powers.

The ratifications will remain deposited in the archives of the French Government.

The present Convention will come into force for each Signatory Power from the date of the deposit of its ratification, and from that moment that Power will be bound in respect of other Powers which have already deposited their ratifications.

Article 12 provided:

The Signatory Powers agree that if any dispute whatever should arise between them relating to the application of the present Convention which cannot be settled by negotiation, this dispute shall be submitted

to an arbitral tribunal in conformity with the provisions of the Covenant of the League of Nations.

By April 11, 1930, ratifications of the convention had been deposited at Paris by all the signatories except the United States and Italy; Italy deposited its ratification on April 14, 1931. On April 11, 1930, the United States ratified the convention, but with a reservation to the effect that "in the event of a dispute in which the United States may be involved arising under the convention, such dispute shall, if the United States so requests, be submitted to a court of arbitration constituted in accordance with the convention for the pacific settlement of international disputes signed at the Hague on October 18, 1907 or to some other court of arbitration." *United States Treaty Information Bulletin*, No. 7 (April, 1930), pp. 5-6. The United States ratification was at once transmitted to Paris for deposit, but the French Government evidently took the view that it could not permit the deposit of a ratification which was subject to reservations unless those reservations were first agreed to by the other signatories of the convention. A year later, the *Treaty Information Bulletin*, No. 20 (May, 1931), p. 3, contained the following statement:

The deposit of ratification of the United States has not yet been completed, as notification of the acceptance of the reservations made by the United States regarding arbitration of disputes has not been received from the other signatory states.

In September of the same year the following information appeared in the *Treaty Information Bulletin* (No. 24, p. 12):

By despatch dated August 28, 1931, the American Ambassador to France informed the Secretary of State of the receipt by him of a note from the French Foreign Office stating that the British, Italian and Portuguese Governments have signified their acceptance of the reservations made by the United States when ratifying the convention revising the general act of Berlin of February 26, 1885 and the general act and declaration of Brussels of July 2, 1890, signed at St. Germain-en-Laye on September 10, 1919. The British Government likewise accepted the reservations on behalf of the Government of South Africa, Australia, and New Zealand.

The Ambassador further reported that by a note dated June 19, 1930, the French Government informed him that it accepted the reservations. Therefore, there remain but two of the signatory states, Belgium and Japan, to accept the reservations and make complete the deposit of all ratifications.

The deposit of the United States' ratification was not effected until September, 1934, because of the delay of the signatory Powers in consenting to the reservations made by the United States. *Treaty Information Bulletin*, No. 60 (September, 1934), p. 4.

The Pan American Union apparently did not act in accord with the principle laid down in the paragraph here under consideration in the case of the

Convention on Consular Agents adopted at Havana on February 20, 1928. 4 Hudson, *International Legislation* (1931), p. 2394. That convention, which was not itself signed but which was incorporated in the Final Act of the Sixth International Conference of American States, the Spanish text of which was signed on behalf of the States represented at the conference, contained this provision in Article 25:

The instrument of ratification shall be deposited in the archives of the Pan American Union in Washington, the Union to notify the signatory governments of said deposit. Such notification shall be considered as an exchange of ratifications.

By February 8, 1932, five States, including the United States, had deposited ratifications and the convention was in force as between them. On April 23, 1932, the Dominican Republic presented for deposit a ratification subject to far-reaching reservations. The Pan American Union seemingly permitted the deposit without question, and subsequently forwarded to all the signatories of the convention a *procès-verbal* of said deposit. On September 27, 1932, the United States Government informed the Director General of the Pan American Union that the reservations of the Dominican Republic "are unacceptable to the executive and will not be laid before the Senate of the United States of America whose advice and consent to that acceptance would in any event be required; and that consequently the Government of the United States of America does not regard the convention, as ratified by the Dominican Republic, to be in effect between the Government of the United States and that Republic.'" *Treaty Information Bulletin*, No. 38 (November, 1932), p. 23. It is submitted that the Pan American Union erred in this case. It should have refused, as the French Government evidently did in the case of the Convention revising the General Act of Berlin discussed above, to permit the definitive deposit of the ratification of the Dominican Republic unless and until it had sought and secured some indication of acceptance by the other signatories of the reservations attached thereto.

The consent here required of the other signatories of a multipartite treaty to a ratification with reservations on the part of one of their number has been, and may be, indicated in several ways, depending upon the circumstances of the particular case. As suggested above, where, as sometimes, though rarely, occurs, there is an actual exchange of ratifications as between each and every signatory State, the consent of each to reservations in the ratifications of the others may be regarded as evidenced by the act of exchange itself. Likewise, where representatives of all the signatories meet to deposit ratifications at one time and sign a protocol recording the fact that the ratifications deposited were "found in good and due form," or words to that effect, consent of all the signatories to reservations included in any of the ratifications may be regarded as implicitly if not expressly indicated. Consent may be expressly indicated by inserting the reservations

in a protocol or *procès-verbal* signed by all the signatories, or signed by a depository government or authority acting, so to speak, in their behalf and after having assured itself of their consent. The consent of a State to reservations made upon ratification by another signatory might be expressly indicated in its own instrument of ratification, as was the consent of the United States to the French reservations to the General Act of Berlin of July 2, 1890, discussed *supra*. Or again, consent might be expressly indicated by an exchange of notes between the States concerned, either directly or through some government or authority acting as depository of ratifications. When a State deposits its ratification with due notice of, and without objecting to, a reservation included in a ratification previously presented for deposit, that fact may, in some instances at least, be regarded as indicating its consent to the reservation. Presumably it is that sort of instance which is envisaged by the provision in Article 6 of the Havana Convention on Treaties to the effect that the consent of a State to reservations made by another State upon ratification may be regarded as given where, "having failed to reject them formally," it performs "action implying its acceptance." Finally, although, as stated in the comment on Article 14, express indications of consent are always preferable, it is probable that, under some circumstances at least, failure on the part of any of the other signatories to object within a reasonable time after receiving notice of a reservation made upon ratification by one signatory may be considered as amounting to consent thereto by those other signatories. In this connection, Miss Owen states that the custom of implying consent of such signatories from failure on their part to protest has "probably established" a rule, and that "it might reflect present practice more accurately" to say that reservations are effective "in the absence of express dissent on the part of any signatory." She adds: "But however tacit the consent, consent there must be. And hence it follows that there must be communication also of the proposed reservations." Article cited, 38 *Yale Law Journal* (1928-29), p. 1113.

(b) If a treaty is open for signature until a certain date, a State may make a reservation when ratifying only with the consent of all other States which become signatories before the date fixed and of all the States which have acceded to the treaty prior to the ratification by that State.

COMMENT

This rule is based upon considerations already discussed above, and in the comment on Article 14. It does not seem necessary, therefore, to discuss them again at this point. It will be sufficient to indicate, by way of example, how the rule here proposed would work in a given set of circumstances.

Suppose a treaty is signed on July 1, 1935, by States A, B, C, D, and E, and that by its terms it is open until January 1, 1936, for signature by States F, G, and H. Suppose also that the treaty provides that it shall

come into force when ratified by three States, and that thereafter it may be acceded to by States other than those named above. Suppose further that States A, B, and C ratify the treaty on September 1, 1935, thus bringing it into force for them, and that on September 15 State X accedes to the treaty. Then on October 1, 1935, State D transmits to State A, designated by the treaty as depository of ratifications, a ratification containing reservations. Under the rule here laid down, State A would have to refuse to permit a definitive deposit of State D's ratification until it had secured the consent of States A, B, C, E, and X and also of such other States as sign the treaty prior to January 1, 1936. This may mean that State D's ratification could not be definitely deposited until after January 1, 1936, when it is known whether States F, G, and H, or any of them, will actually sign the treaty. Should any one of States A, B, C, E, or X, or any one of States F, G, or H which actually signs the treaty prior to January 1, 1936, object to State D's reservations, State A would have to refuse to accept its ratification for deposit, and State D could not become a party to the treaty unless it abandoned the reservations or formulated others which would be acceptable to all the States concerned.

How the consent of the various States concerned might be indicated would depend in large measure on the actual circumstances. See the comment on paragraph (a) above. Assuming, for example, that State A communicated State D's proposed reservations to States A, B, C, E, X, F, G, and H in a note which implied that, in the absence of express objection, their consent to State D's ratifying with reservations would be presumed, then if neither A, B, C, or X made any objection, if E deposited its ratification without making any objection, and if F, G, and H, or any of them, signed the treaty prior to January 1, 1936, without making any objection, it would certainly seem that State A would be justified in regarding the necessary consent as having been given. On the other hand, if State A requested from the various other States an express indication of consent by note, then it would seem that consent should be indicated in that manner, and that until a State indicated its consent in that, or at least in some equally express, manner it could not be regarded as having consented.

The Hague Conventions of 1907 were opened for signature on October 18, 1907, and could be signed up to June 30, 1908, by any of the Powers represented at the Second Peace Conference. No ratifications of the conventions were deposited prior to November 27, 1909. Only some of the signatories of the various conventions took part in the first deposit of ratifications on that date. At that time there were several ratifications presented for deposit which contained reservations. These reservations were not inserted in the *procès-verbaux* of deposit, but the representatives of the States making them verbally called them to the attention of the representatives of the other Powers depositing ratifications and signing the *procès-verbaux*. The *procès-verbaux* simply recorded that the ratifications had been "pre-

sented and found in good and due form." See Miller, *Reservations to Treaties* (1919), p. 138 ff. As to the effect of this procedure, Miller says (p. 141):

It is beyond doubt that all Powers which thus participated in the deposit of ratifications of November 27, 1909, then expressly accepted any reservation made by any of the Powers so participating. This would apply not only to reservations made upon signature but also to reservations contained in the instrument of ratification, although not made upon signature, for the instruments of ratification were "found in good and due form."

It does not appear that the other States which had signed the Hague Convention prior to June 30, 1908, but which did not take part in the first deposit of ratifications, formally expressed their consent to or acceptance of the reservations made at that time, or that the Netherlands Government took any steps to secure such an expression. However, copies of all instruments of ratification deposited were sent to all the Powers invited to the Peace Conference (see Article 92 of the First Hague Convention of 1907); all of the signatories, consequently, had notice of the reservations therein contained, and the failure of any of them to object may be considered as indicating consent.

(c) If a treaty is open for signature at any time in the future, a State may make a reservation when ratifying, if it ratifies before the treaty has been brought into force, only with the consent of all other States which become signatories before the treaty is brought into force, if it ratifies after the treaty has been brought into force, only with the consent of all other States which have become signatories or have acceded to the treaty prior to the ratification by that State.

COMMENT

If the definitive ratification with reservations of a treaty left open for signature at any time in the future were made contingent upon the consent of all signatories, it is obvious that there might be cases where a ratification with reservations could never be regarded as consented to and counted as definitive. So long as there remained a possibility that another State might affix its signature at some time in the future, a ratification with reservations would have to be regarded as tentative. Consequently, for the reasons indicated in the comment on Article 14 paragraph (c), the rule has been drafted so that in any case the consent of a definite number of States will suffice to permit a ratification with reservations. For reasons also indicated in the comment on Article 14, paragraph (c), those States are, in the case where the ratification with reservations is proffered prior to the coming into force of the treaty, the States which sign the treaty before its entry into force, including those which signed before and those which sign after the time of the ratification in question. And, in the case where the ratification with reservations is proffered after the coming into force of the treaty, the

States whose consent must be secured are those which signed or acceded to the treaty at any time prior to the time of the ratification in question. It is believed that the rule is sufficiently clear, and that the reasons therefore have been sufficiently explained elsewhere, so that further comment at this point is unnecessary.

In connection with this paragraph, reference may be made to the case of the Protocol on the Revision of the Statute of the Permanent Court of International Justice. 1 Hudson, *International Legislation* (1931), p. 582. This protocol was opened for signature on September 14, 1929, "to be presented for signature to all the signatories of the Protocol of December 16, 1920, to which the Statute of the Permanent Court of International Justice is annexed, and to the United States of America." No definite period was fixed within which signatures should be affixed. When Cuba presented for deposit with the Secretary-General of the League of Nations a ratification of the protocol containing serious reservations, the Secretary-General did not accept the ratification for deposit. He reported instead that "in execution of the instructions given to him by the Council's resolution of June 17th, 1927, in regard to reservations attached to a ratification of a Convention and not provided for by the terms of the Convention, the Secretary-General by a circular letter of January 22nd (C.L.4.1931.V.), invited the other Governments concerned to inform him whether they were able to accept the reservations made by Cuba. . . . In view of the nature of the Protocol, and the provisions of its seventh paragraph [to the effect that the United States should for the purposes of the Protocol be considered as in the same position as a State which had ratified the Protocol of Signature of December 16, 1920], the letter was addressed to all Members of the League, Brazil and the United States of America." *Records of Twelfth Assembly, First Committee*, p. 136 (Annex 12). When a number of signatories informed the Secretary-General that they could not accept Cuba's reservation of Article 23 of the protocol, it became evident that Cuba's ratification could not become effective, with the result, in this case, that the Protocol on Revision could not come into force. In view of this fact Cuba subsequently withdrew her reservations, thus giving an unqualified ratification to the protocol. For the facts of the case, see Hudson, "The Cuban Reservations and the Revision of the Statute of the Permanent Court of International Justice," 26 *American Journal of International Law* (1932), pp. 590-594.

It may be noted that in the case just discussed, the Secretary-General adverted to "instructions given to him by the Council's resolution of June 17, 1927 in regard to reservations attached to a ratification of a Convention and not provided for by the terms of the Convention. . . ." This is a reference to the Council's resolution taking note of the report of the Committee of Experts for the Progressive Codification of International Law relative to the admissibility of reservations to general conventions. *League of Nations Document C.357.M.130.1927.V*. By its resolution the Council

Requests the Secretary-General to be guided by the principles of the report regarding the necessity for acceptance by all the Contracting States, when dealing in future with reservations made after the close of a Conference at which a convention is concluded, subject, of course, to any special decisions taken by the Conference itself. (*League of Nations Official Journal*, 1927, p. 800.)

See also the resolution of the Assembly of the League adopted on September 25, 1931, which declared that the Assembly:

Notes . . . that the ratification of Cuba [of the Protocol on the Revision of the Statute of the Permanent Court referred to above] is subject to a reservation which other States that have ratified the Protocol have not felt able to accept;

Considers that a reservation can only be made at the moment of ratification if all the other signatory States agree or if such a reservation has been provided for in the text of the Convention. . . . (*Records of Twelfth Assembly, Plenary*, p. 139.)

(d) If a State has made a reservation when ratifying a treaty, the reservation has effect only in the relations of that State with other States which have become or may become parties to the treaty.

COMMENT

A State will be regarded as having "made" a reservation at the time of ratification within the meaning of this paragraph if it has made it with the consent prescribed in paragraph (a), (b), or (c) of this article, as the case may be, or in accordance with any special procedure prescribed in the particular treaty itself. When so made, the reservation applies in the relations under the treaty between the State which made it and any States already parties to the treaty. It is likewise automatically accepted by all States which subsequently become parties to the treaty, whether by ratification or accession, and applies, therefore, in the relations under the treaty between those States and the States which made it. It applies only, of course, as between the State which made it and the other parties to a multipartite treaty, and not as between the latter parties *inter se*. As to this last point, see the comment on Article 13.

ARTICLE 16. RESERVATIONS AT TIME OF ACCESSION

Unless otherwise provided in the treaty itself,

(a) A State may make a reservation when acceding to a treaty only with the consent of all the signatories to the treaty and of all States which have previously acceded to the treaty.

COMMENT

As to the significance and effect of the introductory phrase "unless otherwise provided in the treaty itself", see the comment on Article 14. See that

comment, also, for the discussion of the general theoretical considerations upon which this and the other articles on reservations are based.

Like Articles 14 and 15, this article is designed to prevent the writing of a reservation into a treaty without the consent of those other States which are likely to be affected by it and which might find the value of the treaty for them destroyed or impaired were the reservation to become effective. In the case envisaged in this article, those other States are the States which have signed the treaty or acceded to it prior to the time when the attempt is made to accede with reservations. None of those States, it is believed, should be confronted with the dilemma of having necessarily either to accept the reservations proposed by a State to which the privilege of acceding has been extended or else to withdraw or refrain from participation in the treaty. Rather, if any State is to be excluded, it should be the State which, in exercising the privilege of acceding, seeks in effect, by means of reservations, to write into the treaty provisions which are unacceptable to any State or States which have already become parties to the treaty, or which, as signatories, may wish to become parties to it in its original and unaltered form. This result is achieved by providing that a State may make a reservation when acceding to a treaty only with the consent of all the signatories to the treaty and of all States which have previously acceded to the treaty. If any one or more of these States does not consent to the proposed accession with reservations, the accession can not become effective. Consequently, a government or authority designated as the depository of accessions would not be justified in allowing a definitive deposit of an accession which is subject to reservations unless and until the consent of the States specified had been indicated.

Normally there are no accessions to a treaty until after it has been brought into force and after it has been signed by all States which are to become signatories. In other words, in what may be regarded as the normal case, all the signatories of a treaty are definitely known at the time when a State accedes to the treaty. It is with this normal case in view that Article 16 provides, *inter alia*, that a State may make a reservation when acceding to a treaty "only with the consent of all the signatories to the treaty." It is, of course, possible to conceive of a case where all the signatories of a treaty might not be known at the time when a particular State undertakes to accede to it with reservations. For example, a treaty brought into force by States A, B, and C might thereupon be open to accession by State F, although by its own terms likewise still open for signature by States D and E, and consequently State F might undertake to accede to the treaty with reservations before it could be known whether States D and E would become signatories. Such a case is so unusual, however, that it has not been considered necessary to take account of it in framing a rule governing reservations at the time of accession.

There would seem to be support in practice for the principle here laid down. Reservations upon accession have been made under circumstances

which indicate that they have, in fact, been consented to—or at least not objected to—by the other States signatories of and parties to the treaties concerned. When, for example, Great Britain acceded, with reservations, to the International Sanitary Convention of April 15, 1893 (85 *British and Foreign State Papers*, p. 7), the *protocole d'adhésion*, which was signed by the German Secretary of State for Foreign Affairs as representing the depository government, contained the following significant passage:

Le Royaume-Uni de la Grande-Bretagne et d'Irlande adhère à la Convention Sanitaire Internationale, conclue à Dresde le 15 Avril, 1893, et à ses Annexes, sous la réserve toutefois que, dans le Royaume-Uni, les personnes bien portantes qui arrivent à bord d'un navire infecté ne soient pas soumises à une observation, mais seulement à une surveillance médicale dans leur domicile.

Le Secrétaire d'Etat au Département Impériale Allemand des Affaires Etrangères, M. le Baron Marschall de Bieberstein, accepte au nom des Puissances Signataires de la Convention cette Déclaration d'Adhésion, et constate en même temps que les Gouvernements Signataires ont consenti à la réserve faite ci-dessus. (*Ibid.*, p. 18.)

The fact that all the signatories of the convention had consented to the British accession with a reservation was thus expressly recorded, the German Government apparently having taken steps to secure that consent before permitting the accession to be effected. See Malkin, "Reservations to Multilateral Conventions," 7 *British Year Book of International Law* (1926), pp. 146-147.

Nicaragua made a reservation when acceding to the Second Hague Convention of 1907, and the United States and China made reservations when acceding to Convention XIII. There seem to have been no special steps taken to secure the consent of the signatories of the respective conventions to those reservations, and apparently such consent was never expressly given or recorded. See Miller, *Reservations to Treaties* (1919), pp. 148-154. Nevertheless, it is to be recalled that a State desiring to accede to those conventions was required to notify its intention in writing to the Netherlands Government, forwarding to it its instrument of accession; that it thereupon became the duty of the latter government to "forward immediately to all the Powers invited to the Second Peace Conference a duly certified copy of the notification, as well as of the act of adhesion, mentioning the date on which it received the notification"; and that not until sixty days after that date did the accession become effective and the treaty come into force with respect to the acceding State. It is to be presumed, therefore, that all of the signatories of each convention were promptly apprised of the proposed reservations of Nicaragua, the United States and China, and consequently that they had an opportunity to object thereto. Under the circumstances, it would seem that their consent to such reservations may properly be implied from the fact that none of them made any objection to the reservations.

With respect to the cases just referred to, Miller suggests another reason

for regarding the reservations in question as having been consented to by the signatories of the respective treaties. He points out that, for the most part, the reservations made upon accession by Nicaragua, the United States and China had previously been duly made by other States at signature, and he argues that "any reservation made by one Power *at signature*, may be adopted as its own by another Power on ratification or adhesion, for any party to a multilateral treaty may decline to be bound to any greater or different extent than any other." *Reservations to Treaties* (1919), p. 148. In the case of the Nicaraguan reservation, for example, the same reservation having been duly made at signature and maintained at ratification by Salvador and Guatemala, "the language of the reservation was accepted by all the contracting Powers as to Salvador, and also as to Guatemala, and consequently a similar consent was offered to any other Power which might ratify or, like Nicaragua, adhere." *Ibid.*, pp. 148-149. The argument, it is submitted, is not well-founded. It by no means follows that, because the signatories of a treaty are willing to accept a particular reservation when made by State A, they are therefore willing to accept the same reservation if made by State B. See 1 Hudson, *International Legislation* (1931), p. 1, n. 5. A reservation by Haiti of an important article in a convention regarding maritime warfare, for example, might be deemed a matter of no great significance, whereas the same reservation if made by Great Britain might operate to render the convention relatively useless. Certainly the fact that the other signatories of the convention consented to the reservation when made by Haiti cannot be taken as an absolute indication that they would have no objection to it if made by Great Britain.

The Agreement concerning the Preservation or Re-establishment of Rights of Industrial Property Affected by the World War (113 *British and Foreign State Papers*, 1045; 1 Hudson, *op. cit.*, p. 472) was signed on June 30, 1920 by nine States. Ratifications of the agreement were to be deposited with the Swiss Government within a maximum period of three months. It was to come into force for the signatories which thus ratified it on the day on which the *procès-verbal* of deposit of ratifications was drawn up, and for every other signatory on the date of the deposit of its ratification. Finally, non-signatory States were to be permitted to accede on request, their accessions to be notified to the Swiss Government and by it "to all the others." Such accessions, it was provided, would "imply full and immediate adhesion to all the clauses and admission to all the advantages stipulated in the present agreement." On August 31, prior to the date on which the *procès-verbal* of deposit of ratifications referred to above was drawn up, Great Britain notified the Swiss Government of its intention to accede to the agreement, subject, however, to a reservation. On September 30, in accordance with an invitation addressed to all nine of the signatories of the agreement by the Swiss Government, representatives of six of them which were prepared to ratify it at that time met in Berne and signed the *procès-verbal* which re-

corded the deposit of their ratifications. The *procès-verbal* (113 *British and Foreign State Papers*, p. 1048) also contained the following passage:

Enfin, les soussignés constatent que, d'après les documents qui leur sont présentés par le représentant du Gouvernement suisse, les accessions des pays suivants ont été notifiées au Conseil fédéral suisse dans l'intervalle entre la signature de l'Arrangement et ce jour:

Maroc (Territoire du Protectorat français), le 10 juillet, par note de l'Ambassade de France, à Berne.

Grande-Bretagne, le 31 août, par note de la Légation britannique, à Berne.

Toutefois, le Gouvernement de Sa Majesté britannique subordonne son accession à la réserve suivante: [text of the reservation]

En conséquence, l'Arrangement susmentionné est entré en vigueur ce jour entre les Etats suivants: Allemagne, France, Grande-Bretagne (sous la réserve transcrite ci-dessus), Maroc (Territoire du Protectorat français), Pologne, Suède (sous les deux réserves ci-dessus [made upon signature and maintained at ratification]), Suisse et Tunisie.

The consent of six of the nine signatories of the agreement to Great Britain's accession thereto with a reservation was thus expressly recorded in the *procès-verbal*. The consent of Morocco, notification of whose intention to accede was deposited prior to that of Great Britain, may also be regarded as given, since the *procès-verbal* was signed by its protector, France. And, finally, it may be assumed that the other three signatories, which were not represented at the meeting which drafted the *procès-verbal*, but which might have been had they so desired, tacitly consented to the British reservation, inasmuch as, although presumably duly notified thereof, they took no steps to object thereto, and, indeed, subsequently deposited their ratifications of the agreement without protest. It is to be noted, however, in connection with this same agreement, that Norway and Denmark subsequently acceded subject to reservations, and that there is nothing to indicate that those reservations were consented to, as was the British reservation, by the signatories of the agreement and the States which had previously acceded thereto. Apparently their accessions were regarded as taking effect immediately upon deposit, and the fact thereof was simply thereafter notified to the other parties. See the German *Reichsgesetzblatt*, 1921, pp. 83, 446; Malkin, article cited, 7 *British Year Book of International Law* (1926), p. 155.

It may be noted in connection with this article, that the so-called "adherence" of the United States to the Protocol of Signature of the Statute of the Permanent Court of International Justice is provided for in a Protocol of Accession which reads, in part, as follows (1 Hudson, *International Legislation*, 1931, p. 592):

The States signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, dated December 16, 1920, and the United States of America, through the undersigned duly authorized representatives, have mutually agreed upon the following provisions regarding the adherence of the United States of America to

the said Protocol subject to the five reservations formulated by the United States in the resolution adopted by the Senate on January 27th, 1926.

This protocol is signed by all but one of the States which are signatories of the Protocol of Signature, including five which have not ratified the latter instrument. Hudson, *The Permanent Court of International Justice* (1934), pp. 651, 652 and note. Costa Rica alone of the signatories of the Protocol of Signature has not signed the Protocol of Accession, but, inasmuch as it seems that Costa Rica has no intention of ratifying and becoming a party to the Protocol of Signature, its consent to the United States' reservations is probably not regarded as necessary. Cf. the comment on Article 14.

Finally, it appears that the Secretariat of the League of Nations acts in accordance with the principle laid down in this article, in that it apparently does not regard an accession which is subject to reservations as definitively deposited until those reservations have been communicated to and accepted by the States signatories of or parties to the treaty concerned. Cf. 1 Hudson, *International Legislation* (1931), p. 1 and n. 3. In this connection, reference may be made, for example, to the Slavery Convention of September 25, 1926 (60 *League of Nations Treaty Series*, p. 253; 3 Hudson, *op. cit.*, p. 2010). That convention was opened to accession by non-signatory States. It was provided (Article 11) that:

A State desiring to accede to the Convention shall notify its intention in writing to the Secretary-General of the League of Nations and transmit to him the instrument of accession, which shall be deposited in the archives of the League.

The Secretary-General shall immediately transmit to all the other High Contracting Parties a certified true copy of the notification and of the instrument of accession, informing them of the date on which he received them.

And, finally, Article 12 provided that the convention should come into force for each State "on the date of the deposit of its ratification or of its accession." On April 16, 1927, Hungary, and on March 21, 1929, the United States, presented for deposit accessions which were subject to reservations. Regarding these accessions, the Secretary-General's report of August 11, 1930, relative to the status of the Slavery Convention at that time contains the following statement (*League of Nations Document A.17.1930.VI.*, p. 2):

The accessions by *Hungary* (April 16th, 1927) and by the *United States of America* (March 21st, 1929) were given with certain reservations, which have been submitted for acceptance to the parties to the Convention. Fourteen States have not yet replied as regards the Hungarian reservations; ten replies have still to be received regarding the United States reservations.

Appendix 5 to the report sets forth a letter from the Hungarian delegation accredited to the League of Nations to the Secretary-General of the League in which appears the following passage:

(b) The Hungarian Government has already made known its accession to the Convention on Slavery of September 25th, 1926. This accession will become effective as soon as the Governments of the following countries have declared their acceptance of the reservation made by Hungary at the time of her accession: New Zealand, Colombia, Spain, Abyssinia, Greece, Panama, Persia, Ecuador, Haiti, Monaco and Nicaragua.

Of the latter-named States, New Zealand, Spain and Greece were at that time signatories which had ratified the convention; Colombia, Abyssinia, Panama and Persia were signatories which had not yet ratified the convention; and Ecuador, Haiti, Monaco and Nicaragua were non-signatories which had previously acceded to the convention. It appears that ultimately Hungary abandoned its reservation and acceded unconditionally to the convention, its accession thus finally becoming effective on February 17, 1933. *United States Treaty Information Bulletin*, No. 42 (March, 1933), pp. 9-10.

Unlike Hungary, the United States apparently regarded its accession as effective from the date of deposit, and the convention was proclaimed by the President on March 23, 1929. See *U. S. Monthly Bulletin of Treaty Information*, No. 1 (March, 1929), p. 7; No. 5, First Supplement (July, 1929), pp. 12-13; and Supplement to *Treaty Information Bulletin*, No. 39, p. 85. That, of course, would not seem to alter the fact that the Secretariat received it only subject to the acceptance of the attached reservation by the States which had signed or acceded to the treaty, and that it promptly communicated the reservation to such States for their acceptance or rejection. It is submitted, nevertheless, that the view taken by Hungary that its accession could not become effective until the necessary consent had been given was the sounder one, and that in both the Hungarian and American cases the Secretariat might properly have declined to receive the accessions in deposit at all until the reservations involved had been consented to by the other States concerned.

As stated in connection with the other articles dealing with reservations, it seems desirable that the consent required in this article should be expressly indicated. This might be accomplished by means of a protocol or *procès-verbal* signed by all the States concerned, or by some government or authority authorized to act in their behalf. Consent might also be expressly indicated in an exchange of notes between the State proposing to accede to the treaty with reservations and each of the other States signatories and/or parties to the treaty, either directly or through the medium of some bureau government or authority. Although express indications of consent are always to be desired, it would seem that in some cases consent may properly be regarded as given tacitly or by implication when the circumstances are such as to suggest beyond doubt that silence indicates absence of objection.

(b) If a State has made a reservation when acceding to a treaty, the reservation has effect only in the relations of that State with other States which have become or may become parties.

COMMENT

A State will be regarded as having "made" a reservation when acceding to a treaty within the meaning of this paragraph, if it has made it with the consent prescribed in paragraph (a), or in accordance with any special procedure prescribed in the particular treaty itself. It applies, therefore, in the relations under the treaty between the State which made it and any States already parties to the treaty. It is likewise automatically accepted by all States which subsequently become parties to the treaty, whether by ratification or accession, and applies, therefore, in the relations under the treaty between those States and the State which made it. It applies only, of course, as between the State which made it and the other parties to the treaty, and not as between the latter parties *inter se*. As to this last point, see the comment on Article 13.

ARTICLE 17. REGISTRATION AND PUBLICATION

(a) A treaty, the registration of which is required by Article 18 of the Covenant of the League of Nations, is not binding until so registered.

COMMENT

This text does not purport to say which are the treaties of which registration is required by Article 18 of the Covenant. It is based upon the assumption that the provision in that article does not apply to all treaties; hence, a distinction is drawn in paragraphs (a) and (b) between those treaties of which registration is required, and those of which registration is not required, by Article 18.

The text of Article 18 of the Covenant is as follows:

(French version)

Tout traité ou engagement international conclu à l'avenir par un Membre de la Société devra être immédiatement enregistré par le Secrétariat et publié par lui aussitôt que possible. Aucun de ces traités ou engagements internationaux ne sera obligatoire avant d'avoir été enregistré.

(English version)

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

Under this text, the requirement of registration of international instruments applies to

- (1) "Every treaty or international engagement,"
- (2) "entered into hereafter,"
- (3) "by any Member of the League."

Inasmuch as there are now (January 1, 1935) sixty Members of the League of Nations, the text is broad enough to have a very general application.

(1) "Every treaty or international engagement" seems to be so inclusive that it should cover every treaty, as the term is here used, which satisfies the other two conditions. Provisions of this sort can only be read, however, in the light of the practice of States, and the practice during the fifteen years

since the Covenant came into force necessitates some qualification of the inclusiveness of the provision. The memorandum approved by the Council of the League of Nations on May 19, 1920, stated that the obligation to register applied to "every formal Treaty of whatsoever character and every International Convention," and to "any other International Engagement or Act by which nations or their Governments intend to establish legal obligations between themselves and another State, Nation or Government." *League of Nations Official Journal*, 1920, p. 155; 1 *League of Nations Treaty Series*, p. 8. As "agreements regarding the revision or the prolongation of Treaties form separate International Engagements," it was said that "they also should be registered under Article 18." Yet, in the course of subsequent years, there has been some whittling down of this language.

What may be regarded as a test case arose in 1920, and it has been described as follows:

On September 7, 1920, the chiefs of staff of the French and Belgian armies signed a military understanding. A few days later, on September 10 and 15, 1920, the Ministers of Foreign Affairs of the French and British Governments exchanged letters approving the military understanding, stating its object to be "to reinforce the guarantees of peace and security resulting from the Covenant of the League," and recognizing "as a matter of course that the two states retain undiminished their rights of sovereignty in respect of the imposition of military burdens upon their respective countries and in regard to determining in each case whether the eventuality contemplated by the present understanding has in fact arisen." The fact of the understanding became a subject of popular interest, and during October some agitation arose from the delay of registration. On November 4, 1920, the letters exchanged by the Ministers of Foreign Affairs were presented for registration, but the terms of the understanding itself were not included. (Hudson, "The Registration and Publication of Treaties," 19 *American Journal of International Law*, 1925, p. 280.)

This case led to a prolonged discussion during 1920 and 1921 as to the extent of the obligation imposed by Article 18. A committee of jurists reporting on it proposed certain amendments to the Covenant, and these were considered in the Second Assembly. *Ibid.*, pp. 281-285. Meanwhile, on February 25, 1921, the British Government sent to the Secretary-General for communication to Members of the League of Nations a "declaration" that in its opinion certain financial arrangements did not fall within the term "treaties" as used in Article 18 of the Covenant, and were not being sent in for registration. *League of Nations Official Journal*, 1921, p. 224. Apparently no protest was made against this action. The Second Assembly, meeting in 1921, reached no definitive conclusions on the matter; the Third Assembly in 1922 postponed a final consideration of it, in order to "profit by experience gained over a longer period." The view was expressed by a committee of the Third Assembly that "time and experience alone will supply the material for giving a precise interpretation of the bearing of

Article 18." This would seem to be the sound view to take. While the time and experience are accumulating, there can be little doubt that some derogations from the very inclusive language in Article 18 are not generally disapproved. (See 30 *Annuaire de l'Institut de Droit International*, 1923, p. 47 ff.) The experience to date gives no precise indications on the point. Although 3513 "treaties or international engagements" had been registered on October 1, 1934, it can easily be shown that some instruments which may be thought to fall into one of these categories had not been registered; yet few general characterizations of such instruments would seem to be possible. Certain instruments relating to reparations have not been registered; some financial settlements have not been registered; most of the special agreements for the submission of disputes to the Permanent Court of International Justice have not been registered.

(2) The word "hereafter" (Fr., *à l'avenir*) in Article 18 of the Covenant clearly refers to the period following the coming into force of the Covenant on January 10, 1920.

(3) Only Members of the League of Nations have the obligation to register, and the obligation does not continue for any State after it has ceased to be a Member. The fact that a few important States are not members of the League of Nations (January 1, 1935) means of course that the application of Article 18 will be drawn into question as to treaties between Members and non-members; the obligation to register rests on the Member alone. Prior to its entry into the League, Germany made it a practice to register its treaties; and since early in 1934, one of the important States not members of the League of Nations, the United States of America, has followed this practice. See Hudson, "Registration of United States Treaties at Geneva," 28 *American Journal of International Law* (1934), p. 342.

The first paragraph of Article 17 of this Convention borrows the sanction from Article 18 of the Covenant: a treaty of which registration is required "is not binding until so registered." With the Covenant establishing this law for sixty States of the world, it would clearly be improper to attempt any departure from the rule in a proposal for codification. No considerable dissatisfaction with the Covenant provision has been expressed, and yet even apart from practice the text must be read with appreciation of the necessity for discrimination. A failure of State A, a Member of the League of Nations, to perform its duty to register a treaty concluded with State B, a non-member of the League, may raise difficult questions. May State B take advantage of this failure to escape from the obligations of the treaty? State A can hardly be in a position to do so. Nor is the application of the sanction clear, in the case of a treaty between States A and B, both Members of the League of Nations. A forceful treatment of the whole subject is that by Judge Anzilotti in his *Corso di diritto internazionale* (1923), p. 336 ff. For other comments, see: Hudson, "The Registration and Publication of Treaties," 19 *American Journal of International Law* (1925), 273;

Lambiris, "L'enregistrement des Traités d'après l'article 18 du Pacte de la Société des Nations," 7 *Revue de droit International et de Législation Comparée*, 3d ser. (1926), 697; and Koenig, *Volksbefragung und Registrierung beim Völkerbund* (1927).

The practice to date gives little assistance. Neither the challenge by Mexico of its convention with France, before the French Mexican Claims Commission in 1928, with reference to the claim of *Pablo Nájera*, nor the position taken by the National Assembly of El Salvador in 1933, with reference to the Central American treaty of February 7, 1923, affords any definite guide. On the Mexican challenge, see *La Réparation des Dommages causés aux étrangers par des mouvements révolutionnaires, Jurisprudence de la Commission Franco-Mexicaine des Réclamations, 1924-1932* (Paris: Pedone, 1933), p. 160; *Annual Digest of Public International Law Cases, 1927-1928*, Case No. 271, p. 393. On the Salvadorean statement, see 115 *Diario Oficial* (El Salvador), pp. 1826, 1835. These cases are discussed in Hudson, "Legal Effect of Unregistered Treaties," 28 *American Journal of International Law* (1934), pp. 546-552. Moreover, the Permanent Court of International Justice has given no attention to the question, and its unfortunate practice of failing to cite the *League of Nations Treaty Series* may have the effect of minimizing the importance of compliance with the obligations of Article 18, in that neither the parties' nor the Court's attention will be drawn to the point. On a few occasions, the Court seems to have given effect to unregistered "treaties or engagements" to which Members of the League of Nations were parties. *E.g.*, the *Mavrommatis Case*, *Publications of the P.C.I.J.*, Series A, No. 2, p. 33, 1 Hudson, *World Court Reports*, p. 318; *Polish Postal Service in Danzig*, Series B, No. 11, 1 Hudson, *op. cit.*, p. 441.

In this situation, and in view of the importance of the innovation introduced by Article 18 of the Covenant, it seems to be the part of wisdom to repeat its provision and to refrain from any endeavor to state its effect more definitely than it has been developed. Only time and experience will afford an authoritative answer to the numerous questions to which the provision gives rise.

The purpose of Article 18 of the Covenant was clearly to prevent the conclusion by Members of the League of secret treaties. The duty of States bound by the article is confined to registration, but it is supplemented by the duty of publication imposed upon the Secretariat. In the memorandum approved by the Council of the League of Nations on May 19, 1920, the desideratum of publicity was emphasized in the following paragraph:

Publicity has for a long time been considered as a source of moral strength in the administration of National Law. It should equally strengthen the laws and engagements which exist *between nations*. It will promote public control. It will awaken public interest. It will remove causes for distrust and conflict. Publicity alone will enable the League of Nations to extend a moral sanction to the contractual obligations of its Members. It will, moreover, contribute to the formation

of a clear and indisputable system of International Law. (*League of Nations Official Journal*, 1920, p. 154.)

(b) A treaty, the registration of which is not required by Article 18 of the Covenant of the League of Nations, is not binding until it has been registered with or communicated to the Secretariat of the League of Nations, or until it has been officially published by one of the States which become parties in such manner that its contents may be known by States not parties or signatories.

COMMENT

This paragraph would apply to treaties between non-members of the League of Nations, to treaties between Members of the League of Nations which may be excepted by practice from the phrase "every treaty or international engagement", and, so far as the non-members are concerned, to treaties between Members of the League of Nations and non-members. The paragraph is drafted *de lege ferenda*, with a view to extending the very wholesome policy which is behind Article 18 of the Covenant. It would erect an additional barrier against secret treaties.

A treaty to which this paragraph applies should be either (1) registered with the Secretariat of the League of Nations, or (2) communicated to the Secretariat, or (3) officially published by a party in such manner that its contents may be known by States not parties. Within these alternatives, States would possess considerable freedom. They must be considered *seriatim*.

(1) The memorandum on the execution of Article 18 which was approved by the Council of the League of Nations on May 19, 1920, expressly extends to States not members of the League of Nations the privilege of registering their treaties. *League of Nations Official Journal*, 1920, p. 154; 1 *League of Nations Treaty Series*, p. 13. Germany, which was not a member of the League until 1926, promptly availed itself of this privilege. *League of Nations Official Journal*, 1920, p. 444. Other States, not members, have from time to time requested registrations, and in January, 1934, the United States of America adopted the policy of registering all of its treaties. *Ibid.*, 1934, p. 386. See Hudson, "Registration of United States Treaties at Geneva," 28 *American Journal of International Law* (1934), p. 342.

(2) Communication of treaties to the Secretariat, as distinguished from registration, is not an unknown practice. It enables the Secretariat to publish the texts, either in the League of Nations Treaty Series or separately. In a number of cases, Members of the League of Nations have not requested the registration of treaties formally communicated to the Secretariat or the Council, apparently on the theory that such a step would be supererogatory. From 1926 to 1934, also, the United States communicated its treaties to the Secretariat, and some of them were published in the League of Nations Treaty Series with a serial numbering, lettered "B".

(3) The third alternative in paragraph (b) would require no procedure to be taken through the Secretariat of the League of Nations. A party to a treaty could satisfy the requirement of publicity by publication of the text of the treaty in any official manner, provided the manner selected be such that States not parties or signatories may, with a reasonable amount of diligence, have access to the publication. Thus, publication in the *United States Treaty Series* would be sufficient, for this publication is regularly sold by the Government Printing Office; or publication in the *British Treaty Series* (Command Papers), in the French *Journal Officiel*, or in the German *Reichsgesetzblatt*, or in the Swiss *Feuille Fédérale*. Indeed, many Governments now have some established form for the current publication of the texts of their treaties.

These three alternatives do not make the obligation envisaged in paragraph (b) very burdensome, and they seem to be within the proper limits of a suggestion *de lege ferenda*. The acceptance of this paragraph by the various States would be in line with Article 18 of the Covenant.

The sanction which is embodied in paragraph (b), and that repeated from Article 18 of the Covenant in paragraph (a), are wholly at variance with the provisions of the Havana Convention on Treaties, of February 20, 1928. Article 4 of the Havana Convention reads as follows (4 Hudson, *International Legislation*, 1931, p. 2380):

Treaties shall be published immediately after exchange of ratifications. The failure to discharge this international duty shall affect neither the force of treaties nor the fulfilment of obligations stipulated therein.

There seems to be little purpose served by creating an "international duty" to publish, if a failure to discharge this duty is to have no effect on the force of a treaty. While this Article 4 is not inconsistent with Article 18 of the Covenant, under which the duty of publication rests on the Secretariat, its tenor is in conflict with the general purpose of Article 18; and for this reason the Havana provision is here rejected.

(c) If such registration, communication or publication is effected within a reasonable time after the date on which the treaty would otherwise have come into force in accordance with Article 10 of this Convention, the treaty may be regarded as having been binding from that date.

COMMENT

This paragraph contains a necessary indication, in view of the imperative sanction contained in paragraph (a). Article 18 of the Covenant requires registration "forthwith" (Fr., *immédiatement*); yet in practice the period which elapses between the date when an instrument would come into force according to its terms independently of Article 18, and the date of registration, is sometimes quite extended. Relatively few instruments provide

expressly for their own registration, and such provision does not usually refer to registration as a condition precedent to the instrument's entry into force.

Paragraph (c) covers cases to which either paragraph (a) or paragraph (b) applies. It would allow "a reasonable time" for compliance with the requirement of registration, or with the requirement of registration or communication or publication. It alleviates the rigor of "not binding until" in the two previous paragraphs by sanctioning an earlier entry into force which is followed by prompt fulfilment of the requirement; but it is important to note that this is stated as a retroactive process.

ARTICLE 18. TREATIES AND THIRD STATES

(a) A treaty creates obligations only for the parties thereto.

COMMENT

Paragraph (a) of this article affirms a general principle admitted by all writers on international law. In view of the virtual unanimity among them as to the validity of this principle no purpose would be subserved in quoting their opinions here. See Roxburgh, *International Conventions and Third States* (1917), p. 19 ff. Cavaglieri ("Règles Générales du Droit de la Paix," 26 *Recueil des Cours*, 1929, p. 527) remarks that the rule that treaties bind only States which are parties to them is one of the most certain and universally accepted principles of international law. See also 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 414, who remarks that this principle is not only accepted almost unanimously by publicists, but that it is supported by constant practice. Cf. also Pillaut ("Nature Juridique et effets généraux des Traités Internationaux" 46 *Journal du Droit International*, 1919, p. 600), who remarks that, with some exceptions which he recognizes, a treaty can neither be invoked by nor against third States even though they are named in it; still less can it create obligations for them. Treaties sometimes by their own terms expressly declare that they shall be binding only upon the parties; e.g., the Declaration of Paris, of April 16, 1856. Such affirmations, however, would seem to be superfluous, since they merely declare an already universally admitted principle.

The principle of international law according to which treaties do not create obligations for third States is in line with well-known rules of the Roman private law of contracts as expressed in the maxims: *Obligatio tertio non contrahitur*; *Pacta non obligant nisi gentes inter quas initia*. For States other than the parties, a treaty is *res inter alios acta, quae tertio nec prodest nec noceat*. This general principle is found in the modern municipal law of contracts of many countries. See Roxburgh, *op. cit.*, p. 6 ff. The rule of English law is thus stated by Anson, *Principles of the Law of Contract* (5th American ed., by Corbin, 1930), sec. 278: "Liability *ex contractu* or *quasi ex contractu* cannot be imposed upon a man otherwise than by his own consent." The *Code Civil*

of France, Article 1165, provides "Les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121." This rule is found in the Civil Code of the Netherlands (Arts. 1351-1353), of Belgium (Arts. 1119-1121), of Italy (Arts. 1128-1130), of Germany. Roxburgh, *International Conventions and Third States* (1917), pp. 12, 13.

It must be emphasized, however, that we are here considering only that part of the rule which relates to the creation of *obligations* and not of *rights*. As will be pointed out later, the rule is less absolute and settled in so far as it relates to the creation of rights in favor of third States.

Applied to treaty obligations this rule has been uniformly supported by national courts. See the decision of the Swiss Federal tribunal of December 11, 1925, in the case of *Trampler v. High Court of Zurich*, where it was held that, as Switzerland was not a party to the Treaty of Versailles, its provisions did not apply within Swiss territory. While the court recognized the effects produced on the relations in private law of the subjects of signatory States, it could not admit that the stipulations of the Treaty of Versailles might derogate from rules of competence laid down by Swiss public law. The Treaty of Versailles, the court added, since Switzerland was not a party to it, could not withdraw from the jurisdiction of the Swiss courts any case in which their competence was established by Swiss law. McNair and Lauterpacht, *Annual Digest*, 1925-1926, Case No. 265. See also the decision of the Supreme Court of Poland (Third Division) of February 8, 1921, in the case of *Feldmann v. Polish Treasury*, holding that Poland was subject to no obligations under the Berne Convention of October 4, 1890, since she was not a party to that convention. Williams and Lauterpacht, *Annual Digest*, 1919-1922, Case No. 44. See also the decision of the Italian Court of Appeal (Aquila), November 20, 1923, that the Hague Convention of July 17, 1905, relative to the conflict of laws concerning the consequences of marriage was binding only upon the contracting parties (14 *Bulletin de l'Institut Intermédiaire International*, 1926, p. 66), and the decision of the Royal Court of Hungary of September 4, 1924, that the Hague Convention of July 17, 1905, relative to civil procedure was not applicable to Yugoslavia because it was not a party to the convention (*ibid.*, p. 58). Many other cases affirming the general principle could be cited.

Decisions of international courts likewise have not been lacking, and uniformly they have affirmed the principle that treaties cannot impose obligations on third States without their consent. See the award of the Anglo-Turkish Mixed Arbitral Tribunal of December 28, 1927, in *Eastern Bank Ltd. v. Turkish Government* (8 *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, p. 188), where the claimant invoked against Turkey Article 297h of the Treaty of Versailles providing for the restitution of "all cash assets of enemies," on the ground that Article 25 of the Treaty of Lausanne had incorporated the said Article 297h into its own text. The tribunal held that,

since Turkey was not a party to the Treaty of Versailles, and since her recognition of that treaty as a fact had not made her sueh, the provisions of the treaty could not be applied, directly or indirectly, against her. See also the award of the French-Mexican Mixed Claims Commission of October 19, 1928, in the case of *Pablo Nájera* (McNair and Lauterpaeht, *Annual Digest*, 1927-1928, Case No. 271), where M. Verzijl, President of the Commission, held that a State which was not a party to the Covenant of the League of Nations is not bound by Article 18 of the Covenant which requires the registration of treaties by States Members of the League. The decision is analyzed by Hudson in 28 *American Journal of International Law* (1934), p. 548. See further as to this case the comment on Article 17.

In the *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder* (Publications of the P.C.I.J., Series A, No. 23, p. 19 ff), the question was raised whether the Barcelona Convention on Freedom of Transit of April 20, 1921, could be invoked against Poland, which was not then a party thereto, owing to the fact that she had not yet ratified the convention. The judgment of the court was that it could not be (*ibid.*, p. 22).

In the *Case of the Free Zones of Upper Savoy and the District of Gex* (*Ibid.*, Series A, Nos. 22 and 24, Series A/B, No. 46), where it was rather a question of a *right* created in favor of a third State than of an *obligation* imposed upon it, it was admitted on all sides that, since Switzerland was not a party to the Treaty of Versailles, she was not bound by Article 435 relative to those zones except in so far as she had accepted the article. In fact, she had agreed to accept it subject to certain conditions and reservations which are set forth in an annex to the article, and only to this extent was she admitted to be bound by it. These conditions and reservations were embodied in an exchange of notes dated May 5 and May 18, 1919, between the Swiss Federal Council and the French Government. This case is discussed in more detail below, where the rights of third States are considered.

In practice there has been frequent assertion of the view that, as a general principle, obligations cannot be imposed by a treaty on States which are not parties to it. Thus the United States, while acquiescing in the provisions of Article 1 of the convention of London of July 13, 1841, closing the Bosphorus and Dardanelles to foreign war ships (confirmed by the Treaty of Paris of 1856, the Treaty of London of 1871, and the Treaty of Berlin of 1878), uniformly maintained that, since it was not a party to those treaties, they were not binding upon it, and that consequently its acquiescence must be considered as simply an act of grace on its part. On one occasion, indeed, it was asserted by the American Government that the time might come when the United States would deem it expedient to deny the right of the Turkish Government under those treaties to exclude American war-ships from the Straits. 1 Moore, *Digest of International Law* (1906), pp. 665-668.

Mention may also be made of the refusal of the Government of the Netherlands in 1920 to surrender for trial the former German Emperor whose extradition was requested by the Allied and Associated Powers under Article 228 of the Treaty of Versailles. In its reply of June 15, 1920, to their request, the Netherland Government stated that it "could not admit any other duty than that imposed upon it by the laws of the kingdom and the national traditions." 2 Garner, *International Law and the World War* (1920), p. 493. The Netherlands, not being a party to the Treaty of Versailles, was under no legal obligation to cooperate with the parties in the execution of its stipulations. Likewise the Netherland Government refused to consider that the Netherlands was bound by those provisions of the Treaty of Versailles relative to the navigation of the river Scheldt. 10 Miller, *My Diary at the Peace Conference* (1924), p. 50. See also 4 *ibid.*, p. 426, and Tobin, *Termination of Multipartite Treaties* (1933), p. 167.

Article 17 of the Covenant of the League of Nations has sometimes been interpreted as being based on the theory that States which are not Members of the League, and therefore not parties to the Covenant, may nevertheless, in certain cases, be subjected to the sanctions envisaged by Article 16. Article 17 provides that, if a non-member State refuses to accept the invitation of the Council to assume the obligations of membership for the purposes of a dispute between it and a Member State and resorts to war against such Member, the sanction provisions of Article 16 shall be applicable as against it. But Anzilotti (1 *Cours de Droit International*, Gidel trans., 1929, p. 415), correctly, it is believed, declares that such an interpretation is without legal foundation. Article 17, he says, may and must be interpreted in a manner to reconcile it with the general principle that a treaty cannot impose obligations on States which are not parties to it. The fundamental principle of Article 17 is expressed in the first paragraph of the article, where it is expressly recognized that non-member States are obliged only when, after having received an invitation to submit to the obligations which the Covenant imposes on Members, they accept it. The inquiry and the recommendations which the Council may make and the clause "if a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute," have no juridical significance for non-member States. This view was that which the Permanent Court adopted in the *Eastern Carelia Case* (*Publications of the P.C.I.J.*, Series B, No. 5, p. 27) where it was said that the Covenant of the League could not impose upon a State not a party thereto an obligation to submit its disputes to any particular body for settlement. The Court declared that "it is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."

The report of the Blockade Committee of the League of Nations in 1926 on the effect of Article 16 of the Covenant as regards third States declared:

A third State is not under any treaty obligation to acquiesce in the measures contemplated by Article 16 of the Covenant, and, on the principle: "*pacta tertiis ne que nocent neque prosunt*," the coming into force of the Covenant could not in strict law affect *ipso facto* any rights which it possesses under general principles of international law and by treaty in respect to maintenance of intercourse between its nationals and territory and the aggressor State. Nor, on the other hand, should the Covenant be regarded as imposing on the Members of the League an obligation to violate the rights of a third State. It is true that Article 16 places the third State's nationals and territory on the same footing as those of a Member of the League in the provisions (paragraph I) which contemplate the absolute isolation of the aggressor from the rest of the world. A treaty must, however, be assumed to be intended to be interpreted subject to the rights of third States under international law. . . . It is therefore prudent to conclude that, in applying the economic sanctions of Article 16 without resort to war, the Members of the League must fully respect the rights of third States. (*League of Nations Document A.14.1927.V.*, p. 86.)

While a treaty cannot create obligations binding on States other than the parties, it is conceivable that the failure of a third State to protest against a treaty the conclusion of which has been notified to it by one of the parties may give rise to a moral duty, at least on the part of the third State to respect it, in the sense of refraining from doing anything which would be incompatible with the objects sought to be accomplished by the treaty, and it is possible that the performance of this duty might result in the acquisition of corresponding rights for the third State, which the parties would be bound to respect. See 1 Anzilotti, *op. cit.*, p. 416. But recognition of the treaty by the third State must be formal or manifested by conduct which indicates an undoubted intention to recognize it. Mere acquiescence or silence is not sufficient. It is necessary to emphasize, as Anzilotti remarks, that such recognition is not participation in the formation of the treaty; it does not therefore make the third State a party and does not produce the legal effects which participation in the making of the treaty produces.

According to some writers an exception to the general principle that treaties cannot impose obligations on third States is recognized in the case of collective treaties in the nature of "international settlements." Such treaties find their justification not upon legal principles but upon the acquiescence, willing or otherwise, by the States upon which they are imposed, or upon the ground that they are intended to serve the general interest. Examples of such treaties are those regulating the status or use of international waterways, treaties imposing a régime of neutralization or demilitarization upon a State and others of a like character. As to treaties of permanent neutralization, there is some difference of opinion as to whether they may create obligations for third States, some authors holding that they do, while others deny it, although at the same time admitting that they may become binding upon third States through the operation of custom. Charles de Visscher (*Belgium's Case*, 1916, p. 17), speaking of the

treaty for the neutralization of Belgium, observes that it embodied an "objective rule of international law," from which it would follow that it was binding upon third States as well as upon the parties.

Professor Quincy Wright has expressed the opinion that, while the provisions of treaties in the nature of international settlements which are intended to establish a permanent condition of things may be of universal obligation, this results from the general acceptance and acquiescence in their terms by all States, not from the treaties themselves. "Conflicts Between International Law and Treaties," 11 *American Journal of International Law* (1917), p. 573. Compare in this connection the statement of Judge Negulesco in his dissenting opinion in the *Case of the Jurisdiction of the European Commission of the Danube* (*Publications of the P.C.I.J.*, Series B, No. 14, p. 95), that "decisions of the Great Powers, met together as the Concert of Europe, . . . have never been held to be legally binding upon States not represented in the Concert." In fact, however, whether they were regarded as "legally binding" by the States which were not parties to them, such decisions have been enforced and have been acquiesced in. It would serve no purpose to argue the question here. If it be admitted that a treaty of settlement may create obligations for States which are not parties to it, clearly it must be a multipartite treaty to which a group of Powers, though not necessarily a majority of them, are parties. Thus the bipartite treaty of July 23, 1881, between Argentina and Chile for the neutralization of the Straits of Magellan could hardly be regarded as an international settlement in the sense that it created binding obligations for other States. The same observation may be made of the Hay-Pauncefote Treaty of 1901 between Great Britain and the United States relative to the status of the Panama Canal. Diena (25 *Zeitschrift für internationales Recht*, p. 20) appears to hold otherwise. Roxburgh (*International Conventions and Third States*, 1917, p. 71) concludes that the Hay-Pauncefote Treaty neither creates rights nor duties for third States, although ultimately a customary rule may develop under which they will be entitled to rights and subject to obligations. "Until that time, the Canal cannot be said to be permanently neutralized, since the express or tacit consent of all States of importance is essential to permanent neutralization."

Article 380 of the Treaty of Versailles for the internationalization of the Kiel Canal, by reason of the large number of the parties to it, affords a good example of a treaty of international settlement. See McNair, 1 *British Year Book of International Law*, 1925, p. 116. It has been affirmed that third States are bound to recognize the status which Article 380 has given the canal, since it secures to them the benefit of navigating it so long as the treaty is in force. But on the other hand, they have no legal right to demand of the contracting parties the maintenance of the treaty in perpetuity or its execution so long as it is in force. Cavaglieri, "*Règles Générales du Droit de la Paix*," 26 *Recueil des Cours* (1929), p. 528.

Multipartite treaties which are declaratory of pre-existing rules of

customary international law which bind all States members of the community of nations whether they are parties to such treaties or not, cannot be regarded as an exception to the general rule that treaties cannot create obligations for other States than the parties thereto, since the obligations which third States are under to observe such treaties are really derived not from the treaties themselves but from the customary law of which they are declaratory. See Wright, article cited, 11 *American Journal of International Law* (1917), pp. 569, 574. See also the decision of the Mixed Court of Egypt (Port Said) in the case of *Crichton v. Samos Navigation Co. and others* (1927), which held that the claim of an English captain for salvage must be determined on the basis of the Brussels international convention of 1910 which had been adopted by nearly all maritime States as the law regulating matters of salvage. Although Egypt was not a party to the convention, its provisions were applicable by the Mixed Courts of Egypt as rules of international law. *Gazette des Tribunaux Mixtes*, July, 1927, and McNair and Lauterpacht, *Annual Digest*, 1925-1926, Case No. 1. But multipartite treaties enunciating new rules of international law can not create obligations binding upon third States, unless perhaps they have been ratified by the vast majority of States, including all the important ones. In fact, so called law-making treaties sometimes expressly limit their operation to ratifying and acceding States. The Declaration of Paris of 1856, for example, declared that "the present declaration is and shall be obligatory only among the Powers who have or who shall have acceded to it." The United States therefore would have been under no obligation to observe the rules of the declaration during its Civil War except in so far as they may have been declaratory of the existing customary law.

(b) If a treaty contains a stipulation which is expressly for the benefit of a State which is not a party or signatory to the treaty, such State is entitled to claim the benefit of that stipulation so long as the stipulation remains in force between the parties to the treaty.

COMMENT

While it is a general rule of private law that a contract cannot create obligations for those who are not parties, the rule is less absolute in respect to the creation of rights in their favor. Thus, under English law, it is well settled that a contract which amounts to a declaration of trust may create rights for persons other than the parties. See the opinion of Lord Haldane in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge and Co., Ltd.* (1915), A. C. 847, 853; Anson, *Principles of the Law of Contract* (5th American ed. by Corbin, 1930), sec. 280 ff; and Roxburgh, *International Conventions and Third States*, p. 6 ff, and the cases cited by him. In the United States the common law rule that a third person cannot acquire rights under a contract made for his benefit has been modified in many states with the result that if one person makes a promise to another for the benefit of a third person, the latter

may in some instances maintain an action upon it. *Lawrence v. Fox* (1859), 20 N. Y. 268; *Hendrick v. Lindsay* (1876), 93 U. S. 143. See also Anson, *op. cit.*, Ch. IX, and 1 Williston, *On Contracts* (1929), Ch. XIII.

In France, while the general rule of the Civil Code is that a contract can neither create rights nor obligations for persons other than the parties, an exception is recognized when the benefit is the condition of an advantage stipulated in one's own behalf or of a gift made to another. "On peut pareillement stipuler au profit d'un tiers, lorsque telle est la condition d'un stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre . . ." Code Civil Art. 1121. In that case a right is acquired not only by the promisee but by the beneficiary, as soon as he accepts the benefit, either expressly or tacitly, and the promisor cannot, the Code adds, revoke the right. It has been stated that, at the present time, the doctrine of *stipulation pour autrui* plays almost as large a part in the legal life of France as the trust does in England. Sir Maurice Amos, 10 *Journal of Comparative Legislation and International Law*, 3d ser. (1928), pt. 4, p. 231. The general rule of the French Civil Code prevails in Belgium, in the Netherlands, and in Italy.

According to German law, a contract may confer rights on a third person if it was the intention of the contracting parties so to do. *Bürgerliches Gesetzbuch*, sec. 328, and Schuster, *Principles of German Civil Law* (1907), sec. 141. The same rule prevails in Switzerland, *Code Fédéral des Obligations*, Art. 112.

The civil law of many other countries recognizes the validity of contractual rights conferred in certain cases on third persons. Williston observes that "although the Roman Law refused to recognize any legal right in the beneficiary of a contract, the modern civil law almost universally gives him a direct remedy." "Contracts for the Benefit of a Third Person in the Civil Law," 16 *Harvard Law Review* (1902-1903), p. 50. The rules of the civil law relative to contract stipulations for others than the parties are summarized by Roxburgh, *op. cit.*, p. 12 ff; 2 Rivier, *Droit des Gens* (1896), p. 62; 2 Pradier-Fodéré, *Traité de Droit International Public* (1885), p. 810.

Those writers who see a close analogy between international treaties and contracts at private law have no difficulty in deducing from the analogy the rule that treaties may create rights for third States. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), sec. 69 ff. There is no need, however, to justify the rule here laid down upon an assumed analogy between treaties and contracts. It is sufficiently justified by practice and the decisions of national and international courts.

Although there is general agreement among writers on international law that treaties may stipulate for benefits in favor of third States, there is still much controversy regarding the question as to the legal nature of the right—if it be such—which is conferred, and particularly as to the position of the beneficiary State in respect to the enforcement of this right.

It may perhaps serve to clarify the problem to distinguish between treaties or treaty stipulations which, on the one hand, are deliberately intended to confer benefits on other States than those which are parties, which expressly so declare by their own terms, and which may even name the beneficiary State or States; and those, on the other hand, which, without the parties so intending, do incidentally secure advantages or benefits to third States. Among treaties of the latter class, the most common are multipartite treaties in the nature of international settlements. The doctrine and practice support the view that in such cases it is not within the right of third States incidentally benefited by such a treaty to demand its enforcement in their behalf or to object to its abrogation or modification by the parties. Although the execution of Article 61 of the Treaty of Berlin of 1878 would have benefited the United States, the United States Government admitted that since it was not a party it could not rightfully demand enforcement by the Powers which were parties to it. Thus, while it remonstrated in 1902 against the action of the Roumanian Government in discriminating against Jews in violation of the Treaty of Berlin, as a result of which violation the interests of the United States were prejudicially affected by the enforced emigration to this country of a large number of Jewish inhabitants from Roumania, it admitted that it had no legal right to invoke the stipulations of a treaty to which it was not and could not become a party, or to call upon the Powers which were parties to enforce upon Roumania the observance by her of its provisions relative to non-discrimination against the Jewish population. 6 Moore, *Digest of International Law*, p. 365.

Treaties or treaty stipulations, on the other hand, which were deliberately intended to confer advantages or benefits on third States, have not been lacking. Some examples are mentioned below. As to such treaties the doctrine and the practice are in agreement on one point, namely, that the beneficiary third States are not entitled to demand performance by the parties, or to object to the abrogation, suspension, or modification of the treaties. As to the lack of the latter right, Judges Hurst and Altamira said in their dissenting opinion in the *Swiss Free Zones Case* (*Publications of the P.C.I.J.*, Series A/B, No. 46, p. 185):

In conclusion, we wish to make every reservation in regard to a theory seeking to lay down, as a principle, that rights accorded to third Parties by international conventions, to which the favoured State is not a Party, cannot be amended or abolished, even by the States which accorded them, without the consent of the third State; such a theory would be fraught with so great peril for the future of conventions of this kind now in force, that it would be most dangerous to rely on it in support of any conclusion whatever.

A classic case of a benefit intended to be conferred on a third State was that conferred upon Sweden in connection with the demilitarization of the Aaland Islands. By the convention of March 30, 1856, between France,

Great Britain and Russia, which was annexed to and incorporated in the treaty of peace of the same year to which, in addition to the Powers mentioned, Austria, Prussia, Sardinia and Turkey were parties, Russia undertook not to fortify the Aaland Islands or maintain any military or naval establishment thereon. This was apparently for the benefit of Sweden, which, however, was not a party to the convention, and which was not mentioned in the treaty as the intended beneficiary. Some apprehension having arisen in 1907 that the non-fortification provision of the treaty was about to be violated by Russia, a discussion was precipitated as to whether Sweden had a right to insist on performance by Russia and to demand of Great Britain and France its execution. M. Waultrin, in an article entitled "*La Neutralité des Iles d'Aaland*" (14 *Revue Générale de Droit International Public*, 1907, pp. 517, 529), dealing with the question at the time, took the position that Sweden had no such right under the treaty, apparently, however, for the reason that the treaty did not expressly stipulate that the non-fortification and demilitarization provision had been inserted in her interest. Consequently, Sweden could only call to the benevolent attention of Great Britain and France the facts regarding the threatened violation of the treaty by Russia; but these Powers were not bound to take action at the request of a third State, even though the stipulation was clearly intended for its benefit. Roxburgh (*International Conventions and Third States*, 1917, p. 41) adopts the view that the treaty conferred no legal right upon Sweden but only an advantage, and that, even if it had expressly stipulated that the advantage was conferred in the interest of Sweden, that would not have been sufficient, as Waultrin appears to suggest, to confer a right on Sweden to demand performance. See, in the same sense, 2 Hoijer, *Les Traités Internationaux* (1926), p. 271, who observes that "in these conditions, it is evident that a violation of the Convention could not have infringed upon any right of Sweden nor have furnished any legal basis for a protest on her part; it would simply have prejudiced the interest of Sweden and thereby afforded a ground for political representations."

The question was again raised in 1920, and it was referred by the Council of the League of Nations to a committee of jurists which reached the conclusion that, although Sweden was not a party to the convention of 1856, and therefore had no "contractual rights" under it, the convention in fact created "objective law whose effects extend beyond the circle of the contracting powers." It being in the nature of an international settlement, Sweden could "as a power directly interested insist upon compliance with the provisions in so far as the contracting parties have not cancelled it," and "any State in possession of the Islands must conform to the obligations, binding upon it, arising out of the demilitarization established by these provisions." The committee said:

As concerns Sweden, no doubt she has no contractual right under the provisions of 1856 as she was not a signatory Power. Neither can

she make use of these provisions as a third party in whose favour the contracting parties had created a right under the Treaty, since—though it may, generally speaking, be possible to create a right in favour of a third party in an international convention—it is clear that this possibility is hardly admissible in the case in point, seeing that the Convention of 1856 does not mention Sweden, either as having any direct rights under its provisions, or even as being intended to profit indirectly by the provisions. Nevertheless, by reason of the objective nature of the settlement of the Åland Islands question by the Treaty of 1856, Sweden may, as a Power directly interested, insist upon compliance with the provisions of this Treaty in so far as the contracting parties have not cancelled it. This is all the more true owing to the fact that Sweden has always made use of it and it has never been called in question by the signatory Powers. (*League of Nations Official Journal, Special Supplement No. 3* (October, 1920), p. 18.)

F. De Visscher in an elaborate article on "*La Question des Îles d'Åland*" (42 *Revue de Droit Internationale et de Législation Comparée*, 1921, 3d ser. p. 262), concludes that the decision of the commission was "based on a juridical experience which would be difficult to contest," although he admits that it is not easy to reconcile it with legal principles, considering that treaties ordinarily bind only the parties to them. See, in the same sense, Udina "*Succession des Etats*," 44 *Recueil des Cours* (1933), p. 711 ff.

A case often cited, though it was a bipartite treaty, was afforded by the Treaty of Prague of August 23, 1866, between Austria and Prussia (18 Martens, *Nouveau Recueil Général*, 1873, p. 344), by Article 5 of which the Emperor of Austria ceded to the King of Prussia the Duchies of Holstein and Schleswig, subject to the reservation that if the population of the northern districts of Schleswig should by a plebiscite vote in favor of a union with Denmark they were to be ceded to that country instead of to Prussia. That part of the article relating to the plebiscite was abrogated by a mutual agreement between Austria and Prussia in 1878, without the plebiscite having been held. Did Denmark, which was not a party to the treaty of 1868 but for whose benefit Article 5 of the treaty may be assumed to have been inserted, have a right to demand performance by the parties? On April 16, 1870, the Danish Minister at Paris addressed a letter to the German Minister in which he appears to have maintained that Prussia was under an obligation to Denmark to hold the plebiscite. Although, he said, Denmark was not a party to the treaty, Article 5 was, according to the admission of Bismarck made in the Prussian Parliament, inserted in the treaty exclusively at the request of France, and became an integral part of a treaty which had been accepted by all Europe when it recognized the new order of things created by the treaty. Finally, the Government of Prussia had itself officially brought to the knowledge of the King of Denmark the engagement which it had undertaken to retrocede Northern Schleswig to Denmark. For these reasons, it was argued, Prussia could not "suppress or mutilate its promise" even though Austria released her from the obligation due Austria. Text of

the note in Bruns, *Fontes Juris Gentium*, Digest of the Diplomatic Correspondence of the European States, Ser. B., sec. I, t. I, p. 754. Most writers on international law, however, are agreed that Article 5 conferred no rights upon Denmark, that the parties to the treaty were entirely free to abrogate it whenever they chose to do so, and that Bismarck's declaration in the Prussian Diet, to the effect that only the Emperor of Austria could demand execution of the treaty, expressed a legally sound principle. See to this effect Holtzendorff, 10 *Revue de Droit International et de Législation Comparée* (1878), p. 580 ff; 2 Rivier, *Droit des Gens* (1896), p. 63; Roxburgh, *International Conventions and Third States* (1917), p. 43; and 2 Hoijer, *Les Traités Internationaux* (1926), p. 270.

An example of a treaty stipulation which was intended to secure advantages to third States generally without directly stipulating in favor of any particular State, was Article 380 of the Treaty of Versailles, which declares that the Kiel Canal shall always be free and open on a perfect footing of equality to the vessels of war and of commerce of all nations at peace with Germany. For stronger reasons still, it can be said that a treaty stipulation of this kind cannot be regarded as having created a legal right for any States other than the contracting parties, although it is conceivable that with the lapse of time the benefits thus secured may develop into rights through the force of custom. For the present, at any rate, no State not a party to the Treaty of Versailles is in a position to demand execution or object to the abrogation or modification, to its detriment, of Article 380. Adverting to this treaty with others of its kind, Cavaglieri (26 *Recueil des Cours*, p. 528) remarks that third States "have no right to demand execution of its stipulations; only the contracting States possess such a right; they are perfectly free to modify or abrogate the régime which Article 380 establishes and third States have no right to oppose it." See in the same sense the opinions of Judges Negulesco and Dreyfus in the *Case of the Free Zones of Upper Savoy and the District of Gex* (*Publications of the P.C.I.J.*, Series A, No. 22, pp. 38 and 44), both of whom asserted that, even if it be admitted that Article 380 created rights in favor of third States when the names of such States were not mentioned in the article, it could not be admitted that such rights were irrevocable so that they could not be abrogated or modified by the parties to the treaty which created them.

The question whether States may derive rights from treaties to which they are not parties appears to have been raised before Lord Stowell in 1809 in the case of *The Jonge Josias* (Edwards 128), in connection with the claim of the captain of a Danish vessel which had been captured by the British naval forces in the river Tagus. The claimant invoked against the validity of the capture, Article 16 of the Convention of Cintra of August 30, 1808, between Great Britain, France and Portugal, which purported to confer a certain degree of protection on "all the subjects of France and of Powers in relations of amity or alliance with France, domiciled in Portugal or accidentally

sojourning therein." In the course of his judgment denying the claim, Lord Stowell addressed himself to the preliminary question "whether the stipulations of the treaty may be invoked by those who are not parties to it." "The French," he said, "who were parties to the treaty, could without any doubt, although enemies, claim that the interpretation invoked was in conformity with the spirit and the intentions of the contracting parties at the time; and they have a right to demand the application of the treaty as thus interpreted to the persons upon whom it was intended to confer protection. But whether others who have no right by reason of their being parties to the treaty, but who benefit from it indirectly, are competent to demand its execution is, in my opinion, more than doubtful."

The question of the validity of *stipulations pour autrui* has been before the Permanent Court of International Justice in several cases. In the *Case concerning Certain German Interests in Polish Upper Silesia* (*Publications of the P.C.I.J.*, Series A, No. 7, pp. 28-29), Poland claimed certain rights against Germany under the Armistice Convention of 1918 and the Protocol of Spa of July 16, 1920, to neither of which was Poland a party. It was argued that Poland had given a sort of tacit adherence or accession to both instruments through her conduct, and that the declarations of *de jure* recognition of the Polish State by the Allied and Associated Powers and by Germany during the peace negotiations virtually made her a party entitled to the benefits of the Armistice Convention. Lord Finlay, in his dissenting opinion, supported this view. The majority of the court, while not expressly denying that a third State may in some circumstances acquire rights under a treaty, and while apparently not meaning to deny that accession to a treaty might be tacit in the sense of resulting from acquiescence or conduct, did deny that in this particular case there had been any tacit accession or adherence, and it pointed out that neither instrument contained any provision for a right on the part of other States to accede to them and that no such right could be presumed. And it added: "A treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States." See the comment of W. E. Beckett in 11 *British Year Book of International Law* (1930), p. 12, and in 39 *Recueil des Cours* (1932), p. 176. In the *Case concerning the Factory at Chorzów* (*Publications of the P.C.I.J.*, Series A, No. 17, p. 45), the court reaffirmed this view. The same principle was affirmed by the court in the *German-Austrian Customs Union Case*, where it was stated that since Spain was not a party to the Treaty of Versailles, she could not invoke Article 88 of that treaty. (*Ibid.*, Series A/B, No. 41, p. 15.)

The question whether a third State may acquire rights under a treaty to which it is not a party was more directly—before the Permanent Court between 1929 and 1932, in the *Case of the Free Zones of Upper Savoy and the District of Gex* (*ibid.*, Series A, Nos. 22 and 24, and Series A/B, No. 46). The case is a complicated one and was before the court several times between

the years mentioned. It is sufficient to say that three free customs zones were created in 1815 on the French frontier, manifestly for the benefit of Switzerland, by various treaties, declarations, and supplementary acts concluded at Paris and Vienna in that year. But Article 435 of the Treaty of Versailles in 1920 declared that the high contracting parties were agreed that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the Free Zones of Upper Savoy and the District of Gex, "were no longer consistent with present conditions and that it was for France and Switzerland to come to an agreement with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries." A controversy having arisen between France and Switzerland as to whether Article 435 necessarily intended to abrogate the above mentioned provisions of the treaties of 1815 or whether it was merely intended to mean that they might be abrogated by mutual agreement between France and Switzerland, the question was brought before the Permanent Court of International Justice for an interpretation of the respective rights of the parties. Switzerland was not a party to the Treaty of Versailles, but she agreed to acquiesce in Article 435, subject to certain conditions and reservations. This agreement was embodied in an exchange of notes between the Swiss Federal Council and the French Government, which were inserted in an annex to Article 435. Subsequent to the conclusion of the Treaty of Versailles, France suppressed the Free Zones, justifying her action on the basis of Article 435, which, it argued, was intended to relieve her of the obligation to maintain the zones any longer. France also argued that since Switzerland was not a party to the particular Acts of 1815 which created the zones, she could not rightfully insist on their maintenance. See especially the French *Mémoire* and Argument of Counsel, *ibid.*, Series C, No. 17-1, Vol. I. Switzerland, on the other hand, contended that she had acquired a right to insist on their maintenance, and that they could not be suppressed without her consent.

As regards two of the zones—those of Sardinia and St. Gingolph—the situation was fairly clear, since Switzerland was a party to the arrangements of 1815 (or some of them) which created those zones. But as to the District of Gex the question was more complicated. Switzerland had acceded to the Declaration of Vienna relative to her own perpetual neutralization, but this declaration made no mention of the free zone of Gex. Switzerland did not, however, accede to the protocol of November 3, 1815, which mentioned the withdrawal of the French customs régime from the District of Gex, nor to the Treaty of Paris of November 20, 1815, which provided for the creation of the free zone of Gex.

In its order of August 19, 1928 (*Publications of the P.C.I.J.*, Series A, No. 22, p. 20), the court declared:

All these instruments taken together, as also the circumstances in which they are executed, establish, in the Court's opinion, that the in-

tention of the Powers was, besides "rounding out" the territory of Geneva and assuring direct communication between the Canton of Geneva and the rest of Switzerland, to create in favour of Switzerland a right, on which she could rely, to the withdrawal of the French customs barrier from the political frontier of the District of Gex, that is to say, a right to the free zone of Gex.

And it concluded:

the Court, having reached this conclusion simply on the basis of an examination of the situation of fact in regard to this case, need not decide as to the extent to which international law takes cognizance of the principle of "stipulations in favour of third Parties."

Notwithstanding the somewhat cautious manner in which the Court expressed itself regarding the place in international law of the principle of *stipulations pour autrui*, it would seem that its order in so far as concerned the Zone of Gex was, in fact, based on a recognition of the principle that in this particular case, the Powers having by treaty created for the benefit of Switzerland, a free customs zone within the territory of one of the parties to the treaty, Switzerland was entitled to enjoy that right, and could not be deprived of it without her consent. See Beckett, "*Jurisprudence de la Cour Permanente de Justice Internationale*," 39 *Recueil des Cours* (1932), p. 179. As to this there was a division of opinion among the judges. Judge Nyholm denied that Switzerland had any right under the treaty of November 20, 1815, to a free zone in the District of Gex, since she was not a party to that treaty and was not even mentioned in the treaty as the intended beneficiary. As to the legal basis of her claim he said:

Switzerland's argument that the provisions are for her stipulations *in favorem tertii* is without foundation. Such provisions are not admissible in inter-states relations. The principle of sovereignty is opposed thereto. The "stipulation *in favorem tertii*" is, by its nature, a civil obligation which can hardly apply between nations with their constitutional systems. Amongst other reasons, the unilateral character is ill suited to relations between States which must be placed on a footing defined by their reciprocal rights, and further, the *execution* of such a provision could not fail to give rise to difficult problems. As a matter of fact, the stipulation *in favorem tertii* does not appear to be valid in international law, for it does not create a right in favour of the third State, save of course when a new agreement is added to the original one. This theory is largely accepted by legal doctrine and the opinion of the most highly qualified authors on international law. (*Publications of the P.C.I.J.*, Series A, No. 22, p. 26.)

Judges Dreyfus and Negulesco in separate opinions expressed a similar view. Judge Dreyfus admitted that as Switzerland was not a party to the Treaty of Versailles, the treaty could not deprive her without her consent of any contractual right which she may have had. As to the Sardinian Zone, she certainly had a right under Article 3 of the Treaty of Turin of March 16,

1816, to which along with Sardinia she was a party, Sardinia's obligations thereunder having been assumed by France upon her annexation of Savoy. Of that right she could not be deprived by the Treaty of Versailles. As to the recognition by international law of the general principle of treaty stipulations for the benefit of third States, he was not in agreement with the majority of the court. Regarding this principle he said:

The theory of the stipulation *in favorem tertii*, which the Court declared to be effective in the present case, without, however, expressing an opinion as to its admissibility in international public law, is well known in private law; but its forms vary infinitely in different municipal legislations, and whereas for instance Article 112 of the Swiss Federal Code on Contracts proclaims the entire validity of stipulations on behalf of a third Party, Article 1121 of the French Civil Code only admits these in two cases: when they form a condition of a stipulation made on one's own behalf or of a gift made to another.

In view of this diversity in the nature and legal effect of the stipulation *in favorem tertii* in municipal law, there can be no question of transferring it as such into international public law, nor in particular of giving it such an unlimited field of application as in the present case. It therefore seems certain that it cannot be laid down as a general rule that a State which stipulates on behalf of another State, guarantees the latter, not being a Party to the treaty in which the stipulation appears, an individual and irrevocable right, the execution of which it might personally demand, even if the State stipulating declared that it freed the debtor State from the obligation imposed upon it in favour of the third State. Such is the predominant view of authorities at the present date, and it is summed up as follows by Professor Anzilotti, President of the Permanent Court of International Justice, in his Course of International Law, French edition, 1929, vol. I, page 424:

"Whereas the law of a State may lay down that where a stipulation has been made *in favorem tertii*, that third Party immediately acquires the right to demand its fulfillment or acquires that right by a simple act of its own will, the very structure of the international legal system shows that in the absence of a special rule in derogation of general principles, a right of the third State to demand the execution of stipulations favourable to it can only arise in virtue of an agreement between the contracting Parties on the one side and the third State on the other."

Thus, the stipulation *in favorem tertii* is contrary to the usual structure of the international legal system. How then can it be given legal effect? (*Ibid.* pp. 43-44.)

Judge Negulesco expressed, in the main, the same view. He admitted that it was possible to stipulate by treaty for a benefit in favor of a third State, but argued that normally such benefits could only be acquired by accession. He argued, moreover, that a third State was not entitled to claim a benefit unless it was mentioned by name in the treaty as the intended beneficiary. In fact, the treaty of November 20, 1815, which imposed on France an obligation to withdraw her customs barriers behind her political frontiers, did not mention that the obligation was intended to be for the benefit of Switzerland. As to this he said:

Switzerland's name does not even appear in the provisions relating to the creation of the zone. There is nothing but the obligation of France to withdraw her customs barrier behind the political frontier. As the Treaty says nothing, it is to be concluded that the Great Powers signatory of the Treaty of 1815 are the holders of the rights to be exercised against France. It is impossible, by reason of the silence of a treaty, to create rights in favour of third States. It is clear that Switzerland has a great interest in the existence of this zone, but this interest does not justify the exercise of a right.

Even if it be held that several States may, under a treaty, create rights in favour of a third State without its name being even mentioned, it is difficult to say that this treaty cannot be abrogated without such third State's consent. Thus it cannot be maintained that third Powers at peace with Germany, which are entitled to free passage through the Kiel Canal, under Article 380 of the Treaty of Versailles, can by their veto prevent the abrogation of that provision, notwithstanding the fact that they took no part in this Treaty.

Even if Switzerland had a right under a stipulation in her favour, she could only exercise it as long as the Treaty of 1815 has not been abrogated by the Signatory Powers. (*Publications of the P.C.I.J.*, Series A, No. 22, p. 38.)

Looking at the Court's order of 1929 as a whole, it would seem that a majority of the judges (eight) took the position that *stipulations pour autrui* are supported by a recognized principle of international law, and that three judges adopted the contrary view.

Passing now to the definitive judgment of the court rendered June 7, 1932 (*ibid.*, Series A/B, No. 46), it may be noted that, after an examination of the various instruments under which the free zones were created, the court found that in each case where Switzerland was not a party to the actual treaty establishing a particular zone, she derived contractual rights from some collateral instrument. This made it unnecessary for the court to make a direct pronouncement on the question of the legal nature of stipulations in favor of a third State. It did, however, make certain observations on the subject. Thus it said: "It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour." But it added: "There is however, nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favor of a third State meant to create for that State an actual right which the latter has accepted as such." *Ibid.*, p. 147.

The conclusion in this case was that the free zones could not be suppressed by France without Switzerland's consent. It appears that a majority of the judges in 1932 were in agreement with the majority in 1929 in admitting that a stipulation in favor of a third State is possible, under international law, but that the creation of a right by treaty in favor of a third State cannot be

lightly presumed. As stated above, Judges Hurst and Altamira, who were among the dissenting judges, declared that they wished to make reservations to a theory which would erect into a principle the rule according to which rights accorded to third States by treaties cannot be modified or suppressed by the States which have accorded them, without the consent of the third States. Judge Dreyfus, who likewise dissented, reaffirmed the views expressed by him in 1929. Summarizing, it may be stated that nine judges (Anzilotti, Loder, Oda, Huber, Kellogg, Beichmann, de Bustamante, Hughes, and Wang) admitted that international law recognizes rights stipulated for in favor of third States, while five judges (Negulesco, Nyholm, Hurst, Altamira, and Dreyfus) were of the contrary opinion.

It is believed that the conclusions of the majority of the court are sound, and that they will be approved by the majority of jurists. It may be emphasized in this connection that the increasing practice of inserting in treaties stipulations for the benefit of third States is a fact which cannot be ignored, and that international law should be interpreted in such a way as to bring it into harmony with the actual conditions which this tendency is producing. Reference may be made here to the pertinent observation of Hoijer (2 *Les Traités Internationaux*, 1926 p. 280), that, while the principle of *res inter alios neque prodesse neque nocere potest* is one of the most generally accepted principles of international law, it is necessary to avoid attributing an absolute effect to it which would be in contradiction with the increasing interdependence of nations and contrary to the realities of international life. The conclusions of the majority of the court go no further than to affirm that a treaty may stipulate for a benefit in favor of a State which is not a party to that treaty, and if it does so, such State is entitled to claim and enjoy the benefit. But it would seem that the benefit must be expressly stipulated for in the treaty; in the language of the Court it cannot be "lightly presumed" to have been the intention of the parties to accord it. However, it hardly seems essential, as Judge Negulesco insisted, that the State in whose favor the benefit was stipulated must be specifically named in the treaty, when it is manifest from its terms or the attendant circumstances, as it was in the *Aaland Islands* and *Free Zones Cases*, that the benefit was intended for a particular State and that no other State could have possibly been intended or could have availed itself of the benefit.

It is not believed that the Permanent Court in the *Free Zones Case* intended to approve the general proposition that when a benefit is stipulated for in favor of a third State the benefit cannot be withdrawn by the parties to the treaty without the consent of such third State. It is true that the court in that case declared that Switzerland was not only entitled to enjoy the "right" accorded by the treaties of 1815, but that she could not be deprived of it without her consent. But this conclusion was based on the finding of the court that in each case where Switzerland was not a party to the treaty which created the particular zone she derived contractual rights

from some collateral instrument. In other words, it was the view of the court that in this particular case Switzerland had acquired a right of which she could not be deprived without her consent; it expressed no opinion on the general proposition that a third State in whose favor a benefit has been stipulated for in a treaty has an irrevocable right to claim the benefit and may therefore, by refusing its consent, prevent the parties from abrogating or modifying the treaty so far as such State is concerned, and thus extinguishing or impairing the benefit accorded. It may be seriously doubted whether the court would go to such lengths.

If this be the correct interpretation of the court's decision regarding *stipulations pour autrui*, paragraph (b) of Article 18 of this Convention is in accord with it. It recognizes what would seem to be the unquestionable right of sovereign States to insert in the treaties which they conclude with one another, stipulations for the benefit of States which are not parties, and which indeed may not be permitted to become parties.

Obviously, if a treaty stipulation for the benefit of a third State lays down conditions under which the benefit is offered, compliance with those conditions by the third State is necessary before it is entitled to claim the benefit. Some writers have suggested that some sort of acceptance on its part is also necessary. This appears to be the view expressed in the Havana Convention on Treaties of February 20, 1928, Article 9 of which reads: "The acceptance or non-acceptance of provisions in a treaty, for the benefit of a third State which was not a contracting party, depends exclusively upon the latter's decision." The draft of the International Commission of American Jurists adopted at Rio de Janeiro in 1927 (Article 9) lays down essentially the same rule, except that it requires the acceptance of the third State to be "express". Tacit acceptance or acceptance by conduct would not therefore be sufficient. See 22 *American Journal of International Law* (1928), Special Supplement, p. 245.

If it is meant by these provisions to lay down the rule that a third State must indicate in some manner its acceptance of a stipulation made for its benefit before it is entitled to claim and enjoy the benefit, the requirement would seem to be superfluous. Obviously, the third State is under no obligation to claim or avail itself of the benefit offered; on the other hand, if it chooses to do so, its conduct in availing itself of the benefit is tantamount to acceptance. Ordinarily, it is of no concern to the parties whether it avails itself of the benefit or not, if it does so, its action necessarily implying acceptance ought to be sufficient, assuming that the parties desire some indication of acceptance. Manifestly, the stipulation itself might require some form of acceptance as a condition of the enjoyment of the benefit; if it does not, it would seem to be a reasonable presumption that the parties had no intention of requiring it.

As to the duration of the benefit, the meaning of paragraph (b) is clear: the third State is entitled to the benefit stipulated in its behalf only so long

as the stipulation remains in force between the parties. It may, therefore, be extinguished by the abrogation or termination of the treaty or the benefit stipulation therein, in accordance with Article 33 of this Convention, or its enjoyment may be suspended, or it may be impaired or otherwise modified by an alteration of the treaty—in each case without obtaining the consent of the third State. As stated above, however, good faith at least, would require the parties to notify the third State of such action, and until it has had such notice it cannot be held responsible for the exercise of a privilege or enjoyment of a benefit during a period when it honestly believed the treaty to be still in force.

To require the consent of a third State in whose favor a benefit has been stipulated for, as a condition of the abrogation or modification of a treaty by the parties who have entered into it, would be contrary to one of the basic principles underlying the whole treaty system, and in the face of the axiomatic rule laid down in Article 33 of this Convention that a treaty may be terminated (and a *fortiori* modified) by the agreement of the parties. If it were admitted that the consent of a State, merely because it is the beneficiary of a stipulation in a treaty between other States, but which is not itself a party thereto, were necessary before the treaty could be abrogated or altered by the parties who made it, it is safe to say that few if any treaties containing such stipulations would ever be entered into in the future. It would seem to be a sound principle, therefore, that when a State not a party to a treaty is nevertheless the beneficiary of an advantage or privilege derived from such treaty, the advantage or privilege must be regarded as a precarious one, to be enjoyed only so long as the parties choose to maintain the treaty in force between themselves, and to execute its stipulations. The State which accepts and avails itself of the benefit must do so with full knowledge of the precariousness of its duration and subject to any risk which may be involved in its reliance upon the assumed continuance of the benefit.

ARTICLE 19. INTERPRETATION OF TREATIES

(a) A treaty is to be interpreted in the light of the general purpose which it is intended to serve; the historical background of the treaty, *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.

COMMENT

This paragraph, the various elements of which are discussed in detail below, is not designed as an addition to an already long list of so-called “canons of interpretation”. It is, rather, intended to indicate that the function

of interpretation is to discover and effectuate the purpose which a treaty is intended to serve, and that this is to be accomplished, not automatically by the mechanical and unvarying application of stereotyped formulae or "canons" to any and every text, but instead by giving considered attention to a number of factors which may reasonably be regarded as likely to yield reliable evidence of what that purpose is and how it may best be effectuated under prevailing circumstances.

The weight to be attributed to each of the factors enumerated in paragraph (a) will naturally vary with the individual case; hence no importance is to be attached to the order in which they are named. All that can be said is that all of them are or may be significant in arriving at a sound interpretation in a particular case, and that none of them should be overlooked by the person charged with interpreting a treaty. Each of them may contribute in some measure to giving an accurate and complete "picture" of the treaty in its setting, and it is only when so viewed that its general purpose can be fully comprehended and intelligently effectuated. Only then can one undertake to say what the treaty "means".

NATURE OF INTERPRETATION

Interpretation is closely connected with the carrying out of treaties, for before a treaty can be applied in a given set of circumstances it must be determined whether or not it was meant to apply to those circumstances. "Closely connected with the enforcement of treaties is their interpretation, for the authorities that enforce are usually required also to interpret—often, in fact, to interpret in the very act of enforcement." Mathews, *American Foreign Relations* (1928), p. 476. In any particular case there may be no expressed doubt or difference of opinion as to the meaning of the treaty concerned; its purpose and applicability may be regarded as perfectly evident. Yet, even in such a case, the person or persons deciding that the meaning of the treaty is "clear", and that it is plainly intended to apply to the given circumstances, must do so, consciously or unconsciously, by some process of reasoning based upon evidence.

In short, the "application" of treaties, it would seem, must almost inevitably involve some measure of "interpretation". There is, however, a recognized distinction between the two processes. Interpretation is the process of determining the meaning of a text; application is the process of determining the consequences which, according to the text, should follow in a given situation. Cf. the explanation of M. Ehrlich in the *Case concerning the Factory of Chorzów* (Claim for Indemnity) (Jurisdiction), *Publications of the Permanent Court of International Justice*, Series A, No. 9, p. 39. It is evident, therefore, that, even though interpretation may be essential to application, it is perfectly possible to have interpretation without application. This has been recognized by the Permanent Court, which has said that: "There seems to be no reason why States should not be able to ask the Court

to give an abstract interpretation of a treaty; rather it would appear that this is one of the most important functions which it can fulfill. It has, in fact, already had occasion to do so in Judgment No. 3." Series A, No. 7, pp. 18-19. In actual practice, however, the case involving solely a question of abstract interpretation is relatively rare. Differences as to the interpretation of a treaty practically always arise in connection with its application; disputes as to its application almost invariably involve a question of interpretation.

It may be remarked, also, that the attempted distinction between "construction" and "interpretation" (see, e.g., Taylor, *Treatise on International Public Law*, 1901, p. 395) is based on a difference of degree rather than kind; both are concerned with the determination of the meaning to be attributed to a treaty. See 1 Pitt Cobbett, *Leading Cases on International Law* (4th ed., 1922-1924), p. 345; Mathews, *American Foreign Relations* (1928), p. 476; Yü, *The Interpretation of Treaties* (1927), p. 40, n. 3.

Interpretation, then, is a matter, not of occasional, but of most frequent, occurrence, which is almost necessarily involved in the "application" of, and which includes the "construction" of, treaties. Consequently it would seem both desirable and important that there should be a measure of general agreement as to the principles governing the process of interpretation. Yet it has been said that the interpretation of treaties is among the most confused subjects in international law today. Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933), p. 19.

CANONS OF INTERPRETATION

The question as to the existence or utility of rules of international law governing the interpretation of treaties is one which has given rise to a vast amount of discussion by, and to disagreement among, jurists. Publicists from the days of Grotius onward, influenced by principles of interpretation found in municipal law, and prompted by a desire to ensure some measure of order, uniformity and precision in the interpretation of treaties, have seldom failed to yield to the temptation to formulate a more or less extensive list of rules, although at least some of them have recognized that "it seems to be universally admitted that it is next to impossible 'to prescribe any system of rules of interpretation for cases of ambiguity in written language that will really avail to guide the mind in the decision of doubt'." Taylor, *Treatise on Public International Law* (1901), p. 394. Even some modern writers who assert frankly that there are no rules of international law on the matter, proceed nevertheless to set down certain principles which "recommend themselves on account of their suitability." Among the many publicists who have prescribed rules for the interpretation of treaties, reference may be made to the following: Grotius, *De Jure Belli ac Pacis Libri Tres*, Lib. II, ch. 16; Pufendorf, *De Jure Naturae et Gentium*, Lib. V, ch. 12; Vattel, *Droit des Gens*, Bk. II, ch. 17; Wheaton, *Elements of International Law*

(5th ed., 1916), p. 389; 2 Phillimore, *Commentaries upon International Law* (3d ed., 1879-1889), pt. 5, ch. 8; Hall, *International Law* (8th ed., 1924), p. 390 ff; Fiore, *International Law Codified* (Borchard trans., 1918), p. 341 ff; Hatschek, *Völkerrecht* (1923), pp. 236-237; Fenwick, *International Law* (1924), p. 331 ff; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), sec. 843; Hershey, *Essentials of International Public Law and Organization* (rev. ed., 1927), p. 445 ff; Ehrlich, "L'Interprétation des Traités," 24 *Recueil des Cours* (1928), p. 5 ff. This, of course, is by no means an exhaustive list.

There is great variety in the number and in the phraseology of the rules of interpretation laid down by the various writers. Indeed, one of the chief criticisms of the so-called canons of construction is that, taken altogether, they are "unfortunately so abundant in the pages of publicists that a mere application of one, or a shrewd combination of two, of them may yield almost whatever conclusion the interpreter desires." Yü, *The Interpretation of Treaties* (1927), p. 72. It is impossible, therefore, to indicate exhaustively or precisely the rules of interpretation which have been propounded. In a general way, however, it may be said that most writers have begun with the fundamental principle that the function of interpretation is to discover what was, or what may reasonably be presumed to have been, the intention of the parties to a treaty when they concluded it, and that this is to be accomplished by the application of certain rules of logic and grammar to the instrument itself. Fundamental among those rules is the one laid down by Vattel: "It is not permissible to interpret what has no need of interpretation." Other rules more or less generally agreed upon include those to the effect that usually the words of a treaty should be interpreted in the sense which they would normally have in their context; that technical terms should be given their technical meaning; that no word, phrase or clause in a treaty should be considered as being without meaning, in the absence of clear evidence to the contrary; that a treaty should be considered as a whole and each of its parts in the light of all the others; that an interpretation which would lead to an unreasonable or absurd result, or one which would render a treaty inoperative, ineffective or nugatory should be avoided; that in cases of doubt, that interpretation should be adopted which involves the minimum of obligation for the parties and which is most favorable to the freedom and independence of States; that that interpretation of a provision is to be preferred which is least to the advantage of the party for whose benefit it was inserted in the treaty, or which is least onerous for the party making a concession. Many other rules, or variations upon those just stated, have been suggested. Ehrlich, for example, sets forth a very extensive series of them.

International courts have, on many occasions, declared one or another of the maxims proposed by writers to be recognized rules of interpretation. For example, in the *Van Bokkelen Case* (2 Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898).

pp. 1807, 1848 ff) there was an extended statement of a large number of the "rules" of interpretation. In the *Aspinwall Case* (4 *ibid.*, p. 3621 ff) there is frequent reference to Vattel's rules of interpretation, and the commission considered the following "to be universally recognized as law": "The first general maxim of interpretation is, that it is not allowable to interpret what has no need of interpretation. . . . In the interpretation of treaties, compacts, and promises we ought not to deviate from the common use of the language unless we have very strong reasons for it." And also that: ". . . where language is employed in a treaty which is susceptible of two meanings, that is to be preferred which is least for the advantage of the party for whose benefit the clause is inserted. For in securing a benefit he ought to express himself clearly." In the *Sambiaggio Case* (Ralston, *Venezuelan Arbitrations of 1903, 1904*, p. 689), the umpire accepted it as law that, "if two meanings are admissible, that is to be preferred which the party proposing the clause knew at the time to be that which was held by the party accepting it." He also cited Pradier-Fodéré to the effect that "modern authors recognize that doubtful stipulations should be interpreted in the least onerous sense for the party obligated", and Vattel to the effect that "if he who could and should express himself clearly and fully has not done it, so much the worse for him. He cannot be received subsequently to bring forward restrictions which he has not expressed." Cf. arbitrator Borel's observations in the case of the *Kronprins Gustof Adolf* and the *Pacific* (26 *American Journal of International Law*, 1932, pp. 834, 846), that, "considering the natural state of liberty and independence which is inherent in sovereign states, they are not to be presumed to have abandoned any part thereof", and that consequently the provisions of the treaty (between Sweden and the United States), in so far as there was doubt as to their meaning, must be interpreted in favor of such liberty and independence. In the *Kummerow Case* (Ralston, *op. cit.*, p. 557), the umpire followed the rule laid down in the United States Supreme Court (*Hauenstein v. Lynham*, 100 U. S. 483) that "where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it and the other liberal, the latter is to be preferred." But in the case of the heirs of *Jean Maninat* the umpire recognized it to be in harmony with a "constant line of decision by arbitral tribunals" that treaties relating to powers conferred upon commissioners should be interpreted restrictively. *French-Venezuelan Commission of 1902*, pp. 44, 72. In the *North Atlantic Fisheries Case* (Scott, *Hague Court Reports*, 1916, p. 186), the Hague Tribunal of Arbitration laid down the rule that "words in a document ought not to be considered as being without meaning if there is not specific evidence to that purpose. . . ." In the *Panama Riot Claims Case*, Umpire Upham adhered to Vattel's rule that an interpretation of a treaty which would lead to an absurdity should be rejected. 2 Moore, *op. cit.*, p. 1376. For rules of interpretation employed in decisions of the Permanent Court of Arbitration, see Bruns, *Fontes Juris Gentium*, Series A, sec. 1, Vol. 2, p. 96 ff.

The Permanent Court of International Justice, too, has apparently placed the stamp of its approval on a number of the so-called canons of interpretation. It has, for example, declared that: "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd." *Publications of the P.C.I.J.*, Series B, No. 11, p. 39. See also Series A/B, No. 41, p. 60. And the dissenting minority in the *Wimbledon Case* conceded it to be a rule, apparently followed by the majority, that "when the wording of a treaty is clear its literal meaning must be accepted as it stands, without limitation or extension." Series A, No. 1, p. 36. The court has, in fact, displayed a tendency to fix upon the "natural" meaning of the instrument before it, and then to consider other evidence from the point of view that that "natural" meaning is not to be disturbed. Series A/B, No. 50, pp. 373, 378. In similar manner it has favored a meaning which it has referred to as "literal" (Series A, No. 9, p. 24), "ordinary" (Series B, No. 11, p. 37), "normal" (*ibid.*, p. 39), "logical" (Series A, No. 9, p. 24), "reasonable" (Series B, No. 11, p. 39), "clear" (Series A/B, No. 50, p. 373), or "sufficiently clear" (Series B, No. 12, p. 22). See Hudson, *The Permanent Court of International Justice* (1934), p. 556.

The court has relied upon the frequently cited principle that, in interpreting a treaty, the instrument "must be read as a whole, and . . . its meaning is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense." *Publications of the P.C.I.J.*, Series B, No. 2, p. 23.

In the *Wimbledon Case* the court approved a rule which harkens back to the statements of the classicists to the effect that treaties involving "odious" promises should be interpreted restrictively. It recognized that if a treaty places limitations upon the freedom of a State to exercise its sovereign rights, that fact alone "constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation." Series A, No. 1, p. 24. Cf. Series A, No. 24, p. 12, and Series A/B, No. 46, p. 167. And elsewhere the court has admitted as "sound" the principle that "if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted." Series B, No. 12, p. 25.

In the *Serbian Loans Case* (*Publications of the P.C.I.J.*, Series A, Nos. 20/21, pp. 30, 32), the court declared it to be a rule that "special words, according to elementary principles of interpretation, control the general expressions" and that "it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous. . . ." And in the *Brazilian Loans Case* (Series A, Nos. 20/21, p. 114), the court recognized that "there is a familiar rule for the construction of instruments that, where they are found to be ambiguous, they should be taken *contra proferentem*." (In the last two cases mentioned the court was interpreting instruments other than treaties.)

It should be noted, however, that the Permanent Court has formulated relatively few rules of interpretation, and that it has usually stated them with such qualifications as to leave itself completely free to apply them or not accordingly as the circumstances and evidence in a particular case may require. Thus the court's "cardinal principle" that words are to be given the meaning which they would normally have in their context, for example, is subject to the condition: "unless such interpretation would lead to something unreasonable or absurd." That plainly suggests that there may be circumstances in which the normal or natural meaning must yield to another, and in its opinion relating to the convention concerning the employment of women at night, for example, the court expressed a willingness "to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words." In that particular case the court concluded, however, that "the grounds considered above upon which it has been suggested that the natural meaning . . . can be displaced, do not appear to the Court to be well-founded." *Publications of the P.C.I.J.*, Series A/B, No. 50, pp. 373, 378. Again, the court has declared that the recognized rules as to restrictive or extensive interpretation are to apply "only in cases where ordinary methods of interpretation have failed," and it has said that although the rule is "sound" that, in case of doubt, an interpretation should be adopted which places the least restriction on the freedom of States, nevertheless that rule "must be employed with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of the text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when, in spite of all pertinent considerations, the intention of the parties still remains doubtful, that the interpretation should be adopted which is most favorable to the freedom of States." Series B, No. 11, p. 39; Series A, No. 23, p. 26.

For summaries of the jurisprudence of the court relative to the interpretation of treaties, see Hyde, "Interpretation of Treaties by the Permanent Court of International Justice," 24 *American Journal of International Law* (1930), pp. 1-19; Beckett, "Decisions of the Permanent Court of International Justice," 11 *British Year Book of International Law* (1930), pp. 1, 51, and the same author's lectures on the jurisprudence of the Permanent Court of International Justice in 39 *Recueil des Cours* (1932), p. 261 ff; Hudson, *The Permanent Court of International Justice* (1934), pp. 551-573. See also Ehrlich, *op. cit.*, 24 *Recueil des Cours* (1928), p. 5 ff, *passim*, who cites numerous passages from the court's opinions to support various rules; and Bruns, *Fontes Juris Gentium*, Series. A, sec. 1, Vol. 1, p. 61 ff.

For rules of interpretation announced by United States courts and secretaries of state, see 5 Moore, *Digest of International Law* (1906), p. 249 ff. For various principles of interpretation announced by British courts, see McNair, "*L'Application et l'Interprétation des Traités d'après la Jurisprudence Britannique*," 43 *Recueil des Cours* (1933), p. 263 ff.

In the face of so much doctrine and apparent jurisprudence, it may seem strange that any one would deny the existence or desirability of settled "rules" of international law governing the interpretation of treaties. With the exception of Ehrlich, however, the tendency among modern writers, including those cited above, has been to reduce rather than to extend the number of rules of interpretation and to deny them the character of international law altogether. Thus, Westlake (1 *International Law*, 2d ed., 1910, p. 293) declares that "the important point is to get at the real intention of the parties," and he considers that the rules laid down by the publicists "are not likely to be of much practical use." He emphasizes that the normal and proper nature of treaty drafting makes it eminently desirable that in construing treaties "a large and liberal spirit of interpretation" should prevail (p. 294). Lawrence (*Principles of International Law*, 7th ed., 1923, p. 302), expresses the opinion that "a vast amount of misplaced energy has been expended" on the business of devising rules of interpretation, and confines himself to saying that we "can hardly venture to go beyond the statements that ordinary words must be taken in an ordinary sense and technical words in a technical sense, and that doubtful sentences and expressions should be interpreted by the context, so as to make the treaty homogeneous and not self-contradictory." Fenwick (*International Law*, 1924, p. 331 ff) ascribes only an "inchoate legal value" to the half-dozen rules which he lays down, and Hershey (*The Essentials of International Public Law and Organization*, rev. ed., 1927, p. 445 ff) reproduces nine rules which "have found most general acceptance", but which "form no part of International Law proper." Oppenheim (1 *International Law*, 4th ed., 1928, p. 759 ff) states that neither "customary nor conventional rules of International Law exist concerning the interpretation of treaties," although he himself lays down a few "which recommend themselves on account of their suitability."

Brierly asserts that there "are no technical rules in international law for the interpretation of treaties; its objective can only be to give effect to the intention of the parties as fully and fairly as possible." *The Law of Nations* (1928), p. 168.

Hyde completely distrusts interpretation by formula and is a champion of a scientific method for interpreting treaties unhampered by any preconceived rules or assumptions. The fundamental purpose of all interpretation, he says, is to discover "the signification which the several parties to an agreement may be regarded as having attached to their words," and it is the business of the interpreter to make that discovery by whatever means and with the aid of whatever evidence seems most likely to serve that purpose. "Whatever be its form, evidence of the signification attached by the parties to the terms of their compact should not be excluded from the consideration of a tribunal entrusted with the duty of interpretation. When the fact is established that the parties adopted a particular standard of interpretation—that they used expressions of a particular signification of

their own choice—it is immaterial how widely that signification may differ from any other.” Of course, it is not the separate “volition”, or “intent”, or “will” of any *one* of the parties which is of significance; the object of the endeavor is to determine the sense which *all* the parties attributed, and mutually understood that they attributed, to the words which they employed. “It is the contract which is the subject of interpretation, not the volition of the parties thereto.” In the event that all other evidence is lacking—a situation which Hyde says is “rare”—then recourse is to be had to the circumstances in which the parties found themselves at the time they concluded the treaty and to their conduct, in order to determine if there are any *reasonable* inferences to be deduced therefrom concerning the intent of the parties. Thus, where all proof of anything to the contrary is lacking, if it would seem unreasonable if not inconceivable that a party attached any but one certain meaning to its words, “the necessary inference that such state had acted reasonably, if not wisely, will prevail, although such signification may be at variance with the literal words of the compact.” But, at all events, since “the sense which contracting states have attached to the terms of their agreement is controlling in the estimation of those to whom are entrusted the duty of interpreting treaties, as all circumstances probative of that fact are admissible for the purpose of its establishment, the formation of rules of interpretation can hardly serve a useful purpose. Times when proof is not to be had are rare. Even when it is wholly lacking it is dangerous to impute to a state assent to a particular significance of the words of a treaty.” “Concerning the Interpretation of Treaties,” 3 *American Journal of International Law* (1909), pp. 46–61. See also 2 Hyde, *International Law* (1922), p. 61 ff.

The study of Mr. Tsune-Chi Yü (*The Interpretation of Treaties*, New York, 1927) is, in the main, a restatement and a spirited defense of the views of Professor Hyde. Mr. Yü states that the “essence of the principle of interpretation . . . is to ascertain through all sources of evidence what is the standard agreed upon, namely, what is the sense which the contracting parties mutually attached to the terms of the agreement.” (*Op. cit.*, p. 136. See also pp. 62, 80.) This is the only “rule”, in his opinion, and with those publicists who would make of interpretation a mechanical process of applying systems of prearranged rules or presumptions Mr. Yü takes issue. He says: “The challenge to this school of interpretation . . . is this: Can scientific results be obtained through sheer flights of imagination? That the collection of rules sponsored by some publicists are inefficacious in interpreting treaties between nations may be seen from the very fact that interpretation is eminently a practical science, and as such it has to consider extrinsic evidence and circumstances peculiar to each individual case. Moreover, the fundamental difficulty in prescribing a system of rules also lies in the imperfect nature of human language itself, through which no one can define or direct any intellectual process with perfection. How then is it

to be expected that any artificial rules which are generally to govern the operations of human relationship can be of scientific value? It would appear, therefore, as futile to attempt to frame positive and fixed rules of construction as to endeavor in the same manner to set forth the mode by which judges should draw conclusions from various species of evidence." (*Op. cit.*, p. 28.)

It seems evident that the prescription in advance of hard and fast rules of interpretation—even though, as in the case of those proposed by Ehrlich, they amount only to rebuttable presumptions—contains an element of danger which is to be avoided. In their context and aptly illustrated and supported by numerous real or hypothetical cases, the rules of Ehrlich, and so also those laid down by other publicists, seem eminently reasonable and convincing. The difficulty, however, is that, detached from that context, they still retain a certain fictitious ring of unassailable truth, and tend, as do all neatly turned maxims, to imbed themselves in the mind. The resulting danger is that the interpreter, well versed in such rules, may approach his task with a mind partly made up rather than with a mind open to all evidence which may be brought before him. This is to misconceive the function of interpretation.

The process of interpretation, rightly conceived, cannot be regarded as a mere mechanical one of drawing inevitable meanings from the words in a text, or of searching for and discovering some preëxisting specific intention of the parties with respect to every situation arising under a treaty. It is precisely because the words used in an instrument rarely have exact and single meanings, and because all possible situations which may arise under it cannot be, or at least are not, foreseen and expressly provided for by the parties at the time of its drafting, that the necessity for interpretation occurs. In most instances, therefore, interpretation involves *giving* a meaning to a text—not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgment to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve. This is obviously a task which calls for investigation, weighing of evidence, judgment, foresight, and a nice appreciation of a number of factors varying from case to case. No canons of interpretation can be of absolute and universal utility in performing such a task, and it seems desirable that any idea that they can be should be dispelled. It is the purpose of Article 19 of this Convention to achieve that end, while at the same time serving as a guide post to the route which the person, organ or authority charged with interpreting a treaty should follow.

This is not to say that all the so-called canons of interpretation are of absolutely no utility. Many of them, as has been said, are "full of common sense". If it be kept always in mind that the so-called rules of interpreta-

tion have no extraordinary sanctity or universality of application, and that in all probability they developed as neat *ex post facto* descriptions or justifications of decisions arrived at by mental processes more complicated than the mere mechanical application of rules to a text, they may serve some purpose as aids to interpretation. Where a rule is of such a nature as to suggest a line of investigation for discovering the general purpose of the parties, or where a consideration of all pertinent circumstances in a particular case results in a decision easily explained by a well-known maxim, there is probably no harm in relying on it. It is always to be recalled, however, that the process of interpretation of treaties is, of necessity, one which is not to be confined within narrow limits by iron-clad rules; that all "rules", including those laid down in this article, are but guides to direct the interpreter toward a decision which conforms, not to preconceived standards, but to the circumstances peculiar to the particular case before him.

DISCUSSION OF PARAGRAPH (A)

When interpreting a treaty, the text thereof must, of course, be respected; the interpreter must not alter it or substitute a new text. Nevertheless, the bare words of a treaty have significance only as they may be taken as expressions of the purpose or design of the parties which employed them; they have a "meaning" only as they are considered in the light of the whole setting in which they are employed. To purport to attribute a "clear", a "natural", or a preëxisting meaning to them apart from that setting is to ignore the fact that words may be given any meaning which the parties using them may agree to give them, and that few words have an exact and single meaning. "Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning." Wheaton, *International Law* (8th ed., 1866), p. 365. In this connection reference may be made to the remarks of Judge Anzilotti in his dissent to the advisory opinion of the Permanent Court of International Justice relative to the interpretation of the Convention concerning Employment of Women during the Night. He said:

But I do not see how it is possible to say that an article of a convention is clear until the subject and aim (*l'objet et le but*) of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention. In the first alternative it may rightly be said that the text is clear and that it is impossible, on the pretext of interpretation, to endow it with an import other than that which is consistent with the natural meaning of the words. In the other alternative, since the words have no value save as an expression of the intention of the Parties,

it will be found either that the words have been used in a wider sense than normally attaches to them (broad interpretation) or that they have been used in a narrower sense than normally attaches to them (narrow interpretation). (*Publications of the P.C.I.J.*, Series A/B, No. 50, p. 383.)

It would seem, in short, that the interpreter of a treaty cannot confine his attention to the text alone, and to the application of formal rules of logic and grammar thereto; his task is, rather, in the words of the Permanent Court, "to interpret the text as it stands, taking into consideration all the materials at . . . [his] disposal." *Publications of the P.C.I.J.*, Series A/B, No. 44, p. 40. An exhaustive list of such materials cannot, perhaps, be made; they will vary in nature, amount and probative value with the individual case. It is believed, however, that the most important of the factors which are likely to be significant in shedding light upon the "true meaning" of any treaty are those enumerated in paragraph (a) of this article, and that they should be taken into account by the person or authority called upon to interpret a treaty.

A treaty is to be interpreted in the light of the general purpose which it is intended to serve.

It is practically self-evident that the terms of a treaty cannot be thoroughly comprehended unless read in the light of the design which prompted its conclusion, and likewise that that interpretation of a treaty is to be favored which will harmonize with and tend to effectuate the purpose which it was intended to serve. In the words of Vattel (*Droit des Gens*, Bk. II, ch. 17, sec. 287):

The motive of the law, or of the treaty, that is to say, the purpose which the parties had in mind, is one of the surest means of fixing its true sense, and careful attention should be paid to it whenever there is question either of explaining an obscure, equivocal, or undetermined passage in a law or treaty, or of applying it to a particular case. When once the purpose which has led the speaker to act is clearly known his words must be interpreted and applied in the light of that purpose only. Otherwise he would be made to speak and act contrary to his intention and to the object he had in view. (*Classics of International Law*, Fenwick trans., p. 207.)

Consequently, as Judge Anzilotti put it in his dissenting opinion in the case referred to above: "The first question which arises . . . is what is the subject and aim (*l'objet et le but*) of the convention in which occurs the article to be interpreted." *Publications of the P.C.I.J.*, Series A/B, No. 50, p. 383. For, as he further said, it would seem to be impossible "to say that an article of a convention is clear until the subject (Fr. *objet*) and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to

say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention." *Ibid.*

The Permanent Court of International Justice has on several occasions taken into account the general purpose of a treaty in connection with its interpretation thereof. See Hudson, *The Permanent Court of International Justice* (1934), p. 561. In considering the competence of the International Labor Organization to regulate, incidentally, the personal work of employers, it declared that an examination of the pertinent provisions of the Treaty of Versailles indicated "that the High Contracting Parties clearly intended to give to the International Labour Organization a very broad power of co-operating with them in respect of measures to be taken in order to assure humane conditions of labour and the protection of workers." The court then continued:

It is not conceivable that they intended to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. The Organization, however, would be so prevented if it were incompetent to propose for the protection of wage-earners a regulative measure to the efficacious working of which it was found to be essential to include to some extent work done by employers. If such a limitation of the powers of the International Labour Organization, clearly inconsistent with the aim and the scope of Part XIII, had been intended, it would have been expressed in the Treaty itself. On the other hand, it is not strange that the Treaty does not contain a provision expressly conferring upon the Organization power in such a very special case as the present. (*Publications of the P.C.I.J.*, Series B, No. 13, p. 18. See also Series A/B, No. 50, p. 374 ff.)

Of the Polish Minority Treaty, the court said: "The intention of this Treaty was no doubt to eliminate a dangerous source of oppression, recrimination and dispute, to prevent racial and religious hatreds from having free play and to protect the situations established upon its conclusion, by placing existing minorities under the impartial protection of the League of Nations." And, in rejecting the Polish contention that the competence conferred upon the Council of the League of Nations by the Minorities Treaty did not extend to Poland's exercise of rights given her by the Treaty of Versailles, the court stated:

The main object of the Minorities Treaty is to assure respect for the rights of Minorities and to prevent discrimination against them by any act whatsoever of the Polish State. . . . If the Council ceased to be competent whenever the subject before it involved the interpretation of such an international engagement, the Minorities Treaty would to a great extent be deprived of value. The reasons urged by Poland for a restrictive interpretation of the Treaty do not justify the Court in thus construing it. By Article 93 of the Peace Treaty, Poland agrees to provide by a special treaty for the protection of the interests of her

racial, linguistic and religious minorities. This pledge of protection would be altogether uncertain and conjectural if the Minorities Treaty should cease to be applicable whenever the act complained of involved the consideration of a stipulation of the Peace Treaty not specifically relating to minorities. In order that the pledged protection may be certain and effective, it is essential that the Council, when acting under the Minorities Treaty, should be competent, incidentally, to consider and interpret the laws or treaties on which the rights claimed to be infringed are dependent. (*Publications of the P.C.I.J.*, Series B, No. 6, p. 25.)

And still again, in its advisory opinion on the question concerning the Acquisition of Polish Nationality, the court rejected a Polish interpretation which would have been inconsistent with the general purpose of the Minorities Treaty. The court remarked that it was "clearly not a purely fortuitous circumstance" that the treaties for the protection of minorities contained provisions relating to the acquisition of nationality, since one of the basic problems connected with the protection of minorities was that of preventing States to which territory had been allocated from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons in spite of the link attaching them to such territory. Declaring that the observance by Poland of the provisions regarding the acquisition of Polish nationality was of greatest importance to persons of non-Polish origin entitled to rely thereon, the court proceeded to remark:

In view of the importance of this matter, the Principal Allied and Associated Powers desired to create a sure guarantee in favour of these persons; with this object in view they inserted stipulations on the subject in the Minorities Treaty, thus indicating their intention that these persons should benefit by the protection provided for under Article 12. . . . If this were not the case, the value and sphere of application of the treaty would be greatly diminished. But in the Advisory Opinion given with regard to the questions put concerning the German colonists in Poland, the Court has already expressed the view that an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible." (Series B., No. 7, pp. 16-17.)

The court followed a similar line of reasoning in its interpretation of Article 23 of the Geneva Convention of May 15, 1922. In deciding that the words "differences of opinion, resulting from the interpretation and application of Articles 6 to 22" contemplated as well differences in regard to the reparations demanded for a violation of those articles, the court declared:

For the interpretation of Article 23, account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision. . . .

The object of these methods of obtaining redress—and that of Article 23 in particular—seems to be to avert the possibility that, in consequence

of the existence of a persistent difference of opinion between the contracting Parties as to the interpretation or application of the Convention, the interests respect for which it is designed to ensure, may be compromised. An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes.

This conclusion, which is deduced from the object of a clause like Article 23, and, in general, of any arbitration clause, could only be defeated, *either* by the employment of terms sufficiently clear to show a contrary intention on the part of the contracting Parties, *or* by the fact that the Convention had established a special jurisdiction for claims in respect of reparation due for the violation of the provisions in question, or had made some other arrangement regarding them. (*Publications of the P.C.I.J.*, Series A, No. 9, pp. 24–25.)

In its advisory opinion relative to the Greco-Bulgarian “Communities”, the court was called upon to determine the meaning of the word “community” as used in the Greco-Bulgarian convention of November 27, 1919. In doing so the court considered it necessary “to recall the general purpose” which the convention “was designed to fulfil”. It concluded that the convention was intended to give effect to certain provisions of the Treaty of Peace of the same date relative to the protection of minorities, and to eliminate or reduce in the Balkans, by reciprocal emigration, the centers of irredentist agitation. In view thereof, the word “community”, said the court, must refer to persons who constitute minorities in one country or the other. The court declared that “the aim and object of the Convention, its connection with the measures relating to minorities, the desire of the signatory Powers, to which the whole Convention bears witness, that the individuals forming the communities should respectively make their homes permanently among their own race, the very mentality of the population concerned—everything leads to the conclusion that the Convention regards the conception of a ‘community’ from the point of view of this exclusively minority character. . . .” *Publications of the P.C.I.J.*, Series B, No. 17, pp. 19–22.

In the case of *Honduras v. Salvador and Guatemala*, the Central American Court of Justice took account of the general purpose behind the treaty establishing the court in interpreting the provision thereof that its jurisdiction should extend to cases in which “the respective foreign offices should have been unable to reach an agreement”. In rejecting the Guatemalan contention that those words should be regarded as meaning that recourse to the court could not be had unless there had first been an unsuccessful attempt to settle the dispute via the diplomatic channel, the court said (3 *American Journal of International Law*, 1909, pp. 729–730):

2. That such a view of the matter finds no foundation either in the wording of the law, or much less in a correct interpretation of its spirit, which, in accordance with the principles governing the interpretation of international compacts, should be investigated with a view to deducing from its purport the consequence most in conformity with the order of ideas and interests to which it corresponds and most in conformity with the purpose of maintaining the efficacy of the provision itself and as related to the remaining articles of the treaty. . . .

4. That the function assigned to this Court by Article XVIII *ibid.*, of arresting the course of an armed conflict by determining, from the very moment a claim is filed, the situation in which the contending governments are to remain pending the rendition of an award, presupposes the right to have recourse to the court without delay in matters of urgency, as occurred in the case under consideration, and if we accepted the above mentioned view of the matter the humanitarian and unquestionably utilitarian purpose for which this important article was inserted would be essentially frustrated, the article being reserved perhaps for emergencies of minor risk and significance or converted perhaps into a simple expression of wish.

5. That this error becomes obvious, moreover, if we observe that it would often shut off the nations from the path of judicial controversy, compelling them to accept war or humiliation as the only alternatives.

Chang, after analysing the above and other similar cases—including *Ford v. United States*, 1927 (273 U. S. 593), and *Santovincenzo v. Egan*, 1931, (284 U. S. 30),—reaches the conclusion that: "In interpreting treaties tribunals frequently refer to the purpose of the treaty in question. Where such purpose of the treaty can be easily deduced from the preamble or from viewing the various aspects of the treaty as a whole (and sometimes also from external evidence), the general practice of tribunals has been not to accept a construction, subversive of or tending to thwart, the manifest design of the contracting parties." *The Interpretation of Treaties by Judicial Tribunals* (1933), pp. 93-94.

As some of the extracts from the opinions quoted above suggest, the "purpose" of a treaty is closely connected with what is often referred to as "the intention of the parties". Indeed the Permanent Court, many arbitral tribunals, and most writers make frequent reference to "the intention of the parties" as the basic guide for interpretation.

There can be, of course, no doubt that a definitely entertained and clearly expressed intention of the parties must always prevail. Furthermore, it may be taken for granted that, whenever States enter into a treaty, they do so with the "intention" of achieving certain ends and purposes thereby. Understood in this broad sense, there is always an "intention of the parties" which it is the function of interpretation to discover and effectuate.

There is, however, some danger that the concept of the "intention of the parties" may be carried to too great extremes, with the result that it becomes entirely artificial, and amounts merely to a phrase employed by the interpreter to justify conclusions arrived at by some method other than the

ascertainment of any actual intention of the parties. The problem which often gives rise to disputes as to the application and interpretation of a treaty is the very one which was not foreseen by the parties when they drafted the instrument, or which, if it was foreseen, was in effect left unsolved because no definite solution could be mutually agreed upon. In such cases it is patently artificial to refer to a particular solution as embodying the "intention of the parties"; it is precisely in such cases that the process of interpretation involves *giving* a meaning to the treaty in the light of considerations other than any specific intent of the parties with respect to those particular situations. See, in this sense, Hudson, *The Permanent Court of International Justice* (1934), pp. 554-556. But such meaning can and should effectuate the "intention of the parties" in the sense that it is conformable to the general purpose which they had in mind when they concluded the treaty.

Historical background of the treaty, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected.

A treaty is not concluded *in vacuo*; it has its definite place in the unending flow of events, their causes and effects, which we know as history. As a result of past developments, certain circumstances came into existence which the parties desired in some manner to regulate or alter, and to accomplish this end they chose to enter into a treaty. The treaty, in short, stands, therefore, as a related part of the general setting in which the parties acted, and that setting must be taken into account if the purpose which the treaty was intended to serve is to be fully comprehended and effectuated.

Thus, in the case of the schooner *Washington*, in which the umpire reached the same conclusion as the American Commissioner by a different argument, the American Commissioner, Upham, cited Chancellor Kent as saying: "When the words are not explicit, the intention is to be collected from the occasion and necessity of the law, from the mischief felt, and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion." (Kent's *Commentaries*, Vol. I, 462)." And among the various circumstances which he said must "be considered in connection with the treaty" in order to come "to a correct conclusion as to its intent and meaning" were "the entire history of the fisheries" and "the views expressed by the negotiators of the treaty of 1818, as to the object to be effected by it." Cited in Ralston, *Law and Procedure of International Tribunals*, p. 20.

In the *North Atlantic Fisheries Case* (Scott, *Hague Court Reports*, 1916, p. 141 ff), the tribunal made frequent references to the historical background of the treaties of 1783 and 1818 in support of its interpretations thereof. The tribunal rejected the American contention "that the words 'in common with British subjects' used in the Treaty should not be held as importing a common subjection to regulation, but as intending to negative a

possible pretension on the part of the inhabitants of the United States to liberties of fishery exclusive of the right of British subjects to fish," on the ground that "such an interpretation is inconsistent with the historical basis of the American fishing liberty." It took account of the fact that "the ground on which Mr. Adams founded the American right in 1782 was that the people then constituting the United States had always, when still under British rule, a part in these fisheries and that they must continue to enjoy their past right in the future," and that "the theory of the partition of the fisheries, which by the American negotiators had been advanced with so much force, negatives the assumption that the United States could ever pretend to an exclusive right to fish on the British shores; and to insert a special disposition to that end would have been wholly superfluous." *Ibid.*, pp. 162-163.

In the *Aroa Mines Case*, the umpire heeded the British agent's contention that the text of the treaty concerned, though unambiguous on its face, in fact contained a latent ambiguity, and that "when viewed historically with a wise regard for all the conditions antecedent, proximate and immediate, construction becomes necessary. . . ." The umpire therefore "carefully reviewed the historical status and circumstances surrounding the parties at the time the treaty was made"—relying in part for his information upon a British Blue Book and a Venezuelan Yellow Book supplied by the parties. *Ralston Venezuelan Arbitrations of 1903* (1904), p. 358 ff.

In its opinion relative to the jurisdiction of the European Commission of the Danube, the Permanent Court of International Justice observed "that the view which it has just developed as to the purport of the Definitive Statute is based solely on the language employed in the Statute and on the historical facts upon which it rests. . . ." *Publications of the P.C.I.J.*, Series B, No. 14, p. 28. Again in the *Free Zones Case* the court made extended reference to historical background in the following passage:

All the instruments above mentioned and the circumstances in which they were drawn up establish, in the Court's opinion, that the intention of the Powers was, beside "rounding out" the territory of Geneva and ensuring direct communication between the Canton of Geneva and the rest of Switzerland, to create in favour of Switzerland a right, on which that country could rely, to the withdrawal of the French customs barrier behind the political frontier of the district of Gex, that is to say, of the Gex free zone.

In this connection, it should be recalled that the free zone of Gex which was asked for by Switzerland as an alternative to the cession of that territory, constitutes one of the territorial stipulations contemplated by the first Treaty of Paris of 1814, and which were made effective by stages by means of the decisions of the Congress of Vienna and the second Treaty of Paris, and are referred to in the Declaration addressed by the Powers to Switzerland on November 20th, 1815.

It should also be recalled that the establishment of the Sardinian zone is the counter-part of the establishment of the Gex zone, that the Powers, including France, undertook to obtain this counter-part from the King

of Sardinia and that, according to the Powers' note to Sardinia of November 20th, 1815, this was to be effected by means of a convention between Sardinia and Switzerland. It is difficult to see why Sardinia should have been called upon to concede a right to Switzerland by way of a counter-part, if the Gex Zone had been regarded, so far as Switzerland was concerned, as a mere benevolent concession devoid of any solid legal basis. In actual fact, throughout the long period during which the rights claimed by Switzerland have been acknowledged, no distinction would appear to have been drawn between the two zones; nor does Article 435, paragraph 2, of the Treaty of Versailles make any distinction between them. (Series A/B, No. 46, p. 148.)

In its opinion on Polish war vessels in Danzig, the court declared that "the promise to Poland at the time of the peace settlement after the war of 1914-1918 of a free and secure access to the sea is a matter of history of which the Court is prepared to take notice . . .", but it found no reason to suppose that these promises were not fulfilled in subsequent agreements. Series A/B, No. 43, p. 144. The court, in its opinion on the treatment of Polish nationals in Danzig, clearly took account of existing historical circumstances and of the change sought to be effected therein, when it declared:

The prohibition against discrimination can best be understood in the light of the circumstances which led to the creation of Danzig as a Free City. The separation of Danzig from Germany was contrary to the wishes of the German people. Almost the whole of the population of that city was German, and the Peace Conference, in order to assure to Poland free and secure access to the sea, decided to make Danzig a Free City without incorporating it in Poland. In this respect, some apprehension might be entertained lest the Polish people in Danzig would be exposed to discriminatory measures on the part of the Free City for no other reason than that they were Poles. An unsympathetic or even hostile attitude in a community towards a group of persons merely because of their possessing a particular attribute, *e.g.*, nationality, origin, race or religion, is not without precedent. It is natural to suppose that it was with a view to preventing any such discriminatory measures that the authors of the Treaty of Versailles thought it desirable to prescribe as one of the objects of the treaty between Poland and Danzig the terms of which were to be negotiated by the Principal Allied and Associated Powers, that a clause prohibiting such discriminatory measures should figure therein. It is precisely because of their Polish character that discrimination against Polish nationals and other persons of Polish origin or speech is prohibited at Danzig. (Series A/B, No. 44, pp. 27-28.)

And in the German-Austrian Customs Union Case, the court was careful to consider the proposed union, Article 88 of the Treaty of St. Germain, and the protocols of October 4, 1922, in the light of historical and political circumstances which it described as follows: "Austria, owing to her geographical position in central Europe and by reason of the profound political changes resulting from the late war, is a sensitive point in the European system. Her existence, as determined by the treaties of peace concluded

after the war, is an essential feature of the existing political settlement which has laid down in Europe the consequences of the break-up of the Austro-Hungarian monarchy." Series A/B, No. 41, p. 42.

Cf. in this connection *Cook v. United States* (1933), 288 U. S. 102, wherein the United States Supreme Court reviewed the circumstances preceding and prompting the conclusion of the liquor treaty of January 23, 1924, between Great Britain and the United States, saying that "in construing the Treaty its history should be consulted."

Travaux préparatoires

As stated above, a scientific interpretation of a treaty must take into consideration its complete setting, and the development of the negotiations of the treaty would logically seem to form a part of the history which constitutes that setting. This brings us, therefore, to the question as to whether or not the preliminary work (*travaux préparatoires*) which preceded and led up to the conclusion of a treaty may be taken into account by the person or court charged with its interpretation. *Travaux préparatoires* include such materials as preliminary drafts, the correspondence of the negotiators, the records of their remarks in committee or plenary sessions, committee reports, reports of rapporteurs, perhaps even public statements of negotiators or representative statesmen, etc. They are to be distinguished from formal reservations and from interpretations mutually agreed upon and formally recorded as "authentic" interpretations.

There is a difference of opinion as to the admissibility of taking account of such preliminary material. Some writers have considered that it is "merged" in the final treaty, which alone, therefore, is considered as recording the final and common intention of the parties. See Field, *Outlines of an International Code* (1876), Art. 201; Hershey, *Essentials of International Public Law and Organization* (rev. ed., 1927), p. 448. *Cf.* also Fachiri, "Interpretation of Treaties," 23 *American Journal of International Law* (1929), pp. 745-752. On the other hand, some authors take the view that, inasmuch as the interpreter of a treaty must attempt to discover the purpose or intention of the parties thereto, he must not be denied recourse to any evidence likely to assist him in that discovery, and that certainly the prior negotiations of the treaty constitute evidence of that character. "The supposition", says Mr. Yü, for example, "that the prior negotiations leading up to a treaty could be merged into the latter document is a fantastic one. The mere words appearing in a treaty always require explanation, and in order that such explanation be scientifically made, the evidence such as that which exists in prior negotiations must be sought with the view of ascertaining the real design of the makers of the agreement. To maintain that all that is necessary in interpreting a treaty is to exact a sense out of the words, clauses and sentences in the treaty itself, is to deny the scientific approach to the problem, because the supposed 'merging' into the final document

often does not even yield a semblance of the sense which the negotiators sought to attach to the text of the agreement." Yü, *The Interpretation of Treaties* (1927), pp. 166-167; also pp. 46, 64 ff, 138. Cf. Hyde, "Concerning the Interpretation of Treaties," 3 *American Journal of International Law* (1909), p. 46 ff, and "Judge Anzilotti on the Interpretation of Treaties," 27 *ibid.* (1933), p. 502 ff; 2 Hyde, *International Law* (1922), pp. 64, 68; Fenwick, *International Law* (1924), p. 333; Ehrlich, *op. cit.*, 24 *Recueil des Cours* (1928), p. 118 ff; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 377; Brown, "The Interpretation of the General Pact for the Renunciation of War," 23 *American Journal of International Law* (1929), p. 374 ff. and "Interpretation of Treaties", *ibid.*, p. 819 ff.

Finally, there are those who strike a compromise, so to speak, between the two above-stated views, basing their theories upon a distinction drawn as between treaties of a contractual nature between relatively few States, and great "law-making" treaties to which many States are parties, either originally or by accession or adherence. Thus, Professor Quincy Wright compares the former to contracts and the latter to statutes, and ventures the opinion that, while municipal courts frequently have recourse to written or oral communications between the parties and to other extrinsic evidence when interpreting contracts, they are much less apt to give weight to statements of intention in legislative debate, committee reports or correspondence when called upon to interpret statutes. In the case of contractual treaties, he argues, the parties are usually few in number and have been in close contact during negotiations; it is, therefore, not unreasonable to have recourse to the records of their preliminary negotiations when seeking enlightenment as to the meaning of an ambiguous text. In the case of multipartite law-making treaties, however, it is probable that the actual negotiation of the treaty was the work of only a few of the important parties; the remarks in plenary session, if the treaty was drawn up at a conference, probably have the perfunctory character of legislative debate; and finally, if the treaty is one open to accession, many States may become parties to it who "are usually officially cognizant only of the text and formal reservations and can not be supposed to have accepted interpretations suggested in the preliminary conversations of the original negotiators." Hence, when called upon to interpret a treaty of the latter type, the task can most reasonably be accomplished by "applying law, grammar, and logic to the text itself"—by employing "general rules developed by experience, utilizing historic evidence with respect to the specific document only when 'authentic' in the sense of having been formally approved by the makers of the document, when necessary to disclose its general purport and the contemporary use of terms, or when ambiguities, inconsistencies or manifest errors can not be resolved by a thorough consideration of the whole text." Wright, "The Interpretation of Multilateral Treaties," 23 *American Journal of International Law* (1929), p. 94 ff. (McNair, while doubting that the tendency to make the

distinction drawn by Professor Wright is as yet "conscious and defined" in practice, says that to him it seems "intrinsicly reasonable". McNair, "Legal Character of Treaties," 11 *British Year Book of International Law*, 1930, p. 107. But see Hudson, *The Permanent Court of International Justice*, 1934, p. 561, n. 23.)

In commenting upon the latter view, it may be pointed out that, even admitting the validity of the analogy between multipartite treaties and statutes, the practice of municipal courts is by no means uniform as regards the question of the admissibility of legislative *travaux préparatoires* when interpreting statutes. Ehrlich, *op. cit.*, 24 *Recueil des Cours* (1928), pp. 118-120; Fachiri, article cited, 23 *American Journal of International Law* (1929), p. 747. Secondly, it may be said that, although the character of the *travaux préparatoires* incidental to the conclusion of a multipartite treaty may be such that it will be an extremely difficult task to determine just what weight is to be attributed to them in the process of interpretation, nevertheless, that fact is no reason for absolutely preventing courts, arbitrators and statesmen from taking cognizance of them. It would seem to be peculiarly within the province of men chosen for their high intelligence and technical skill to determine the relative merits of complex and conflicting evidence of all sorts. As Hyde has pointed out:

The reason why declarations of intention could not be given in aid of interpretation of documents at common law, save in certain exceptional circumstances, was that they were considered dangerous for a jury who, not being expert in such matters, might attach to them too great weight. This objection is not applicable to the interpretation of agreements between states. Declarations of their plenipotentiaries, in so far as they indicate the sense in which the terms of a treaty are employed, are valuable not merely because they are enlightening, but also because they may be safely entrusted to the consideration of judges of international tribunals, or to ministers of state. ("Concerning the Interpretation of Treaties," 3 *American Journal of International Law*, 1909, p. 54, n. 10.)

Finally, it may be pointed out that even Professor Wright himself merely asserts that, in the case of multipartite treaties, preliminary negotiations are not *conclusive* of the meaning of the treaty, but that "they may furnish evidence of that meaning." He is even ready to concede that, although the States which acceded to the Kellogg Pact were only "rather informally" apprised of the lengthy preliminary correspondence connected with its negotiation, nevertheless in fact they did have knowledge of it, and hence "it can not be said that the interpretative notes are without weight. The manner of their presentation and the express or tacit acceptance of them by the original signatories precludes such a conclusion." Article cited, 23 *American Journal of International Law* (1929), p. 104.

The question of the admissibility of resorting to *travaux préparatoires* in the interpretation of treaties was debated pro and con in connection with the Convention on the Suppression of Counterfeiting Currency. The orig-

inal draft of the protocol to the convention having set forth certain interpretations of the convention which were declared to have been agreed upon by the plenipotentiaries and which were referred to as the "sole interpretations" allowable, objection was raised that the effect would be to rule out the possibility of interpretation based on evidence such as that derived from the report of the committee on coördination or other *travaux préparatoires*. After a somewhat extended debate in which the reliance upon such evidence was both defended and attacked, the preamble to part I of the protocol was amended to read simply that the "undersigned plenipotentiaries declare that they accept the interpretations of the various provisions of the convention set out hereunder," the reference to them as the "sole interpretations" being omitted. *League of Nations Document C.328.M.114.1929.II.*, pp. 78-80.

In practice, international arbitral tribunals have in fact frequently taken account of *travaux préparatoires*, as well as of other extrinsic evidence, when interpreting treaties. See Ralston, *The Law and Procedure of International Tribunals* (1926), pp. 18-21, and cases there cited; and Ehrlich, *op. cit.*, 24 *Recueil des Cours* (1928), pp. 121-125, and cases cited. See also Fachiri, article cited, 23 *American Journal of International Law* (1929), p. 747 ff; and Lauterpacht, "The So-called Anglo-American and Continental Schools of Thought in International Law," 12 *British Year Book of International Law* (1931), pp. 43-44. In the following cases decided by mixed arbitral tribunals set up after the war preparatory work was used as evidence: *Société Vinicole de Champagne v. W. de Mumm*, 1 *Recueil des Décisions des Tribunaux Arbitraux Mixtes Institués par les Traités de Paix* (8 vols., Paris, 1922-1930), p. 22; *Schmid v. Chemische Werke Fürstenwalde*, *ibid.*, p. 345; *Karl Toth v. Serb-Croat-Slovene State*, 7 *ibid.*, p. 850; *Abbas Hilmi Pacha v. British Government*, *ibid.*, p. 909; *Ekrem Bey v. Italian Government*, *ibid.*, p. 965; *Banque d'Orient v. Turkish Government*, *ibid.*, p. 967; *Polyxène Plessa v. Turkish Government*, 8 *ibid.*, p. 224; *G. Kourouklis v. Turkish Government*, *ibid.*, p. 398.

In the *Island of Timor Case* (Scott, *Hague Court Reports*, 1916, p. 354 ff) the tribunal was called upon to interpret Article 3 of the convention between the Netherlands and Portugal of November 10, 1904, which article described the method of drawing a boundary line between the Dutch and Portuguese possessions in the Island of Timor. In doing so the tribunal carefully reviewed the discussions of the Dutch and Portuguese delegates during the negotiations leading up to the convention, and based its decision thereon. It declared:

It is important to reproduce this discussion in detail, since it throws positive light on the real and mutual intention of the parties. Portugal declared herself satisfied with the conditions offered to her. . . . In a word, throughout the negotiations she found compensations deemed sufficient by her for abandoning the line B-D and the intermediate line A-B that she claimed. She finally accepted the line A-C claimed by the Netherlands *sine qua non*.

Thus it is certain that this line A-C should be considered, in the intention of the parties, as a *concession* made by Portugal to the Netherlands. . . . (*Ibid.*, p. 369.)

Having determined the line, the tribunal again referred to prior negotiations in determining how it should be drawn in detail, and concluded that:

. . . there develops from what has gone before the conviction that the will of the contracting Parties ought to be interpreted in the sense that, starting from the point A situate on the Bilomi river, the frontier follows in a northerly direction the thalweg of the river Kabun or Leos as far as the source of this last water-course wrongly called Oè-Sunan in 1899, 1902 and 1904. (*Ibid.*, p. 375).

Having reached that decision, the tribunal said that there was "no need to pause on the mistake of name made by the boundary commissioners in 1899 and by the negotiators of the international acts of 1902 and 1904 when they gave the name of Oè-Sunan to Kabun or Lèos, and that, on the contrary, there is reason to admit that it is this very Kabun or Lèos that the parties intended to consider as properly to serve as a frontier from the point A north." *Ibid.*, p. 374.

In the *Chilean-Peruvian Accounts Case*, the arbitrator deduced the sense of Article 2 of the Treaty of Alliance of December 5, 1865, between Chile and Peru from the text primarily. He referred, however, to prior negotiations and contemporary declarations, and remarked:

Though possessing only a corroboratory value, but tending to show the intention of the parties to the treaty, it may be said, in general terms, that every document of the government officials of the time, presented to the arbiter, bears out the construction of a single combined fleet. . . . (2 Moore, *History and Digest of International Arbitrations to which the United States has Been a Party*, p. 2095.)

In the case of the *Roumanian Minister of War v. Turkish Government* (7 *Recueil des Tribunaux Arbitraux Mixtes Institués par les Traités de Paix*, p. 993), when the Turkish Government sought to rely on the preparatory work of the Lausanne Conference relating to Article 65 of the Treaty of Lausanne, the tribunal said (pp. 995-996):

Afin d'étayer sa position, le défendeur invoque les procès-verbaux des séances tenues à la Conférence de Lausanne. A ce propos il échet de relever, en voie principielle, que le texte de la loi est le guide principal et suprême de l'interprète qui doit se garder de l'éluder sous prétexte d'en respecter l'esprit. Ce n'est qu'au cas où le texte est obscur, douteux ou en contradiction avec les principes par ailleurs admis par le législateur que le juge doit, hors le texte, rechercher le véritable sens de la loi. . . . Il est vrai que parmi les moyens dont le juge dispose pour ces recherches figure sans doute le recours aux travaux préparatoires qui peuvent et doivent, en cas de besoin, servir à l'interprétation de la loi qui en est dérivée. Mais il est aussi reconnu que la valeur des arguments tirés de ces travaux est très limitée et qu'il ne faut les utiliser qu'avec un extrême prudence pour ne pas tomber dans l'erreur de modi-

fier, par des raisons qui y sont empruntées, un texte clair et précis par lui-même. . . .

[A treaty, unlike a law, is a synallagmatic convention, and] par conséquent les travaux préparatoires pour être utilement mis à profit pour l'interprétation du texte, doivent établir l'intention *commune* des parties contractantes de donner à une certaine clause du Traité une signification et une portée qui ne découlent pas directement de ses termes. Pour que l'on puisse s'en écarter, il faut qu'il soit nettement et incontestablement prouvé que les parties contractantes ont voulu dire autre chose que ce qu'elles ont dit. Mais dans la règle il est à présumer qu'elles aient su fidèlement traduire leur pensée par les termes employés.

It is significant that, although emphasizing the precaution with which *travaux préparatoires* are to be used—and this is quite proper—the tribunal indicated that they might on occasion be used as evidence even to establish that the parties used the words of a treaty in a sense different from their ordinary meaning. In the particular case, the tribunal found nothing to contradict the conclusions which it based on the text.

In *Ascherberg Hopwood and Crew, Ltd. v. Quaritch* (5 *Recueil des Tribunaux Arbitraux Mixtes Institués par les Traités de Paix*, p. 332), the Anglo-German Mixed Arbitral Tribunal was confronted with the observations of Germany on the Treaty of Versailles and the reply of the Allied and Associated Powers thereto, to prove that the word "cancelled" as used in Article 310 of the treaty in regard to certain licenses was intended to mean the same thing as the word "dissolved" employed in Article 299 in reference to pre-war contracts in general. It would seem that the preparatory material cited tended to substantiate the above contention. (See Chang, *The Interpretation of Treaties by Judicial Tribunals* (1933), pp. 49–51.) Nevertheless, the tribunal said:

The tribunal have on more than one occasion referred to the reply of the Allied and Associated Powers. This they have done where the Treaty itself has given no clear indication, and when the Tribunal have not been satisfied as to the intention of the High Contracting Powers.

In their opinion, however, the provision under discussion is so clear that they are unable to base their interpretation upon any other document. It may be that in the correspondence between the High Contracting Parties as to this Article, some mistake has crept in, but here the Treaty has a clear meaning, and that meaning must prevail. (pp. 335–336.)

In this case there was apparently a real conflict between the "clear" meaning and the evidence of intention contained in the *travaux préparatoires*, and the court, without much discussion, chose to ignore the *travaux préparatoires*, into which "some mistake" might have crept. Chang remarks: "Thus, by suspecting that some mistake might have crept into the correspondence, the Tribunal seemed to have rejected the mutual agreement of the Contracting Parties. . . . The case of *Ascherberg Hopwood and Crew, Ltd. v. Quaritch*, moreover, stands almost by itself." *Op. cit.*, p. 51.

The Permanent Court of International Justice has on a number of occasions referred to the question of the use of *travaux préparatoires* in connection with the interpretation of treaties. In the case concerning the competence of the International Labor Organization in regard to international regulation of the conditions of labor of persons employed in agriculture, the court was confronted with an objection to the introduction of the preparatory work of the Commission on International Labor Legislation by which Part XIII of the Treaty of Versailles was drafted and submitted to the Peace Conference, on the ground that, ". . . as the terms of the Treaty clearly excluded the claim of competence, there was no room for the consideration of extrinsic evidence to the contrary, and that Powers who took no part in the preparatory work were invited to accede to the Treaty as it stood, and did so accede." The court held that it did not "think it necessary to discuss these contentions as it has already on the construction of the text itself reached the conclusion that agricultural labour is within the competence of the International Labour Organization, and there is certainly nothing in the preparatory work to disturb this conclusion." *Publications of the P.C.I.J.*, Series B, No. 2, p. 41. The court must, in fact, have examined the *travaux préparatoires* and become convinced that they contained nothing to suggest a conclusion different from that which it had reached by other methods. See also Series B, No. 12, p. 22.

In the *Lotus Case* the court was asked to interpret Article 15 of the Lausanne Convention of July 24, 1923, "in the light of the evolution of the Convention," the French Government contending that the exercise of jurisdiction by Turkey in the prosecution of Lieutenant Demons was "contrary to the intention which guided the preparation" of the convention. The court, however, reached a decision based on a consideration of the ordinary meaning of the words used in the clause in question, as well as upon the context, and declared that it "must recall in this connection what it has said in some of its preceding judgments and opinions, namely, that there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself." Nevertheless, the court did in fact examine the preparatory work and found that it contained nothing "calculated to overrule the construction indicated by the actual terms of Article 15." *Publications of the P.C.I.J.*, Series A, No. 10, pp. 16, 17. Here again, therefore, although not compelled by them to change its opinion already formulated on other grounds, the court did in fact advert to the *travaux préparatoires* and discuss them in detail. Cf. the court's advisory opinion number 14 relative to the competence of the European Commission of the Danube, where the court based its decision "solely on the language employed in the Statute and on historical facts upon which it rests," and again declared "that there is no occasion to have regard to the protocols of the conference at which a convention was negotiated in order to construe a text which is sufficiently clear in itself" and that "preparatory work should not be used

for the purpose of changing the plain meaning of a text." Nevertheless, the court added that "it will be shown later on that the preparatory work fully confirms the conclusion at which the Court has now arrived," and, after a careful examination of that work, it concluded that "the records of the preparation of the Definitive Statute do not, in the opinion of the Court, furnish anything calculated to overrule the construction indicated by the actual terms of Article 6." Series B, No. 14, p. 28, 31. See also Series A, No. 20-21, p. 30; Series A/B, No. 47, pp. 249-253.

In the case relative to the interpretation of the convention of 1919 concerning the employment of women during the night, the majority of the court based its decision primarily on what it regarded as the clear meaning of the text. As in past cases, nevertheless, the court examined the preparatory work introduced as evidence, and concluded that it but confirmed the conclusion "reached on a study of the text of the Convention. . . ." *Publications of the P.C.I.J.*, Series A/B, No. 50, pp. 378-380. It is significant, however, that five out of eleven judges felt that the *travaux préparatoires* would justify a different conclusion than that which the majority adopted as resulting from a text sufficiently "clear" in itself. Four of them declared that "in their opinion, the agenda, documents and minutes of the Washington Conference which refer to the Berne Convention of 1906 . . . do not permit them to subscribe to the grounds and conclusions of the present opinion." *Ibid.*, p. 382. And Judge Anzilotti, taking into account the object and aim of the convention as indicated by external evidence, considered that the article in question necessarily implied an interpretation opposite to that adopted by the majority. He added that if any doubt were possible as to the intention of the parties, "it would be necessary to refer to the preparatory work, which, in such case, would be adduced not to extend or limit the scope of a text clear in itself, but to verify the existence of an intention not necessarily emerging from the text but likewise not necessarily excluded by that text." *Ibid.*, pp. 383, 388. He regarded the preparatory work as supporting his interpretation rather than that adopted by the majority.

In interpreting Article 33, paragraph 1, of the Convention of Paris in the case relative to the treatment of Polish nationals and other persons of Polish origin or speech in Danzig, the court did refer to *travaux préparatoires*, saying: "This text not being absolutely clear, it may be useful, in order to ascertain its precise meaning, to recall here somewhat in detail the various drafts which existed prior to the adoption of the text now in force." *Publications of the P.C.I.J.*, Series A/B, No. 44, p. 33. Again, in interpreting the words "duly entered into" in the special agreement by which the Governments of France and Greece agreed to submit the *Lighthouses Case* to the court, the court said: "Where the context does not suffice to show the precise sense in which the Parties to the dispute have employed these words in their Special Agreement, the Court, in accordance with its practice, has to

consult the documents preparatory to the Special Agreement, in order to satisfy itself as to the true intention of the Parties." It proceeded, thereupon, to give extended attention to preliminary drafts of the agreement. Series A/B, No. 62, pp. 13, 15-16.

The court definitely refused to give any consideration to *travaux préparatoires* in the *Case concerning the Jurisdiction of the European Commission of the Danube*; this, however, because the preparatory work in question was "confidential and not . . . placed before the Court by, or with the consent of, the competent authority." *Publications of the P.C.I.J.*, Series B, No. 14, p. 32. Finally, in the *Oder Commission Case* the court refused to admit in evidence, and did not consider, the minutes of the commission of the Peace Conference in Paris which prepared the articles of the Treaty of Versailles establishing the commission of the Oder. It did so on the ground that three of the parties to the case before the court had not taken part in the work of the conference which prepared the Treaty of Versailles, and that "accordingly the record of this work cannot be used to determine, in so far as they are concerned, the import of the Treaty." In any particular case, said the court, "no account can be taken of evidence which is not admissible in respect of certain of the Parties to that case." Series A, No. 23, pp. 39, 42.

In connection with the discussion in the paragraphs just preceding, see Bruns, *Fontes Juris Gentium*, Ser. A, sec. 1, Tomus 1, p. 66 ff; Beckett, "Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application," 11 *British Year Book of International Law* (1930), p. 50, and also his lectures in 39 *Recueil des Cours* (1932), p. 257; Hudson, *The Permanent Court of International Justice* (1934), pp. 563-566.

From the above review of the cases it appears that the Permanent Court of International Justice has frankly had recourse to *travaux préparatoires* when called upon to interpret a text the meaning of which it has considered to be doubtful. On the other hand, in cases in which it has been confronted with a text which it has regarded as "clear" or "sufficiently clear", it has repeatedly asserted that *travaux préparatoires* were not then to be taken into account. In almost every such case, nevertheless, the court has in fact looked into the *travaux préparatoires*, but merely, so it has stated, to confirm the conclusions at which it had already arrived. Consequently, it has been said, "the Court has not exercised a complete freedom in the use of *travaux préparatoires*; a resort to them only after a conclusion has been reached is not the same as a resort to them before the conclusion is formulated." Hudson, *The Permanent Court of International Justice* (1934), p. 565. It is not without significance, however, that the court has in fact almost invariably examined *travaux préparatoires* in disposing of contentions based thereon by a party, and it is difficult to be certain, despite the apparent assertions to the contrary, that such material has not entered into the process by which it has arrived at the conviction that a particular text was "clear" and unambiguous

on its face. Finally, it may be remarked that it was only in cases where there appeared to be no conflict between the *travaux préparatoires* and what the court regarded as a "clear" text, that it has stated that preparatory work may not be resorted to to change the plain meaning of a clear text. (See *Publications of the P.C.I.J.*, Series B, No. 12, p. 22, 23.) Such declarations, under the circumstances, must be regarded as in the nature of *dicta*, and it cannot therefore be said that the court has directly passed on the question of the admissibility of having recourse to *travaux préparatoires* in a case where the latter might tend to establish a meaning different from that appearing on the face of the text. Mr. Hudson has said that, "under the approach made by the Court, it seems improbable that it will have a case in which it admits the 'plain meaning' to be clear and in which it will feel compelled by the *travaux préparatoires* to assign a different meaning to the text." *The Permanent Court of International Justice* (1934), p. 565.

It may be noted, in addition to what has been already considered, that the United States Supreme Court frequently takes preparatory work into consideration when interpreting a treaty, and places considerable reliance thereupon as evidence of the actual design of the contracting parties. See *Cook v. United States* (1933), 288 U. S. 102; *Terrace v. Thompson* (1923), 263 U. S. 197; *Kinkead v. United States* (1893), 150 U. S. 483. See also *United States v. Texas* (1896), 162 U. S. 1; *Jordan v. Tashiro* (1928), 278 U. S. 123; *Nielsen v. Johnson* (1929), 279 U. S. 47; *Todok v. Union State Bank* (1930), 281 U. S. 449; *Factor v. Laubenheimer* (1933), 290 U. S. 276. Chang, on the basis of a study of the cases, declares that the Supreme Court relies frequently on the evidence of prior negotiations, that it has not attempted to appraise the relative probative value of deductions drawn from the text itself and evidence furnished by such prior negotiations, and that it has shown no preference for one form of evidence over the other. "The Court," he says, "in ascertaining the design of the contracting parties has followed a simple method of using all possible sources of evidence at its disposal." *The Interpretation of Treaties by Judicial Tribunals* (1933), pp. 131-139.

British courts, especially prize courts, have relied upon evidence found in the records of negotiations and the deliberations of conferences when interpreting treaties. See McNair, "*L'Application et l'Interprétation des Traités d'après la Jurisprudence Britannique*," 43 *Recueil des Cours* (1933), pp. 267-270. See also Lauterpacht, "The so-called Anglo-American and Continental Schools of Thought in International Law," 12 *British Year Book of International Law* (1931), pp. 43-44.

In conclusion, it would seem that it cannot be said that there is any rule of international law forbidding recourse to *travaux préparatoires* when interpreting treaties, and the very fact that courts, both international and national, have in reality examined and in many cases relied upon such material, is certainly suggestive that it would be undesirable to lay down such a rule. Neither is it possible to adopt a rule that evidence contained in *travaux*

préparatoires should in all cases prevail over that found in the text or elsewhere. But *travaux préparatoires* should be examined for such light as they may throw upon the problem confronting the interpreter, inasmuch as they are an inherent part of the "whole picture" of a treaty. Whether or not a text is really "clear", whether or not the *travaux préparatoires* are of a character to be relied upon as revealing the purpose of the parties, whether or not it would be fair to rely upon the evidence therein contained as against a State which had no share in the prior negotiations, etc.—these are all questions which cannot be decided abstractly and *in limine*. They can be answered only in the light of what would seem most reasonable and just under the circumstances of a particular case. We are, therefore, reduced to a rule of reasonableness. As Ehrlich has observed: "Il s'agit d'établir la véritable volonté des parties à l'aide de tous les moyens utiles. Il n'y a donc pas de règles au sujet des groupes de documents qu'on peut ou qu'on ne peut pas consulter, ni au sujet de la manière dont le cours des négociations pourrait être prouvé, ni encore au sujet des conditions dans lesquelles une telle recherche serait, soit admissible, soit nécessaire. Les seuls principes décisifs sont, d'abord le principe de la bonne foi et, comme sa conséquence, le principe de la véritable volonté des parties." *Op. cit.*, 24 *Recueil des Cours* (1928), pp. 125–126.

The subsequent conduct of the parties in applying the provisions of the treaty.

In interpreting a treaty, the conduct or action of the parties thereto cannot be ignored. If all the parties to a treaty execute it, or permit its execution, in a particular manner, that fact may reasonably be taken into account as indicative of the real intention of the parties or of the purpose which the instrument was designed to serve.

The Permanent Court of International Justice has indicated a willingness to apply this "familiar principle" if confronted with an ambiguous agreement. Thus, in an advisory opinion on the competence of the International Labor Organization the court said: "If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty." *Publications of the P.C.I.J.*, Series B, No. 2, p. 39. And as a matter of fact, although the court was "unable to find in Part XIII read as a whole any real ambiguity," it proceeded nevertheless to refer to action taken under the treaty. It pointed out that "the Treaty was signed in June, 1919, and it was not until October, 1921, that any of the Contracting Parties raised the question whether agricultural labour fell within the competence of the International Labour Organization. During the intervening period the subject of agriculture had repeatedly been discussed and had been dealt with in one form and another. All this might suffice to turn the scale in favour of the inclusion of agriculture, if there were any ambiguity." And it also added that: "Every

argument used for the exclusion of agriculture might with equal force be used for the exclusion of navigation and fisheries. As has been pointed out already in this opinion, the second session of the International Labour Conference was almost entirely devoted to seamen. And in that session a recommendation was also made on June 30th, 1920 for the limitation of hours of work in the fishing industry. It was never even suggested that either of these great industries was not within the competence of the Labour Organization." *Ibid.*, pp. 39-41. In a subsequent opinion relative to the competence of the International Labor Organization the court, speaking in like vein, said: "Moreover, the High Contracting Parties, in incorporating in Part XIII, relating to 'Labour', a provision for the first meeting of the General Conference . . . themselves included in the agenda of the Conference 'the extension and application' of the Convention prohibiting 'the use of white phosphorus in the manufacture of matches'. The measure was thus treated as falling within the sphere of labour legislation; and this may be regarded as a contemporaneous practical interpretation made by the High Contracting Parties of the scope of the competence which they had conferred upon the International Labour Organization." Series B, No. 13, p. 19.

The court supported the correctness of its interpretation of paragraph 4 of the annex following Article 179 of the Treaty of Neuilly by a reference to the conduct of the parties. The court held that "the correctness of this view is also confirmed by the fact that the Greek Government itself has interpreted the notion of 'reparation' in this sense . . ." and that "therefore, the decision . . . by the Reparation Commission . . . is not opposed to an interpretation which appears to be that of the two Contracting Powers at the time of the conclusion of the Treaty of Neuilly." *Publications of the P.C.I.J.*, Series A, No. 3, pp. 8-9.

In its advisory opinion No. 15 the court laid down the "principle of interpretation" that: "The intention of the Parties, which is to be ascertained from the contents of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive." *Ibid.*, Series B, No. 15, p. 18.

Arbitral tribunals have acted in accordance with the principle here under discussion. In the decision in the *Chamizal Case*, the umpire said: "On the whole, it appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the Treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary." 5 *American Journal of International Law* (1911), p. 805. Cf. also the following statement in the *North Atlantic Fisheries Case*: "Now considering that the evidence seems to show that the intention of the parties to the treaty of 1818, as indicated by the records of the negotiations and by the subsequent attitude

of the Governments was to admit the United States to such fishery, this tribunal is of opinion that it is incumbent on Great Britain to produce satisfactory proof that the United States are not so entitled under the treaty." Scott, *Hague Court Reports* (1916), p. 190.

National courts, also, take into account the conduct of the parties when interpreting treaties. See, in this connection, the decision of the United States Supreme Court in *Factor v. Laubenheimer* (1933), 290 U. S. 276. (Cf. *Terrace v. Thompson* (1923), 263 U. S. 197.) The court there said: "In ascertaining the meaning of a treaty we may look beyond its written words to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter, and to their own practical construction of it." The court gave a great deal of weight, in its decision, to diplomatic correspondence between the American Secretary of State and the American Minister in London, which it regarded as establishing a practical construction of the Treaty of 1842 from which the United States had not receded. Although the principle stated by the court is undoubtedly sound, it may be open to question whether the material relied upon by it in this particular case actually constituted a "practical construction". See Hudson, "The Factor Case and Double Criminality in Extradition," 28 *American Journal of International Law* (1934), pp. 274, 302-303. See also *Pigeon River Improvement Slide and Boom Co. v. Cox* (1934), 291 U. S. 138, where the Supreme Court relied upon a "practical construction" which had been put upon Article 2 of the Webster-Ashburton Treaty by both Canada and the United States, and which neither party to the treaty had ever regarded as amounting to a breach of the treaty. The court, under those circumstances, found "no ground for rejecting the practical construction which the treaty has thus received."

In connection with the consideration of the action or conduct of the parties to a treaty, it may be proper to refer to the formal interpretation of treaties by the parties themselves. It is too obvious to need comment that the same parties which created an instrument by agreement may also, by agreement, place upon it such interpretation as they wish. Therefore, if the parties to a treaty agree formally upon an interpretation which they will regularly place upon it, such an interpretation has the same "*physionomie*" as the treaty itself, and, in a sense, it becomes incorporated into the treaty. Fauchille (1 *Traité de Droit International Public*, pt. 3, 1926, sec. 841) remarks that such an interpretation by all the parties has "un caractère vraiment officiel et participe de la force obligatoire de l'acte lui-même auquel elle s'incorpore." Cf. Pic, "De l'Interprétation des Traités Internationaux," 17 *Revue Générale de Droit International Public* (1910), pp. 7-8; Duez, "L'Interprétation des Traités Internationaux," 32 *ibid.* (1925), p. 432. It may take the form of an interpretative protocol, a declaration, etc. Ehrlich says: "Il va sans dire que l'interprétation authentique, comme tout autre accord international, n'implique pas une forme spécialement déterminée." *Op cit.*,

24 *Recueil des Cours* (1928), p. 36. Cf. also 1 Oppenheim, *International Law* (4th ed., 1928), p. 715, and Article 5 of this Convention. Thus the *additional protocol* of May 22, 1897 (25 Martens, *Nouveau Recueil Général de Traités*, 2d ser., p. 226) contained an official interpretation of certain provisions of the convention of November 14, 1896, on private international law; the *declaration* of September 11, 1860, between France and Sardinia (17 Martens, *ibid.*, pt. 2, p. 49) fixed the interpretation of paragraph 3 of Article 22 of the treaty of March 24, 1760, between those two countries; and the *declaration* signed by Italy and France on July 16, 1873 (1 Martens, *ibid.*, 2d ser., p. 367) fixed the "*sens*" of Article 1, section 23 of the treaty of extradition of May 12, 1870, between those two countries. Again, the *protocol* to the Convention on the Suppression of Counterfeiting Currency, opened for signature at Geneva on April 20, 1929, was interpretative of that convention signed the same day; the *declaration* concerning the Treaty relating to Insular Possessions and Insular Dominions in the Pacific Ocean, signed at Washington December 13, 1921, was interpretative of the treaty of the same date; the *protocol* to the Convention on the Simplification of Customs Formalities, opened for signature at Geneva November 3, 1923, interpreted the convention of the same date. Hudson, *International Legislation* (1931), Nos. 216a, 63a, 100a.

A formal interpretation of a treaty agreed upon by the parties has the same juridical effect as the original treaty itself; usually, indeed, it is expressly provided that it shall "have the same force, effect and duration" as the treaty to which it refers. See, e.g., Hudson, *International Legislation* (1931), No. 100a, No. 216a; Martens, 25 *Recueil Général de Traités*, 2d ser., p. 226. It is, therefore, binding upon all of the parties, each of which must take whatever action is necessary for its complete observance. Thus the courts of France, and of Italy (with exceptions), recognized the binding force of the declaration of September 11, 1860, exchanged between France and Sardinia, interpreting the treaty of March 24, 1760, the court of Paris declaring in *La Moderazione c. la chambre d'assurance maritime* that "Cet acte bilatéral se lie et fait corps avec l'ancien traité, dont il se borne à donner l'interprétation; il fait, comme lui, loi entre les parties contractantes et ne peut cesser d'être obligatoire pour l'une d'elles, sans cesser de l'être en même temps pour l'autre. . . ." 6 *Journal du Droit International* (1879), p. 545; and for Italian views, *ibid.*, p. 305 ff.

The principle that an authoritative interpretation of an instrument made by the parties thereto must be followed by an international tribunal has been implicitly admitted by the Permanent Court of International Justice. But the court has not followed the principle where the "authoritative interpretation" sought to be relied upon was not the product of parties competent to make it. Thus in its opinion on the Jaworzina question, the court refused to admit as authoritative an interpretation by the Conference of Ambassadors of its own previous decision, given, however, *after* the task entrusted to

it had been completely fulfilled. The court said: "Without success it has been maintained . . . that the letter of November 13th, 1922, from the Conference of Ambassadors, which had already taken the decision of July 28th, is the most authoritative and most reliable interpretation of the intention expressed at that time, and that such an interpretation, being drawn from the most reliable source, must be respected by all, in accordance with the traditional principle; *ejus est interpretare legem cujus condere.*" It would suffice, declared the court, "to reduce this objection to its true value, to observe that it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it. Now, as has been stated above, the Conference of Ambassadors did not retain this power after the decision of July 28th, 1920, by which it fulfilled the task entrusted to it." *Publications of the P.C.I.J.*, Series B, No. 8, p. 37.

The conditions prevailing at the time interpretation is being made.

Finally, it is to be remembered that the task of the interpreter is to give a treaty the interpretation which will effectuate the purpose thereof under current conditions. If, for example, the purpose of a treaty is to prevent smuggling across the border, it may well be that an interpretation thereof which would achieve that purpose in 1800 would not do so in 1934 with the now existing means of rapid transportation, aerial travel, etc. This is not, of course, to imply that the interpreter is authorized to *alter* a treaty to meet new and changed conditions; it does mean, however, that the interpreter must consider the effect which his interpretation will produce under current conditions and decide if that effect will be harmonious with the purpose behind the treaty.

Again, for example, if subsequent agreements have supplemented or added to a treaty, the treaty should be interpreted in the light of all such supplements or additions existing at the time the interpretation is made, for any or all of them may contain factors essential to a proper conclusion. The United States Supreme Court has been criticized for having failed to do this when called upon, in the case of *Factor v. Laubenheimer* (1933), 290 U. S. 276, to interpret the extradition treaties in force between the United States and Great Britain. The original agreement was contained in Article 10 of the Webster-Ashburton treaty of 1842, but by subsequent conventions the provisions thereof were made applicable to new lists of crimes. These subsequent conventions were to "be considered as an integral part" of preceding ones. It has been said:

It was clearly the duty of the court to examine the treaty of 1842 as it existed in 1933, *viz.*, with the additions made in 1889, 1900, 1905, 1922, and 1925. Yet it did not do this. The additions of 1922 and 1925 are not referred to in the opinion. This was possibly because they apply only to the United States and Canada; but as part of the now existing

convention of 1889, if not of the now existing treaty of 1842, they may very well influence the interpretation of other provisions in that convention. (Hudson, "The Factor Case and Double Criminality in Extradition," 28 *American Journal of International Law*, 1934, p. 301.)

(b) When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different versions a common meaning which will effect the general purpose which the treaty is intended to serve.

COMMENT

The text of a treaty is often recorded in several different languages. In such a case, the version in each language is commonly referred to as a separate "text", as the "French text", the "German text", etc., although it would probably be more accurate to refer to them as several versions of a single text. In any event, unless the treaty expressly provides otherwise, *all* the texts or versions are authoritative. There is no rule of international law which gives precedence to a text or version in any particular language. See Hudson, "Languages Used in Treaties," 26 *American Journal of International Law* (1932), p. 368 ff. Therefore the versions in all languages must be considered together, with a view to finding a common meaning which harmonizes with the provisions in the different languages, and which at the same time is consistent with the general purpose which the treaty was intended to serve.

This principle was apparently recognized by the Permanent Court in the *Mavrommatis Case*, where it said:

The Court is of opinion that, when two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. (*Publications of the P.C.I.J.*, Series A, No. 2, p. 19.)

In the same case, although the court regarded the English term "public control" as having a more limited meaning than the French "*contrôle public*", and therefore, under the rule above, was bound to adopt the former, it nevertheless did not interpret "public control" in its narrowest English sense. On the contrary, it took the phrase "public control" to mean something in the nature of general government regulation rather than merely just government ownership, because "this wider meaning of the English expression appears to be the only one which does not nullify the expression *contrôle public* in the French version: it seems hardly possible to read the latter as referring exclusively to cases where a public administration itself takes in hand an undertaking." *Ibid.*, p. 20. In short the court took the comparatively wider meaning of the English expression which harmonized with

both the English and French versions and with what the court considered to be the sense understood by both parties.

In *United States v. Arredondo* (1832), 6 Pet. 691, the Supreme Court was confronted with a divergence in the equally authoritative English and Spanish versions of the Treaty of Cession signed February 22, 1819. The opinion of the court said:

. . . and thus considering the Treaty in both languages, and each as is declared at its head, "original", the one version neither controls nor is to be preferred to the other; each expresses the meaning of the Contracting Parties, respectively, in their own language, as in the opinion of each, expressing and declaring the intention of both. If they are mistaken, and the words used do not and are not understood afterwards by the Parties to convey the same meaning in both languages; then, both being originals, and of equal authority, we must resort to some other mode than the inspection of the treaty to give it a proper construction. . . .

On the basis of internal evidence, and on the principle that since the King of Spain was the grantor whose will should control and whose language should be given more weight, the court concluded that the Spanish version expressed the true meaning and should prevail. This was evidently the sound and logical approach to the case. It is impossible to agree with Oppenheim's statement that "unless the contrary is expressly provided, if a treaty is concluded in two languages and there is a discrepancy between the meaning of the two different texts, each party is only bound by the text in its own language," and that "a party cannot claim the benefit of the text in the language of the other party." It has been suggested that this view of Oppenheim, which must be regarded as erroneous, may have been due to statements of English courts in such cases as *Rex v. Brixton Prison* (1912), 3 K. B. 190, 197. Hudson, *The Permanent Court of International Justice* (1934), p. 559, n. 2.

Where a treaty has been drafted in one language, and later translated into several versions of equal authority, courts have shown a tendency to resort to the "basic" language when confronted with a divergence. Thus, in the *Mavrommatis Case*, the Permanent Court considered that its decision to adopt the narrower English term "public control" was "indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English." *Publications of the P.C.I.J.*, Series A, No. 2, p. 19. And see the *Guastini Case* (Ralston, *Venezuelan Arbitrations of 1903*, pp. 730, 749), where, confronted with equally authoritative English and Italian versions, the umpire said:

The text of the Protocol is in English and in Italian. It was the result of long negotiations between the representatives of England, Germany, and Italy on the one hand, and Mr. Bowen, Venezuela's

representative, on the other. These negotiations were carried on almost altogether in English, and the drafts (afterwards becoming protocols) were in English. It is therefore evident that the basic language is English, and in case of difference of translation resort should be had to it.

Where a treaty itself specifies that the text or version in a certain language shall prevail in case of difference, then, of course, an interpretation in accord therewith and consistent with the general purpose which the treaty was intended to serve must prevail as against one based merely on one of the texts not recognized as authoritative. As Ehrlich with apparent reason points out, however, the other texts not recognized as authoritative are not, for that reason, to be regarded as non-existent and of no import whatsoever, and therefore an interpretation which is consistent with the purpose which the treaty was intended to serve, and which at the same time harmonizes with *all* texts, both authoritative and non-authoritative, is to be preferred. *Op. cit.*, 24 *Recueil des Cours* (1928), pp. 98-99.

WHO MAY INTERPRET TREATIES

It is not the function of this Convention to provide machinery for the interpretation of treaties or for settling disputes arising out of their interpretation or application. It is felt, however, that a discussion of the interpretation of treaties would be incomplete without some reference as to who or what authorities may interpret treaties and as to the legal effect of their decisions.

It is, of course, purely a matter of municipal law as to what organs of the State may interpret a treaty in so far as its infraterritorial effect is concerned. With that we are not concerned here. Viewed, however, in its international aspect only, the interpretation of treaties is always, in the first instance, a matter to be determined by agreement of the parties themselves. Acceptance of a particular interpretation as a result of recourse to good offices, mediation or conciliation still amounts to interpretation by agreement of the parties.

In the event of failure to arrive at a mutually satisfactory interpretation of a treaty by means of negotiation and mutual agreement, the parties to a treaty may, in case of disagreement between them as to its meaning, submit the question at issue to some neutral person, organ or authority by whose decision they agree to abide. They may, in other words, agree to have recourse to arbitration or judicial settlement. The interpretation of treaties is essentially a judicial process, and, in any case, the neutral and presumably unprejudiced judge or arbitrator, more than any organ or agency of the interested parties, is likely to arrive at a fair and unbiased interpretation. In consequence, this method of interpretation, called by some authors "*interprétation juridictionnelle*" (Ehrlich, *op. cit.*, 24 *Recueil des Cours*, 1928, p. 38; Duez, "*L'Interprétation des Traités Internationaux*," 32 *Revue Générale de Droit International Public*, 1925, p. 435), has been generally recognized as

most desirable. Thus, by Article 16 of the Hague Convention of 1899 for the Pacific Settlement of International Disputes the contracting parties recognized that "in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is . . . the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle." And in 1907 they added that "it would be desirable that, in disputes about the above-mentioned questions, the contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit." (Article 38.) Scott, *The Hague Conventions and Declarations of 1899 and 1907* (New York, 1915), p. 55. By Article 13 of the Covenant the Members of the League of Nations declare "disputes as to the interpretation of a treaty . . . to be among those which are generally suitable for submission to arbitration." And the forty-odd states of the world which have signed the Optional Clause of the Protocol of Signature of the Statute of the Permanent Court of International Justice have accepted the jurisdiction of that court as "compulsory, *ipso facto* and without special agreement" in disputes concerning the interpretation of a treaty. Nor has this recognition of the value of arbitration been confined to declarations and resolutions. Beginning with the mixed commissions under the Jay Treaty of 1794 the number of cases submitted to international arbitral or judicial settlement, many if not most of them arising out of or involving conflicting unilateral interpretations of treaties, has constantly increased. And it has been stated that, with perhaps five or six exceptions, "all the cases submitted to the Court [*i.e.*, Permanent Court of International Justice] have related to the construction of complicated and obscure treaty or contract provisions. . . ." Beckett, "Decisions of the Permanent Court of International Justice, etc.," 11 *British Year Book of International Law* (1930), p. 1. Cf. Hudson, *The Permanent Court of International Justice* (1934), p. 543. In the face of such overwhelming evidence regarding the practice of States themselves, it would be supererogation to quote the statements of the numerous publicists who have recommended recourse to arbitration or judicial process for the settlement of international differences in the matter of treaty interpretation. The value and the desirability of such recourse is everywhere recognized today.

As to the juridical effect of an "interpretation placed upon a treaty by an international court of justice or arbitral tribunal, one can do no better than to refer to the pronouncements contained in the Hague Convention for the Pacific Settlement of International Disputes and the Statute of the Permanent Court—both declaratory of international law on this point. The Hague Convention of 1907 declares that "recourse to arbitration implies an engagement to submit in good faith to the award," that "the award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal," and finally that "the award is not binding except on the parties in dispute. When it concerns the interpretation of a

Convention to which Powers other than those in dispute are parties, they shall inform all the signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them." (Convention of October 18, 1907, cited *supra*, Articles 37, 81, and 84.) The Statute of the Permanent Court, in similar vein, declares that "the decision of the Court has no binding force except between the parties and in respect of that particular case," that the "judgment is final and without appeal," and that whenever "the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith. Every State so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it." (Articles 59, 60, and 63.)

Two facts are evident from these pronouncements: (1) the interpretation of a treaty contained in the award of an arbitral tribunal or in a decision of the Permanent Court is binding only on those parties to the treaty who were also parties, original or intervening, to the case before the tribunal or the court, and (2) such an interpretation is conclusive only with respect to the particular case submitted for decision. But the other parties to the treaty thus interpreted, and who did not appear as parties to the case before the tribunal or court, are not legally bound by the interpretation made, and even the parties to the case themselves are not bound by that interpretation except with regard to the particular dispute submitted to the court. In strict theory this is all true. However, as the practice of international arbitration has acquired more and more prestige as a result of increasing recourse thereto, and as the Permanent Court of International Justice has demonstrated repeatedly its high capacity to render generally approved decisions based on law and equity, there has been an increasing tendency to show great respect for arbitral awards or opinions of the court, and to recognize in international as in national jurisprudence the applicability of the doctrine of *stare decisis*, or of something closely resembling it. Cf. 1 Moore, *International Adjudications* (1929-1931), p. lxviii ff; Garner, *Recent Developments in International Law* (1925), p. 524 ff. Under such circumstances an arbitral award or decision of the Permanent Court interpretative of a multipartite treaty would undoubtedly carry a moral force which would cause all the parties to the treaty, even though some of them may not have been parties to the case and are not therefore legally bound, to attribute great weight to it, not only as regards the particular dispute involved, but as regards their general application of the treaty in the future as well.

To summarize, it may be said that, in so far as treaties in their international aspect are concerned, they may be authoritatively interpreted by the parties themselves through mutual agreement, either directly and through the ordinary channels of international relations, or indirectly as the result of recourse to good offices, mediation, or conciliation. Or they may be

interpreted by an international organ or agency, permanent or *ad hoc*, to whose decision and interpretation the parties to the dispute agree to submit. In other words, the parties to a treaty may agree to an interpretation of their own making or they may decide to accept that of some outside person, organ or authority mutually agreed upon. Under international law they are entirely free to choose either method, unless the treaty involved specifically binds them to have recourse to one or the other, or unless they are bound by some general treaty obliging them to have recourse to certain methods for the settlement of their international disputes. Some treaties themselves provide that, in the event of a difference or dispute arising as to their interpretation, the difference shall be settled by diplomacy. See, for example, 5 *League of Nations Treaty Series*, p. 295; 18 *ibid.*, p. 223. Such provisions are of comparatively little value because, unless one envisages the very rare case of complete deadlock resulting from an absolute refusal of the parties even to discuss the question of their conflicting interpretations, recourse to diplomacy would be the natural and normal procedure in any case. Difficulty does not arise until diplomacy, resorted to either voluntarily or as the result of a stipulation therefor in the treaty, fails to lead to an interpretation acceptable to the parties. To meet that situation many treaties contain a so-called *clause compromissoire* obliging the parties to have recourse to arbitration for the settlement of any disputes arising between them as to their interpretation and which cannot be settled by agreement of the parties. For examples see 1 *League of Nations Treaty Series*, p. 381; 3 *ibid.*, p. 171; 23 *ibid.*, p. 430; 21 *ibid.*, pp. 215, 259; 6 *ibid.*, p. 329; 8 *ibid.*, p. 119; 10 *ibid.*, p. 424. Other treaties bind the parties to have recourse to some particular arbitral tribunal already established. 8 *ibid.*, p. 387; 3 *ibid.*, p. 219. Still others oblige the parties to accept the opinion of some organ of the League of Nations. 20 *ibid.*, p. 33 (the opinion of the Council); 25 *ibid.*, p. 440 ("shall be settled by the Council of the League"). Again, the obligation sometimes is to have recourse to settlement in accordance with the provisions of a specified general arbitration or conciliation treaty. 18 *ibid.*, p. 297 ("shall be settled in accordance with the Arbitration and Conciliation Treaty dated December 3, 1921"). And, finally, provision is made for recourse to the Permanent Court of International Justice. 38 *ibid.*, p. 369; 14 *ibid.*, p. 127; 23 *ibid.*, p. 85; 9 *ibid.*, p. 55. The parties to the treaty whose interpretation is in dispute may, even in the absence of express provision therein, be bound by other treaties between them to submit such disputes to arbitration or to the Permanent Court. See, *e.g.*, Articles 2 and 20 ff of the Convention on Conciliation and Arbitration signed at Helsingfors January 17, 1925; Article 17 ff of the General Act for the Pacific Settlement of International Disputes, adopted at Geneva September 27, 1928; Article 1 of the General Treaty of Inter-American Arbitration signed at Washington January 5, 1929. Hudson, *International Legislation* (1931), Nos. 135, 207, 211. The members of the League of Nations are especially bound by Article

13 of the Covenant to submit to arbitration disputes which they recognize as suitable for settlement by that process, and they declare disputes concerning the interpretation of a treaty to be of that nature. Finally signatories of the Optional Clause of the Statute of the Permanent Court of International Justice are obliged to recognize "as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning: (a) the interpretation of a treaty. . . ."

As has been pointed out above, recourse to some specified method of settling conflicts concerning the interpretation of treaties when a mutual agreement of the parties is not or cannot be reached, is highly desirable. And inasmuch as all the parties to a treaty may not at the same time be parties to general agreements binding them to have recourse to arbitration or to the Permanent Court in such cases, and especially since, even if they are, further difficulty may arise as to whether or not the particular dispute comes within the scope of the general agreement as modified by reservations, etc., it is highly desirable that every treaty should itself contain provision for its own interpretation. 1 Hudson, *International Legislation* (1931), p. lx.

ARTICLE 20. PACTA SUNT SERVANDA

A State is bound to carry out in good faith the obligations which it has assumed by a treaty (pacta sunt servanda).

COMMENT

This article is merely declaratory of what is believed to be a rule of international law, one which has seldom been challenged in practice, and one the validity of which tribunals, both national and international, have always assumed, whenever cases involving the binding force of treaties have come before them for adjudication. No case is known in which any tribunal ever repudiated the rule or questioned its validity. Occasionally, treaties themselves expressly pledge the parties to a faithful observance of their stipulations. See, for example, the treaty of July 3, 1844 (Article 34), between the United States and China. 1 Malloy, *Treaties, etc. of the United States*, p. 206. But such pledges add nothing to the obligation of the parties in respect to their duty of performance; they merely declare a duty existing under international law, independently of any specific assurances as to this which the treaty may contain.

It may happen that the fulfillment of a treaty obligation requires the citizens or inhabitants of the State to do or refrain from doing certain things, in which case the State is responsible for seeing that they are done or prevented from being done. Reference may be made in this connection to the note addressed by the British Government to the Soviet Government, October 24, 1924, demanding that the latter government put a stop to the activities of individuals and organizations engaged in spreading bolshevist

propaganda in Great Britain in violation of the terms of an agreement of June 4, 1923, between the two countries. Referring to this agreement and a recently concluded treaty, the note said:

His Majesty's Government mean that these undertakings shall be carried out both in the letter and in the spirit, and it cannot accept the contention that whilst the Soviet Government undertakes obligations, a political body, as powerful as itself, is to be allowed to conduct a propaganda and support it with money, which is in direct violation of the official agreement. The Soviet Government either has or has not the power to make such agreements. If it has the power it is its duty to carry them out and see that the other parties are not deceived. If it has not this power and if responsibilities which belong to the State in other countries are in Russia in the keeping of private and irresponsible bodies the Soviet Government ought not to make agreements which it knows it cannot carry out. (12 *Bulletin de l'Institut Intermédiaire International*, 1925, pp. 33-34.)

Cf., in this connection, the assurances given by M. Litvinoff to President Roosevelt as to the policy of the Soviet Government as a condition of its recognition by the United States. 28 *American Journal of International Law* (1934), Supp., p. 3.

Treaties not infrequently require by their express terms appropriations of money or the enactment of legislation to insure their execution. An increasing number, especially of multipartite treaties, pledge the parties to enact certain specified legislation, or to propose or recommend to their legislatures the enactment of such legislation. See, *e.g.*, Article 12 of the Convention of March 14, 1884, for the Protection of Submarine Cables (2 Malloy, *Treaties, etc.*, p. 1954), which obligated the parties "to take or to propose to their respective legislative bodies the measures necessary in order to secure the execution of this Convention, and especially in order to cause the punishment, either by fine or imprisonment or both, of such persons as may violate the provisions of Articles 2, 5 and 6." See also Article 5 of the General Act for the Repression of the African Slave Trade, signed July 2, 1890 (*ibid.*, p. 1970), which pledged the parties, in case they had not already done so, "to enact or propose to their respective legislative bodies, in the course of one year at the latest from the signing of the present General Act, a law rendering applicable, on the one hand, the provisions of their penal laws concerning grave offenses against the person," etc. See also Article 122 of the Algeiras Convention, signed April 7, 1906 (*ibid.*, p. 2157); Article 27 of the Convention of July 6, 1906, for the Amelioration of the Condition of the Wounded in Armies in the Field (*ibid.*, p. 2192); Article 19 of the International Wireless Telegraph Convention, signed November 3, 1906 (3 *Treaties, etc. of the United States*, p. 2894), which bound the high contracting parties "to take or propose to their respective legislatures, the necessary measures for the execution of the present convention"; Articles 20 and 24 of the Convention and Final Protocol for the Suppression of the Abuse of Opium and Other Drugs, signed

January 23, 1912, and July 9, 1913 (*ibid.*, pp. 3032 and 3034), which pledged the parties to examine into the possibility of enacting laws or regulations making illegal the possession of raw opium, etc., unless they already had existing laws or regulations regulating the matter, and to propose the drafts of such laws and regulations within six months after the coming into force of the convention; and Article 4 of the Convention of March 2, 1923, for the Preservation of the Halibut Fishery of the Northern Pacific Ocean (*ibid.*, p. 2661), which pledged the high contracting parties "to enact and enforce such legislation as may be necessary to make effective the provisions of this Convention, with appropriate penalties for violations thereof." Bipartite treaties also sometimes bind the parties or one of them to enact certain legislation. See, *e.g.* Article 10 of the Protocol between the United States and Haiti for the Establishment of a Claims Commission, signed October 3, 1919 (*ibid.*, p. 2681), by which Haiti bound herself to enact legislation to compel the attendance before the commission of witnesses whose testimony was desired in connection with any claims before the commission and to require the production of papers which the commission might deem necessary for it to consider.

When the obligation is merely upon the executive to propose or recommend legislation for the consideration of the legislature, the obligation is discharged when the recommendation has been made. There would seem to be no obligation on the part of the legislature in such cases to comply with the recommendation. When, however, the faith of the State is pledged to enact legislation necessary to the execution of a treaty, it is clearly the duty of the executive to recommend such legislation and of the legislature to enact it, and if the executive fails to do so it is then the duty of the legislature to act independently of the executive and upon its own initiative. The failure of either organ to collaborate in whatever process is required for the enactment of the necessary legislation, would involve a violation of the rule *pacta sunt servanda*. The principle was thus stated by Mr. Livingston, Secretary of State of the United States, in 1833:

The government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations. (2 Wharton, *International Law Digest*, 1887, p. 67.)

A similar view was expressed by the French Conseil d'Etat in 1839, when it affirmed that the obligation to execute treaties rests not upon a single organ or authority but upon all those, legislative, executive and judicial, whose collaboration may be necessary. Dalloz, 42 *Jurisprudence Générale, Répertoire*, pt. I, No. 131, p. 555. See, in the same sense, Wright, "The Legal Nature of Treaties," 10 *American Journal of International Law* (1916), p. 722, and

"Treaties and the Constitutional Separation of Powers," 12 *ibid.* (1918), p. 84.

If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation, just as much as if the breach had been an affirmative act by any other department of the government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions; and, as foreign nations dealing with it cannot be permitted to interfere with or control these, so they are not to be affected or concluded by them, to their own injury. (Dana's *Wheaton*, Dana's note No. 250, citing Kent, 1, 165-166.)

The opinion of Kent was that "treaties of peace, when made by the competent Power, are obligatory upon the whole nation. If the treaty requires the payment of money to carry it into effect and the money cannot be raised but by an act of the legislature, the treaty is morally obligatory upon the legislature to pass the law, and to refuse it would be a breach of the public faith." 1 *Commentaries on American Law* (12th ed., 1873), p. 166. As to the duty of the Congress of the United States to make the necessary appropriations of money for the execution of a treaty of cession, it has been said: "That Congress is under no obligation to make the stipulated appropriation has not been seriously advanced by the House since 1868, although individual advocates of the view have not been wanting." Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 177. See also the following observation of Hyde (2 *International Law*, p. 51):

It is not unreasonable to assert that when, for example, the United States concludes a treaty contemplating payment by it for the cession to itself of territory, the nation incurs a legal obligation to make payment, and incidentally agrees that the Congress will not fail to make the requisite appropriation.

The controversy between the United States and France arising out of the refusal of the French Chamber of Deputies to make an appropriation for the execution of the indemnity convention of July 4, 1831, is well known. The convention had been ratified by the King in accordance with the constitution, but the Chamber of Deputies claimed that since it required an appropriation of money the Chamber should have been consulted in advance of its conclusion and that the United States was presumed to know that under the constitution of France the execution of such a convention was dependent upon the collaboration of the Chamber. The Government of France endeavored to obtain the appropriation, and, when the Chamber rejected the appropriation bill, the Minister of Foreign Affairs resigned. Finally, after a threatened recourse to reprisals by the United States, the Chamber yielded and made the appropriation required by the convention. Throughout the con-

troversy, the Government of the United States took the position that the convention was binding upon any and all departments of the French Government whose collaboration was necessary to its execution, and that while the intervention of Parliament may have been necessary to its execution it was not necessary to the validity of the convention. Wharton (2 *International Law Digest*, 1887, p. 20), distinguished the action of the French Chamber from that of the United States Congress in refusing for a time to pass the necessary legislation for the execution of the Jay Treaty, on the ground that in the latter case it was a refusal to approve a treaty relating exclusively to the future, whereas the action of the French Chamber involved a refusal to provide for the payment of a debt which "had been over and over again admitted to be due by France." As to the controversy, see 5 Moore, *History and Digest of International Arbitrations* (1898), p. 4463 ff, and 5 Moore, *Digest of International Law* (1906), p. 231. As to the constitutional issue involved, see Chailley, *La Nature Juridique des Traités Internationaux* (1932), pp. 224-225.

The phrase "carry out in good faith" as used in Article 20 is not intended to suggest that the obligation of a State to fulfill its treaty engagements is merely one of good faith rather than a legal obligation. It has reference rather to the manner or spirit in which the obligation is to be performed—the degree of fidelity, strictness and conscientiousness manifested in the fulfillment of the promise made. The obligation to fulfill in good faith a treaty engagement requires that its stipulations be observed in their spirit as well as according to their letter, and that what has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise. It requires that a party refrain from seeking to avoid its duty of performance for trivial reasons or from taking advantage of technicalities of interpretation. It is difficult to be more precise in defining the element of good faith in the performance of treaty obligations. In determining whether in a particular case a State is guilty of lack of good faith in the performance of a stipulation, it may be necessary to take into account a variety of circumstances which cannot be detailed here. One thing is clear; namely, that the utility of the treaty system depends in large measure upon the degree of good faith with which States fulfill the engagements which they have undertaken. Sir Robert Phillimore (1 *International Law* 3d ed., 1879, sec. 136) referred to good faith as "the great moral ligament which binds together the different nations of the globe." It has been said by a French jurist that:

Le principe de la bonne foi doit être un principe fondamental du droit international. Il est commun à toutes les nations civilisées. Il fait partie de la morale internationale. Lord Phillimore, dans la Commission préparatoire du Statut de la Cour, a cité cette notion de la bonne foi comme une de celles admises *in foro domestico*. (Ripert, "*Les Règles du Droit Civil Applicables aux Rapports Internationaux*," 44 *Recueil des Cours*, 1933, p. 637.)

The obligation of good faith in the keeping of covenants was an ancient rule and the fathers of the modern system of international law adopted it as one of the basic principles of their system. Grotius, citing with approval a statement of Cicero to that effect, declared that fidelity to promises was the foundation not only of every particular State but also of that greater society of States which embraces all nations. *De Jure Belli ac Pacis*, lib. III, ch. 25, sec. 1 (*Classics of International Law*, Kelsey trans., p. 860). As good faith among individuals was necessary to hold life together, it was more essential still, he said, that rulers should maintain it inviolate. Even covenants with rebels, deserters, infidels and enemies should be scrupulously kept. *Ibid.*, ch. 19, p. 792 ff. Pufendorf expressed the same view, *Elementorum Jurisprudentiae Universalis*, lib. I, ch. 12 (*Classics of International Law*, Oldfather trans., p. 95). Compare, in the same sense, Suarez, *Tractatus de Legibus*, lib. II, ch. 18, sec. 19, and ch. 7, sec. 4; and Gentilis, *De Jure Belli*, lib. III, ch. 14. Bynkershoek in his chapter on "the observance of public agreements" maintained that treaties "must be kept in good faith" even when the observance "may not be expedient to the State—nay, even when it may be dangerous." "If you destroy good faith," he said, "you destroy all intercourse between princes, for intercourse depends expressly upon treaties; you even destroy international law, which has its origin in tacitly accepted and presupposed agreements founded upon reason and usage." Referring to an admonition addressed in 1595 by the States-General of Holland to Queen Elizabeth, that she observe a treaty made with the Dutch in 1585, and also to a certain book which had appeared in Holland at the time maintaining that treaties should be observed only when it was advantageous to the parties to do so, Bynkershoek relates that the States-General by an "edict" dated May 28, 1669, condemned the book and "openly declared that the doctrine that a pledge was binding only when expedient, was dangerous, abominable, and execrable." Respect for treaty obligations, he concluded, was more necessary in international law than respect for contracts in private law, because there was no superior power competent to compel the parties to a treaty to observe its stipulations: *Pacta privatorum tueretur jus civile, pacta publicorum bona fides*. Bynkershoek admitted that there were generally recognized exceptions to the rule requiring observance of treaty obligations; for example, where one State promises aid to an ally in case he is attacked and the latter is itself unjustly the cause of the attack. But the alleged exception resulting from the rule *rebus sic stantibus*, he repudiated. Although "somewhat more respectable" than the Machiavelian doctrine that a prince is bound by treaties only in so far as it is to his advantage to be bound by them, it is, he said, "perhaps no more just." *Quaestionum Juris Publici*, lib. II, ch. 10 (*Classics of International Law*, Frank trans., p. 190 ff).

Vattel, to quote one more of the classical writers, devoted an entire chapter to "The Faith of Treaties," in which he maintained that the obliga-

tion to fulfill treaty engagements was "indispensable." Who can doubt, he said,

that treaties are among the number of the things to be held sacred by Nations? . . . But treaties are no more than empty words if Nations do not regard them as solemn promises, as rules which are to be inviolably observed by sovereigns and to be held sacred throughout the whole world.

The faith of treaties, that firm and sincere determination, that invariable steadfastness in carrying out our promises, of which we make profession in a treaty, is therefore to be held sacred and inviolate by Nations whose safety and peace it secures; and if States do not wish to be lacking in their duty to themselves they should brand with infamy whoever violates his word.

He who violates his treaties violates at the same time the Law of Nations, for he shows contempt for that fidelity of treaties which the Law of Nations declares sacred, and, as far as is in his power, he renders it of no effect. He is doubly guilty, in that he does an injury both to his ally and to all Nations and the human race as well.

Adverting to the right of the nations acting in concert to restrain a State which shows a contempt for its treaty obligations and which violates them with impunity, he declared that such a nation was "a public enemy which attacks the foundations of the common peace and security of nations." Nevertheless, Vattel admitted that it did not necessarily follow in every case that because a sovereign broke a treaty he meant to flout contemptuously his treaty obligations, since he might have had good reasons for believing that the treaty was no longer binding upon him. "It is the sovereign who fails to keep his promises on clearly trivial grounds, or who does not even take the trouble to offer reasons, or to disguise his conduct and cover up his bad faith, who deserves to be treated as an enemy of the human race." *Le Droit des Gens*, liv. II, ch. 15, secs. 219-222 (Classics of International Law, Fenwick trans., pp. 188-189).

The views of modern writers are mainly reaffirmations and amplifications of the rule laid down by the founders of international law. Most of them dwell upon the necessity of the rule as a fundamental condition of the utility of international law and of an orderly international life. They point out that if treaties were not binding on the parties it would be useless for States to enter into them. See especially Williams, *Chapters on Current International Law*, etc. (1929), p. 109; de Taube, "*L'Inviolabilité des Traités*," 32 *Recueil des Cours* (1930), p. 295 ff; Dupuis, "*Règles Générales du Droit de la Paix*," 32 *ibid.* (1930), p. 83; Urrutia, "*La Codification du Droit International en Amérique*," 22 *ibid.* (1928), p. 194; Ehrlich, "*L'Interprétation des Traités*," 24 *ibid.* (1928), p. 80 (who declares the rule *pacta sunt servanda* to be the basis of all international law and who adds: "enlevez cette règle, et il ne restera de tous les traités internationaux que de vains mots"); Fauchille, 1 *Traité de Droit International Public*, pt. 3 (1926), p. 350; Chailley, *La Nature Juridique des Traités Internationaux* (1932), p. 78; Radoïkovitch, *La Révision des Traités et le Pacte de la Société des Nations* (1930), p. 11 ff; Oté-

téléchano, *De la Valeur obligatoire des Traités Internationaux* (1916), p. 49, and the opinions there cited; Wigniolle, *La Société des Nations et la Révision des Traités* (1932), p. 12 ff; Strupp, *Eléments du Droit International* (Blociszewski trans., 1927), pp. 69 and 190; and Keeton, "The Revision Clause in Certain Chinese Treaties," 10 *British Year Book of International Law* (1929), p. 111. Radoïkovitch (*op cit.*, p. 19) in a review of the doctrine says:

En tous temps et en tous lieux, le principe de la force obligatoire des traités a été reconnu comme la forme fondamentale du droit des gens. Tous les auteurs l'admettent et demandent sa stricte observation; tous ils expriment l'idée du respect des traités sous une forme différente, et cette idée s'impose malgré les restrictions et les exceptions nombreuses dont souvent ils l'entourent et qui, si elles étaient acceptées, tendraient à nier toute valeur aux traités et rendraient impossible toute vie internationale. Il serait inutile de citer tous ces auteurs et les développements qu'ils consacrent à la sainteté des traités et à la nécessité de leur inviolabilité.

Bluntschli (*Droit International Codifié*, Lardy trans., 1881, Art. 410), after affirming that the obligation to respect treaties rests on the conscience and sentiment of justice, declares that: "Le respect des traités est une des bases nécessaires de l'organisation politique et internationale du monde." He adds that this obligation can not be deduced from the free will of States; it is the consequence of the necessary principles on which the organization of mankind rests—necessary because without them peace and the security of relations between peoples would be impossible. Fiore in his draft (*International Law Codified*, Borchard trans., 1918, Art. 735) declares: "Every obligation contracted by one State toward another, produces a legal duty of the obligor to carry out his undertaking, and a legal right of the obligee to demand and exact its fulfillment." Compare also his Articles 769–772.

The principle of the binding force of treaties has been solemnly affirmed in various international acts, declarations and conventions. Among them may be mentioned the Protocol of London of 1871 (61 *British and Foreign State Papers*, p. 1198), which declared it to be "an essential principle of the law of nations that no power can liberate itself from the engagement of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement"; the resolution of the ninth assembly of the League of Nations (*League of Nations Official Journal*, 1928, p. 1669); the treaty of arbitration between Germany and Poland signed at Locarno, October 16, 1925 (Annex D to the Final Act of the Locarno Conference, 54 *League of Nations Treaty Series*, p. 327); the similar declaration in the preamble to the treaty of arbitration of the same date between Germany and Czechoslovakia (*ibid.*, p. 341), and the Covenant of the League of Nations. In the Preamble to the Covenant it is declared that: "The High Contracting Parties, in order to promote international cooperation and to achieve international peace and security . . . by the maintenance of justice and a scrupulous respect for all treaty obligations in

the dealings of organized peoples with one another, agree to this Covenant of the League of Nations." Furthermore, the Covenant provides for the imposition of penalties upon a member State which resorts to war in disregard of certain undertakings. See particularly Articles 10 and 16. In the Convention on Treaties adopted at Havana by the Sixth International Conference of American States February 20, 1928, it is declared (Article 10) that "no State can relieve itself of the obligations of a treaty or modify its stipulations except by the agreement, secured through peaceful means, of the other contracting parties."

The binding force of treaties has been affirmed in a number of decisions by international or quasi-international tribunals. The award of the referee in the matter of the claim of Van Bokkelen against the Republic of Haiti, dated December 4, 1888, cited with approval the London Protocol of 1871, already referred to, as well as the following statement of Chancellor Kent (1 *Commentaries on American Law*, 12th ed., p. 175): "Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals, and these are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and to be kept with the most scrupulous good faith." *U. S. Foreign Relations*, 1886, pt. 1, pp. 1034-1035, and 2 Moore, *History and Digest of International Arbitrations* (1898), pp. 1849-1850. See also the remarks of the arbitrator (William R. Day) in the matter of the claims of John D. Metzger and Co. against the Republic of Haiti: "It need hardly be stated that the obligations of a treaty are as binding upon nations as are private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here." Award of September 27, 1900, *U. S. Foreign Relations*, 1901, p. 276.

In the *North Atlantic Coast Fisheries Case*, a tribunal of the Permanent Court of Arbitration, in its award of September 7, 1910, declared: "Every State has to execute the obligations incurred by treaty *bona fide*, and is urged thereto by the ordinary sanctions of International Law in regard to observance of Treaty obligations. Such sanctions are, for instance: appeal to public opinion, publication of correspondence, censure by Parliamentary vote, demand for arbitration with the odium attendant on a refusal to arbitrate, rupture of relations, reprisal, etc." Wilson, *Hague Arbitration Cases* (1915), pp. 145, 166.

Authority for the existence of the rule *pacta sunt servanda* is found in various decisions of the Permanent Court of International Justice. In its advisory opinion regarding the Exchange of Greek and Turkish populations, (*Publications of the P.C.I.J.*, Series B, No. 10, p. 20) the court, referring to a certain clause in the convention which it had under consideration, said: "This clause, however, merely lays stress on a principle which is self-evident, according to which a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be

necessary to ensure the fulfillment of the obligations undertaken." See also its observations in the case concerning the Polish nationals in Danzig, Series A/B, No. 44, p. 24. "Throughout its jurisprudence, the assumption runs that States will in good faith observe and carry out the obligations which they have assumed. Hence, little hospitality has been shown to reasons advanced by parties for the non-fulfillment of their obligations." Hudson, *The Permanent Court of International Justice* (1934), p. 547. Thus, in the case of *The Wimbledon*, the court, passing upon Germany's obligations under the Treaty of Versailles, refused to be influenced by the argument that in the interpretation of treaty obligations "account must be taken of the complexity of interstate relations," that "international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions," and that if, "as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention." *Publications of the P.C.I.J.*, Series A, No. 1, p. 36. The court has also shown a reluctance to admit impossibility of performance. Thus, in the cases concerning the Serbian and Brazilian loans it was argued on behalf of the Serbian and Brazilian governments that on account of the "economie dislocations" caused by the World War it was impossible for those governments to make payments on certain bonds, in the coin stipulated in the loan contracts. While admitting that there were equities in both cases, the court did not find that impossibility of payment existed in either case. Series A, No. 20/21, pp. 40, 120. It would appear from the language used by the court, however, that had it been a case of actual impossibility of performance this would have been recognized as a proper excuse. Finally, it may be observed that the Permanent Court has affirmed in strong language the principle that any breach of a treaty engagement involves an obligation on the part of the violating State to make reparation for any injury resulting from the breach. Judgment No. 13 concerning the *Factory at Chorzów* (Claims for Indemnity, Merits), Series A, No. 17, p. 29.

While the doctrine and the jurisprudence are in full agreement that treaties are binding on the parties, various explanations have been advanced as to the reasons, legal or otherwise, why they are binding. Many writers, however, do not consider it worth while to go into the matter, merely taking it for granted without deeming it necessary to endeavor to establish the existence of a rule which is universally admitted. For example, Hyde (2 *International Law*, 1922, p. 50) dismisses the subject with the remark that "it may be assumed that the law of nations imposes upon the parties to a treaty the duty to perform faithfully the undertakings which they have agreed to discharge."

The more important of the theories advanced as to why treaties are bind-

ing may be briefly stated. First, there is the "auto-limitation" theory which has been advanced, chiefly by a group of German writers. According to this theory treaties are binding only because the parties to them have freely consented to be bound by them and not because of any obligation resulting from some superior law. Jellinek, *Die rechtliche Natur der Staatenverträge* (1880), p. 1 ff, also his *Gesetz und Verordnung*, p. 197; Sukiennicki, *Essai sur la Souveraineté des Etats en Droit International Moderne* (1926), p. 170 seq.; Bergbohm, *Staatsverträge und Gesetz als Quellen des Völkerrechts* (1876); and Nippold, *Der völkerrechtliche Vertrag* (1894), pp. 19-22. This theory has few supporters today. It was discredited in part because its outstanding advocate, Jellinek, maintained that international law could be disregarded by a State if it were opposed to its interests. *Op. cit.*, pp. 46-49. In effect, as has been pointed out, this theory amounts to the very negation of international law. Borchard, "Governmental Responsibility in Tort," 36 *Yale Law Journal* (1927), p. 1086 ff. "As a legal theory," says Lauterpacht (*Function of Law in the International Community*, 1933, p. 411), "the doctrine of self-limitation cannot be interpreted otherwise than as a denial of the binding force of international law." The objections to the theory have been pointed out by many writers. For example, Verdross, "*Le Fondement du Droit International*," 16 *Recueil des Cours* (1927), p. 266 ff; Brierly, "*Le Fondement du Caractère Obligatoire du Droit International*," 23 *ibid.* (1928), p. 482; Chailley, *La Nature Juridique des Traités Internationaux* (1932), p. 102; Duguit, "The Law and the State," 31 *Harvard Law Review*, special number (1917), p. 139 ff; and Triepel, *Droit International et Droit Interne* (Brunet trans., 1920), p. 76 ff.

A second theory which has been the subject of much writing is that which regards the rule *pacta sunt servanda* as a fundamental axiom or postulate which is incapable of juridical demonstration. Among those who have adopted this view may be mentioned Anzilotti (1 *Cours de Droit International*, Gidel trans., 1929, p. 42 ff) and Kelsen (*Das Problem der Souveranität und die Theorie des Völkerrechts*, 1920, p. 106; and "*Droit Interne et Droit International*," 14 *Recueil des Cours*, 1926, p. 302 ff, and "*Ordres Juridiques Statiques*," 42 *ibid.*, 1932, pp. 183 and 282). Anzilotti (*op. cit.*, pp. 43-44), referring to the special category of norms of conduct which are established by means of treaties between States, says:

La force obligatoire de ces normes dérive du principe que les Etats doivent respecter les accords conclus entre eux: *pacta sunt servanda*. Ce principe, précisément parce qu'il est à la base des normes dont nous parlons, n'est pas susceptible d'une démonstration ultérieure du point de vue de ces normes elles-mêmes: il doit être pris comme une valeur objective absolue ou, en d'autres termes, comme l'hypothèse première et indémontrable à laquelle se rattache d'une façon nécessaire cet ordre, comme tout autre ordre, de connaissances humaines.

He adds:

Tout ordre juridique consiste en un complexe de normes qui tirent

leur valeur obligatoire d'une norme fondamentale, à laquelle elles se ramènent toutes, directement ou indirectement. La norme fondamentale détermine, par suite, quelles sont les normes qui composent un ordre juridique donné et les ramène à l'unité. Ce qui distingue l'ordre juridique international, c'est que, dans cet ordre international, le principe *pacta sunt servanda* ne repose pas, comme dans le droit interne, sur une norme supérieure; c'est lui-même qui est la norme suprême.

Kelsen (*op. cit.*, 14 *Recueil des Cours*, p. 303) places the rule *pacta sunt servanda*, which, he says, is an original, unique and juridically undemonstrable hypothesis, at the base of a pyramid of norms which in his opinion constitute in their *ensemble* the entire system of law, although strictly speaking this hypothesis is not itself a part of the system of positive law but serves as its "first foundation."

Chailley (*op. cit.*, p. 79 ff) examines critically these and other theories that have been advanced in explanation of why treaties are binding and concludes that none of them are correct. His own view is that the rule *pacta sunt servanda* is merely an application to treaty engagements of the general principle of good faith. This, he maintains, was the view of early writers on international law, particularly Suarez and Bynkershoek. Triepel (*Droit International et Droit Interne*, Brunet trans., 1920, p. 62 ff, and 1 *Recueil des Cours*, 1923, p. 79 ff), likewise rejects the theory of the fundamental hypothesis, which he pronounces a "pure fiction," and defends, instead, the theory of the collective will (explained and criticized by Chailley, *op. cit.*, p. 106 ff, and by Lauterpacht, *Function of Law in the International Community*, 1933, p. 415).

Some writers (e.g., Merignhae, 2 *Traité de Droit Public International*, 1907, p. 634) find in the analogy between treaties and contracts in private law the basis of the rule *pacta sunt servanda*. Lauterpacht (*Private Law Sources and Analogies of International Law*, 1927, ch. IV) has dwelt upon the analogy, and while he points out very correctly that it does not always hold good in the sense that every rule of private law may be resorted to for the interpretation of treaties (p. 176), he regards the analogy of their binding force as a sound one. It may be remarked in this connection that the Supreme Court of the United States in almost all of its definitions of a treaty has described it as being "primarily a contract", or "in its nature a contract", between nations. See, e.g., *Ware v. Hylton* (1796), 3 Dall. 199; *Whitney v. Robertson* (1888), 124 U. S., 195; *United States v. Arredondo* (1832), 6 Pet. 735; and *Ford v. United States* (1927), 273 U. S. 618. If this be true, the question might be disposed of by saying that treaties are binding on the parties for the same reason that contracts between individuals are binding on the parties to them. The various theories advanced as to why contracts at private law are binding are discussed by Cohen, *Law and the Social Order* (New York, 1933), p. 88 ff. Chailley (*op. cit.*, p. 98), observes that the rule *pacta sunt servanda* originated in the Roman civil law and from

it was transferred to international law and applied to treaty engagements between States.

Perhaps a majority of jurists support the theory that treaties are binding because there is a generally recognized rule of customary international law which obliges States which become parties to treaties to fulfill their treaty engagements. Thus Oppenheim (1 *International Law*, 4th ed., p. 704), says the categorical answer to the question "why are treaties legally binding, must be that this is so because there exists a customary rule of international law that treaties are binding." See, in the sense, Cavaglieri, "*Règles Générales du Droit de la Paix*," 26 *Recueil des Cours* (1929), p. 525; Urrutia, "*La Codification du Droit International en Amérique*," 22 *ibid.* (1928), p. 194; Lawrence, *Principles of International Law* (7th ed., 1923), p. 303; Radoïkovitch, *op. cit.*, pp. 11 ff and 29, who concludes that the rule enunciates a principle of positive law and also an ethical norm based on good faith; 1 de Louter, *Droit International Public Positif* (1920), p. 471; and Heilborn, *System des Völkerrechts* (1896), p. 8.

Some older writers, especially those who belonged to the law of nature school, have derived the rule *pacta sunt servanda* from the law of nature. Others have found its foundations in the necessities of international life, the self interest of States, the sentiment of justice and morality, the principle of good faith, etc. 2 Pradier-Fodéré, *Traité de Droit International Public* (1885), p. 844, and Redslob, *Histoire des Grandes Principes du Droit des Gens* (1923), p. 19. Brierly points out (*op. cit.*, 23 *Recueil des Cours*, 1928, pp. 546-547), that, just as in the case of the rules of law generally, so in the case of the rules of international law, one must always reach a point where a juridical explanation of its obligatory force becomes impossible and an explanation will have to be sought outside the law, that is, perhaps, in the field of morals, between which and law there is a connection which cannot be ignored.

Whatever may be the true reason why treaties are binding on the parties, there is a universal consensus that they are binding and are binding independently of the will of the parties. Lauterpacht remarks (*Function of Law in the International Community*, 1933, p. 419) that it matters little what explanation is accepted, since in any case "the rule in its actual operation confronts the State independently of its will." Whether, he says, the rule is juridical or pre-legal, whether it is imposed as a matter of juridical construction or as a clear generalization from the actual practice and legal conviction of States, the result is the same—"in both cases, the basic rule constitutes a command, *i.e.*, a rule existing independently of the will of the parties. It is of no consequence that in the international sphere the command does not issue from a political superior." See, in somewhat the same sense, Radoïkovitch, *op. cit.*, p. 13.

It is hardly necessary to say that the fact that treaty engagements are sometimes broken, occasionally, though rarely, with impunity, proves

nothing against the validity of the principle *pacta sunt servanda*. Nor does the absence of a sanction established by law for insuring the observance of treaties afford any evidence that the parties are not legally bound. 2 Hyde, *International Law* (1922), pp. 2-3, and Pollock, Introduction to Phillipson's edition of *Wheaton's International Law* (1916), p. xli. In fact, in the vast majority of cases treaties are observed in good faith and cases are rare, at least in normal times of peace, in which States have denied the binding force of treaties the validity of which was admitted. Brierly, "Sanctions," in *Transactions of the Grotius Society*, 1931, p. 1. National self-interest, a sense of duty, respect for promises solemnly made, the desire to avoid the obloquy which is attached to the breaking of contracts, and the force of habit are influences sufficient in the overwhelming majority of cases to insure a scrupulous observance of treaties. If in particular cases these forces prove ineffective, the fear of reprisal is likely to deter a State from violating its treaties. In practice, whenever a State defaults in the performance of its treaty obligations it is promptly taken to task by the other party and if the default is persisted in without proof that it was justified, reparation will be demanded for any injuries which the innocent party may sustain in consequence of the default. Sometimes the head of a State whose legislative assembly has enacted legislation in violation of the State's treaty obligations will take steps to have the legislation repealed, when his attention has been called to the contravening legislation. Reference may be made in this connection to President Wilson's address to Congress on March 5, 1914, in which he relied upon respect for treaty obligations as his principal argument for the repeal of the Panama Canal Tolls Act. 8 *American Journal of International Law* (1914), p. 593. See also the appeal of Senator Root for the repeal of the Act, in his addresses to the Senate January 21, 1913, and May 21, 1914. Root, *Addresses on International Subjects* (1916), pp. 207 and 241.

So strong is national sensitiveness to accusations involving the good faith of a country in the observance of its treaty obligations that almost invariably when a State is charged with violating a treaty it promptly replies to the accusation with a denial of the truth of the charge, or with a denial that the treaty was actually in force and binding upon it at the time the alleged violation occurred, or that the act complained of was forbidden by a correct interpretation of the treaty; or, in case the truth of the charge is admitted, with the defense that the act was justified on the ground of non-observance of the treaty by the other party or that it was justified as a legitimate act of reprisal or on the ground of other extenuating circumstances. See Williams, *Chapters on Current International Law, etc.* (1929), p. 10, and Radoïkovitch, *op. cit.*, p. 29. As to such accusations during the World War, see Garner, *Recent Developments in International Law* (1925), p. 806 ff.

According to the view of some writers, the rule *pacta sunt servanda* is not an absolute one, but is subject to certain limitations or exceptions, *e.g.*, that

which is enunciated by the rule *rebus sic stantibus*. See Radoïkovitch, *La Révision des Traités* (1930), p. 135 ff ("the obligation to remain faithful to treaties has its limits"); Otétéléchano, *De la Valeur Obligatoire des Traités* (1916), p. 119; and Wigniolle, *La Société des Nations et la Révision des Traités* (1932), pp. 12 and 27, who declares:

si solidement établie que soit la maxime *pacta sunt servanda*, elle ne peut pas être un principe absolu: son empire cesse là où son application stricte conduit à des résultats iniques et injustes que reproche la conscience juridique . . . le traité qui n'a de valeur que parce qu'il est en conformité avec un état donné du droit objectif peut perdre sa force obligatoire par suite du changement des circonstances . . . on renait alors qu'elle [la règle *pacta sunt servanda*] n'est que relative et comporte une exception capitale que représente la clause *rebus sic stantibus*.

See also Goellner, *La Révision des Traités sous le Régime de la Société des Nations* (1925), p. 10 ff, who sees in the *clausula rebus sic stantibus* a principle by which the rigor of the rule *pacta sunt servanda* is tempered and "conciliated." Attention may also be called to the cautious observation of Brierly, who, while admitting that the "sanctity" of treaties is commanded by international interest, suggests that "if international law insists too rigidly on the binding force of treaties, it will merely defeat its own purpose by encouraging their violation." *The Law of Nations* (1928), p. 169. In the same sense see Eagleton, "Problems of International Legislation," 8 *Temple Law Quarterly* (1934), p. 505. Writers of course are by no means lacking who maintain that a State is under no obligation, legal or moral, to observe the stipulations of a treaty to which it has been compelled under duress to become a party, save treaties of peace which have been imposed on a defeated belligerent at the close of a war, and there are some who do not admit even this exception if the war was declared by the State which imposed the treaty in violation of international law or of its own treaty engagements. See on this point the comment on Article 32 of this Convention.

It may be pointed out in this connection that one of the principal criticisms of the rule *rebus sic stantibus* is that it tends to undermine the more important and fundamental rule *pacta sunt servanda*. See, e.g., Schmidt, *Über die völkerrechtliche clausula rebus sic stantibus* (1907), p. 72; Otétéléchano, *op. cit.*, p. 120; and the comment on Article 28 of this Convention. As interpreted by those writers who recognize the right of unilateral termination by a dissatisfied party on account of a change of conditions, the two rules are undoubtedly incompatible, and the *clausula rebus sic stantibus* would render illusory the rule *pacta sunt servanda*. But few reputable authorities today in fact so interpret it. Article 28 of this Convention emphatically rejects the right of unilateral termination because of changed conditions. It does not purport to enunciate a principle by which a party may be released from the obligation to fulfill its treaty engagements while the treaty is still in force. The two rules, *pacta sunt servanda* and *rebus sic*

stantibus, as formulated in this Convention and interpreted in the comment, are, therefore, not at all inconsistent. Nor is there anything in Articles 17, 21, 26, 27, 29, 31 and 32 which might be interpreted as being inconsistent with the rule.

ARTICLE 21. TREATIES CONCLUDED BY INCOMPETENT ORGANS

A State is not bound by a treaty made on its behalf by an organ or authority not competent under its law to conclude the treaty; however, a State may be responsible for an injury resulting to another State from reliance by the latter upon a representation that such organ or authority was competent to conclude the treaty.

COMMENT

The words "made" and "conclude" are used in this article synonymously. They mean more than is implied by the term "negotiate"; they have reference to the sum total of the acts or processes by which a treaty is brought into force with respect to a State. Thus if, in order to come into force with respect to a State, a treaty must be signed and ratified on its behalf, and the instrument of ratification deposited at a designated place, the treaty is not "made" or "concluded" by that State until all those acts are performed.

The words "organ or authority" have reference to any public functionary, body, department or branch of government which makes or concludes the treaty. For our purposes there is no distinction between an "organ" and an "authority". The former term is frequently used in Europe; the latter is preferred in the United States. It might perhaps be said that while the head of the State or the parliament is an "organ", the Minister of Foreign Affairs, or a diplomatic representative is an "authority", but if such a distinction has any foundation in legal theory it is of no practical consequence in the interpretation or application of this Convention.

The words "not competent" have reference to the lack of legal power or capacity on the part of the organ or authority which concludes the treaty. They envisage two sorts of incompetence; (1) incompetence to conclude any treaty whatever; and (2) incompetence to conclude a particular treaty whose validity may be questioned. Thus a treaty concluded by the Interstate Commerce Commission of the United States would be a treaty concluded by an "incompetent organ", because that body does not have, under the Constitution or laws of the United States, any treaty-making power whatever. Likewise, an organ or authority which is competent to conclude some treaties, or treaties generally, but which has no competence to conclude a particular kind of treaty must be regarded as an incompetent organ so far as the conclusion of that particular treaty is concerned. Thus, an organ which is competent to conclude treaties generally but which is forbidden to conclude treaties of alliance or secret treaties or a particular type of extradition treaty is manifestly an incompetent organ so far as the conclusion of the latter kinds

of treaties is concerned. That is to say, an organ is an incompetent one, as regards any treaty concluded by it in excess of its constitutional or legal power to conclude that treaty.

In the United States, where the advice and consent of two-thirds of the members of the Senate present is required by the constitution before the President can make certain treaties, a treaty of that type, if concluded by the President without the advice and consent of the Senate or with the advice and consent of less than two-thirds of the senators present would be one concluded by an incompetent organ or authority. In short, an organ to be competent must be the whole organ or such part of it, where it is a collective organ, as the constitution or laws of the State on behalf of which it acts, requires.

The legislative approval required may take several forms. First, the consent of one chamber of a bicameral body may be required. This is the requirement in the Constitution of the United States (Art. 2, sec. 2), and in the constitutions of certain Latin American countries, for example, that of Cuba (Art. 68) where the consent of the Senate is necessary to ratification. In the second place, it is provided by some constitutions that certain kinds of treaties negotiated and ratified by the head of the State must be submitted by him to both chambers of the legislative assembly and approved by them before they become binding. Article 8 of the Constitutional Law of France of July 16, 1875, is a typical example of such provisions:

Le Président de la République négocie et ratifie les traités. Il en donne connaissance aux Chambres aussitôt que l'intérêt et la surété de l'Etat le permettent.—Les traités de paix, de commerce, les traités qui engagent les finances de l'Etat, ceux qui sont relatifs à l'état des personnes et au droit de propriété des Français à l'étranger, ne sont définitifs qu'après avoir été votés par les deux Chambres.

The Constitution of Belgium (Art. 68) contains a similar requirement, empowering the King to make treaties of peace, alliance, and commerce, but treaties of commerce and those which impose a financial burden on the State or which affect the private rights of Belgians are valid only after the chambers have given their approval. Similar provisions are found in other constitutions.

Looked at from the point of view of the juridical consequences of the non-observance of such requirements it may be stated that the existing constitutional provisions are of two kinds. In the first group are those which are entirely silent on the subject, there being no indication whether a treaty concluded in violation of these provisions is to be regarded as invalid internally, or internationally, or both, or whether, in case it is considered as internationally valid and internally invalid, the organ which exceeded its competence shall be held nationally responsible, etc. Among constitutional provisions falling within this group may be mentioned Art. 75 of the Constitution of Albania of 1925, Sec. 33 of the Constitution of Finland of 1919,

Art. 45 of the Constitution of the German Republic of 1919, Art. 18 of the Constitution of Denmark of 1915 as amended in 1920, Sec. 64 of the Constitution of Czechoslovakia of 1920, Art. 60 of the Constitution of Esthonia of 1920, and Art. 2, sec. 2 of the Constitution of the United States.

In the second group are those which expressly declare what shall be the juridical effect of the excess of competence on the part of the organ which concludes, or participates in the conclusion of, the treaty, the usual provision being that such treaty "shall have no effect." Constitution of Italy of 1848, Art. 5; of Belgium, 1831, Art. 68; of Luxemburg, 1919, Art. 37; of Egypt, 1930, Art. 46. Such provisions deal with the effect of non-observance of constitutional requirements relative to the assent of the legislative assembly. They do not relate to limitations on the competence of the treaty-making organs with respect to the *kinds* of treaties which they may conclude.

Reference may now be made to a group of constitutional provisions which impose certain restrictions or prohibitions on the treaty-making power, that is, limitations on the competence of the treaty-making organs, so far as their power to conclude certain kinds of treaties is concerned. Two examples may be cited. Thus the Constitution of Spain of December 9, 1931, in effect forbids the conclusion of secret treaties. Article 76 reads: "Secret treaties and conventions as well as secret clauses in a treaty or convention whatever they may be, are not binding upon the nation." The Constitution of Mexico of January 31, 1917 (Art. 15), expressly forbids "the conclusion of treaties for the extradition of persons charged with political offences and common law offenders who have the status of slaves in the country in which the offences were committed; likewise is forbidden the conclusion of treaties or conventions which would have the effect of diminishing the rights and guarantees established by this constitution for the benefit of the man and the citizen." It would seem that any organ in Spain or Mexico which should conclude one of the treaties thus forbidden would be an incompetent organ, so far as its authority to conclude such a treaty is concerned. This view has recently been challenged by Professor P. B. Potter ("Inhibitions upon the Treaty-Making Power of the United States," 28 *American Journal of International Law*, 1934, p. 456 ff), who argues that the treaty-making power of a State is derived primarily if not wholly from international law rather than from its own constitution; that while the constitution may regulate to some degree the exercise of this power, as when it requires the observance of a certain procedure in the making of treaties, or requires that they shall be negotiated by certain organs and approved by certain other organs, it does not create or confer the treaty-making power; that the power conferred by international law is plenary and, with perhaps some reservations in behalf of the supremacy of international law itself, is unlimited, and that it cannot be destroyed or fettered by constitutional restriction or prohibitions. Therefore, constitutional provisions which purport to "prohibit" or "restrict" (as contradistinguished from those which "regulate") the exercise of

the treaty-making power are not binding upon the State. Something can be said in favor of this view but neither the general doctrine nor the practice justifies us in proceeding upon it.

The question of the status of a treaty, particularly as regards its binding force, concluded by constitutionally incompetent organs, including those which act in excess of their competence, has been a subject of prolific controversy among writers in international law. In particular, the controversy has raged over the question as to the status of a treaty ratified and proclaimed as being in force by the head of the State but which has not in fact received the approval of the legislative assembly or one of the chambers thereof, when such approval is required by the constitution.

We find on the one side those who maintain that the conditions of the validity of treaties are determined by international law and not by the national law of the particular States concluding them. A treaty, therefore, which has been ratified and promulgated or proclaimed by the head of the State to whom, it is argued, international law attributes the right to speak for the State in its international relations, must be regarded as a valid and binding treaty, even though the authorities who participated in making it exceeded their competence or failed at some points in the process to comply with the procedural requirements of the constitution relative to the making of treaties, or even violated a substantive provision of the constitution. This is all the more true if the head of the State in his act of ratification recites or declares that the treaty was concluded in conformity with the requirements of the constitution. In that case, it is argued, other States have a right to assume that his recital or declaration was a truthful one and they are under no obligation to verify by inquiry or investigation its correctness. Other States are not concerned with the question whether a State has imposed upon itself constitutional limitations relative to the extent of its treaty-making power or as to the manner of its exercise, or whether, in case it has done this, it has conformed to those requirements when it has concluded a treaty. This is a national or municipal matter and not one of international concern. A State derives its power to enter into treaties with other States from international law, and if it chooses to place limitations or restrictions on the exercise of that power or to regulate the manner of its exercise, it is free to do so; but if, after having done this, it neglects or deliberately refuses to conform to the requirements of its own law, that is a matter of no concern to other States. It may raise a question of national responsibility as regards the authorities or organs which have disregarded their own law, but it involves no question of international responsibility. A distinction is sometimes made between ordinary procedural requirements of the constitution relative to the making of treaties and the essential or fundamental requirements, such as those requiring the assent of the legislative assembly. Non-conformity with the former requirements does not render the treaty invalid but disregard of the latter deprives it of its obligatory force.

Among those who apparently go the whole length and hold that no constitutional provisions have any significance or effect upon the international validity of treaties, may be mentioned F. de Martens (1 *Traité de Droit International*, Léo. trans., 1883, p. 524); Laband (2 *Staatsrecht des Deutschen Reiches*, 3d ed. 1895, p. 185); Seligmann (*Abschluss und Wirksamkeit der Staatsverträge*, 1890); Heilborn (*System des Völkerrechts*, 1896); and Geffcken (note on Heffter, *Europaischen Völkerrecht*, 7th ed., p. 192).

Anzilotti (1 *Cours de Droit International*, Gidel trans. 1929, p. 364 ff) maintains that the conditions of the validity and efficacy of treaties depend exclusively on international law; one cannot therefore speak of the internal or constitutional validity of a treaty. A treaty is valid and binding internationally or it is not binding at all; it cannot therefore be internationally binding and at the same time internally not binding. A declaration of the head of the State, for example, in his act of ratification, that a treaty has been concluded in accordance with the requirements of the constitution, is conclusive as to the facts, and other States are under no duty to examine into the matter with a view to verifying the correctness of the facts declared by the head of the State. He admits that this rule may result in "practical inconvenience," and that it may seem to some a fundamentally indefensible proposition in principle that a State should be bound by a treaty which was not "constitutionally authorized." But such inconvenience, he adds, is "exceptional, we might say, pathological, because it supposes that the chief of State wishes to violate his constitutional duties, and that, on the contrary, the inconveniences of the opposite thesis would be normal, and, in a certain sense, physiological." Anzilotti thus states his conclusion:

La conclusion à laquelle nous arrivons est donc que le droit international impute à l'Etat la déclaration de la volonté de stipuler faite en due forme par le chef de l'Etat, sans prendre égard aux dispositions constitutionnelles qui, d'une façon quelconque, limitent sa compétence ou lui imposent des devoirs. Nous disons "par le chef de l'Etat", nous référant ainsi au cas le plus important et le plus grave: ajoutons immédiatement toutefois que lorsque, en conformité avec une pratique désormais bien établie, des accords internationaux sont conclus sans l'intervention des chefs des Etats contractants, notre conclusion vaut pour les déclarations de volonté des organes dument autorisés à conduire les négociations et à conclure l'accord. La question, qui est de droit constitutionnel, de savoir si, dans ces cas, la compétence des organes doit se ramener à une délégation de compétence du chef de l'Etat et si cette délégation est valable, est dénuée de pertinence au regard du droit international. (1 *Cours de Droit International*, Gidel trans. 1929, p. 366.)

Cavaglieri ("*Règles du Droit de la Paix*," 26 *Recueil des Cours*, 1929, pp. 500-501) is likewise, possibly with reservations, a partisan of this view. It is, he says, based on considerations of expediency, the continuity of international relations, and mutual respect by States for the sovereignty and internal organ-

ization of one another. The maxim of Roman private law, *qui cum alio contrahit non est vel non debet esse ignarus conditionis ejus*, is not a principle of international law and cannot be invoked in support of the contrary view. That principle is one of private law and not of international law.

This view also appears to have the support of Bittner (*Die Lehre von den völkerrechtlichen Vertragsurkunden*, 1924, p. 86 ff), who bases his conclusion on the character of the formulas employed by States in the instruments of full powers issued to their negotiators, the language employed in treaties, and in the forms of instruments of ratification commonly employed. These instruments support the legal validity of the treaty in international law, although it may not be so according to the constitutional law of one of the parties. If, he thinks, it should become a general rule, as it is tending to become, for instruments of ratification to contain a recital that the treaty has received the approval of the legislature where its approval is required, or was duly ratified in conformity with other constitutional requirements, and an instrument of ratification contained no such reference, it would then be the duty of the other party or parties to endeavor to ascertain whether the constitutional requirements had been complied with. Since, however, there is not as yet any such general practice, there is no duty on the part of the other party to satisfy itself by investigation as to the matter of conformity with the constitution, and a treaty which has not received legislative approval as required by the constitution would nevertheless be internationally binding on the party whose constitution had thus been violated.

Verdross ("*Règles Générales du Droit International de la Paix*," 30 *Recueil des Cours* (1929), p. 300) declares that according to "general rules" a treaty "irregularly" concluded engages the responsibility of the State by which it has been ratified and its invalidity cannot therefore be pleaded by the party whose constitution has not been complied with. Basdevant ("*La Conclusion et la Rédaction des Traités*," 15 *Recueil des Cours*, 1926, p. 581), is likewise, with some reservations, a partisan of the theory that a treaty ratified by the head of the State and proclaimed or promulgated by him as one which represents the will of the State, is binding on the State and its validity cannot be challenged, even though it was not concluded in accordance with the requirements of that State's constitution. According to international customary law, this attestation by the head of the State relative to the will of the competent organ must, he says, be believed. "L'autre Etat n'a pas à la contrôler, à vérifier son exactitude constitutionnelle." However, Basdevant appears to recognize a distinction between mere irregularities of procedure in the matter of ratification and "manifest violations" of the constitution. In the latter case it would be contrary to the mutual respect which States owe one another to insist on the binding force of a treaty which has been ratified in clear violation of the constitution, and "a State which would invoke the validity of such a treaty would be failing in its international duties." See, in the same general sense, 1 Fauchille, 14 *Revue Général de Droit International*

Public (1907), p. 665 ff; Despagnet, "*Les Difficultés Internationales venant de la Constitution de Certains Pays*," 2 *ibid.*, p. 184 ff; and Pitamic, *Die Parlamentarische Mitwirkung bei Staatsverträgen in Österreich* (1915), p. 37 ff.

Willoughby (*The Fundamental Concepts of Public Law*, 1924, p. 313 ff), goes to the length of asserting that "whatever undertakings" are entered into by the treaty-making organs of a State are "internationally binding upon the State which they represent," apparently whether they were made in conformity with the constitutional provisions of such State or not. He adds that while one State when dealing with another is presumed to know which organs of that other State are competent to enter into treaties which will be constitutionally binding upon itself, it is also true that:

in any given case, one State is entitled to rely upon the assertion of the executive head of a State or of his plenipotentiary or agent, that he is qualified to negotiate a treaty which will be immediately binding without ad referendum proceedings. The assertion thus made might be without constitutional warrant, but the State would none the less be internationally bound, for it could not be held that the other contracting State would be qualified or obligated to determine the question, which might be a very technical one, of the proper interpretation and application of the provisions of the other State's constitutional laws.

The Danish Government in its *exposé de droit* in the Eastern Greenland Case (*Publications of the P.C.I.J.*, Series C, No. 63, 1933, p. 881 ff), quoted the opinions of two Norwegian jurists to the effect that treaties concluded in contravention of the procedure required by the Constitution of Norway, are nevertheless binding on the State. (Gjelsvik, *Laerbok i Folkeret*, Oslo, 1915, p. 219, and Lie, *Legitimation ved Traktat*, Kristiania, 1922, p. 127.)

Many writers, however, who defend the general principle that the international validity and binding force of treaties is determined by international law and not by the law of the parties, and that therefore constitutional provisions relative to the extent of the treaty-making power and the manner of its exercise do not, in general, have any international significance, nevertheless admit that such essential provisions as those which require the assent of the legislative chambers cannot be disregarded without affecting the validity of the treaty. This is apparently the view of Tezner who has discussed the question in detail in an article entitled "*Zur Lehre von der Giltigkeit der Staatsverträge* (20 *Zeitschrift für das privat und öffentliche Recht der Gegenwart*, 1893, p. 123 ff). He argues that the international validity and binding force of a treaty cannot be judged, at least solely, on the basis of the constitutional law of the parties, that its international validity must not be confused with its constitutional validity, and that international law, which determines the conditions of the validity or invalidity of treaties, is not concerned with the question whether in the conclusion of a treaty the constitutional procedural requirements of the parties have been complied with. Nevertheless, he apparently does not go to the length of maintaining, as

Geffcken, Martens, Heilborn and others do, that a treaty would still be binding upon a State if it had not been approved by the legislature when the constitution required such approval.

This summary of the opinions of an important group of writers on international law shows that there is a large body of doctrine to the effect that the international validity of treaties is a matter which is determined by international law, that while a State may by constitutional provisions limit and regulate the exercise of the treaty-making power, such provisions have no international significance, and that treaties made by the organs designated by the constitution to exercise the treaty-making power are binding as international engagements even though the treaty-making organ or organs exceeded their constitutional competence.

Turning now to the opposite view, we find that there is an equally large body of opinion—perhaps larger—which maintains that the international validity of treaties and the competence of the treaty-making authorities, are determined, in part at least, by the constitutional law of the States which enter into them and that international law recognizes that this law must be taken into account; that a treaty which has not been made in conformity therewith does not express the real will of the State and is not therefore binding on such State, either internally or internationally; that the notion that a State may be bound internationally when it is not bound internally or constitutionally, is illogical and contradictory; and that it is both the right and duty of a State when negotiating with another State to verify by inquiry the facts relative to the competence of the treaty-making organs of the latter State. According to this view a treaty can bind a State to do only what the treaty-making authority is competent under the constitution of that State to bind it to do, and therefore a treaty which is unconstitutional or *ultra vires* for want of competence on the part of the treaty-making authorities or for excess of competence, is null and void and consequently not binding on the State whose constitution has been violated.

Strupp (*Eléments du Droit International Public*, 1927, p. 182), affirms that a treaty is valid only when it has been concluded in accordance with the modes of procedure provided by the national law of the State on behalf of which it was concluded; he defends the rule *qui cum alio contrahit non est vel non debet esse ignarus conditionis ejus*, which, he says, means that according to international custom every State is bound to satisfy itself not only as to what is the competent organ under internal law to conclude treaties, but also as to whether the conditions under which this organ may conclude them have been fulfilled.

In a report to the International Institute of Public Law, Schücking declared: "A treaty is only binding upon the parties when it has been concluded by competent organs and when all the constitutional provisions relative to the conclusion of treaties have been observed." There is no rule of international law, he said, which authorizes the head of a State, independ-

ently of his constitutional powers, to conclude treaties which are binding upon the State. It is the duty of States when concluding treaties with other States to inform themselves as to the competence of their treaty-making organs and (apparently) also as to whether they have acted within the limits of their competence. *Annuaire de l'Institut International de Droit Public*, 1930, p. 225. See also the report of M. Politis (*ibid.*, p. 216), who apparently adopts the same view. See also F. de Visser, "*Des Traités Imposés par la Violence*," 12 *Revue de Droit International et de Législation Comparée* (3d ser. 1931), p. 527. Charles de Visser (2 *Bibliotheca Visseriana*, 1924, p. 98), declares that treaties bind a State definitively only when they have been concluded in accordance with the constitutional law of the parties, and that each party is bound to take into account the constitutional provisions of the other, governing the exercise of the treaty-making power. A treaty which has been ratified without the assent of the legislature when it is required by the constitution is not therefore binding under international law. Hobza has made a trenchant criticism ("*La République Tchécoslovaque et le Droit International*," 29 *Revue Général de Droit International Public* (1922), p. 398 ff) of the theory that a State may be bound externally by a treaty which is not binding internally and which therefore the public authorities are under no obligation to execute. See also Mirkine-Guetzévitch, "*Droit International et Droit Constitutionnel*," 38 *Recueil des Cours* (1931), p. 400; Liszt, *Droit International* (Gidel trans., 1929), p. 181; Bluntschli, *Droit International Codifié* (Lardy trans., 1881), Art. 404 bis; and Barthélemy et Duez, *Traité Élémentaire de Droit Constitutionnel* (1926), pp. 646-647. A treaty which is not made in conformity with the constitution, the two latter authors assert, is juridically null and void, and does not bind the State. Clunet reached a similar conclusion ("*Du Défaut de Validité de Plusieurs Traités Diplomatiques Conclus par la France avec les Puissances Etrangères*," 7 *Journal du Droit International Privé*, p. 5 ff). Chailley (*La Nature Juridique des Traités Internationaux*, 1932, pp. 175 and 215) declares that it is the internal public law of each State which determines the international validity of treaties, including the competence of the authorities charged with concluding them, and that there is no rule of international law which attributes validity to treaties which have been unconstitutionally concluded. He points out that bipartite treaties frequently declare by their own terms that they shall be ratified according to the respective procedures required by the constitutions of the States entering into them, and he refers to various multipartite treaties containing similar provisions, adding that they would be more numerous if it were not for the fact that such provisions would be superfluous. See also an article by Schoen entitled "*Die völkerrechtliche Bedeutung staatsrechtlicher Beschränkungen der Vertretungsbefugnis der Staatsoberhäupter beim Abschlusse von Staatsverträgen*," in 5 *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1911), p. 400 ff, in which he criticizes the theory of Anzilotti, Heilborn, Geffcken, Martens and others, and main-

tains that a treaty concluded in violation of the constitutional provisions of a State is not binding upon it and that it is the duty of each party to satisfy itself by examination whether a declaration by the head of the State that a treaty has been ratified in accordance with the constitutional procedure required, really corresponds with the facts.

Hyde (2 *International Law*, 1922, sec. 494), adverting to the provisions of constitutions which "in various ways limit and regulate the exercise of the right to conclude treaties, restricting the conclusion of treaties designed to effect certain objects, or prescribing the method by which the State shall give its consent to certain classes of engagements," asserts emphatically that "an unconstitutional treaty must be regarded as void." In the same sense, see Nippold, *Der völkerrechtliche Vertrag* (1894), p. 100 ff; and Kusters, "*Le Caractère Juridique des Traités relatifs aux Droits Légaux des sujets*," in 9 *Bulletin de l'Institut Intermédiaire International* (1923), p. 24, who points out that while in Imperial Germany, under the influence, especially of Laband, the contrary view prevailed, it ceased to be dominant under the Republic. Kusters, referring to the statement of a delegate in the assembly of Weimar (1919) to the effect that while the assent of Parliament was necessary to the internal validity of a treaty it was not necessary to its international binding force, quotes Preuss as denying with emphasis this proposition and asserting that no treaty could be regarded as valid internationally unless it was at the same time valid constitutionally, and that "its validity, and consequently the obligation of the Reich to enforce it, depends always on the fact that the conditions laid down in the constitution have been fulfilled."

Hall (*International Law*, 6th ed., p. 318), and Oppenheim (1 *International Law*, 4th ed., p. 709), are emphatic in the opinion that treaties concluded in violation of constitutional restrictions do not bind the State whose constitution is thus violated.

McNair, in a detailed discussion of the subject ("Constitutional Limitations on the Treaty-Making Power," in Arnold, *Treaty-Making Procedure*, Oxford, 1933, especially p. 3 ff), adverting to the common provisions in the municipal law of States relative to the exercise of the treaty-making power, "compliance with which is essential for the conclusion of a treaty binding upon the State and for its application and enforcement," distinguishes between: (a) those requirements which are essential to make a treaty binding on the State and (b) those which are essential only to its application and enforcement by and within the State. An example of the former would be the common provision that the assent of the legislative assembly or a particular chamber thereof is necessary to the ratification and putting into force of a treaty. If the head of the State in which such a constitutional requirement existed should ratify a treaty and proclaim it to be in force without its having received such legislative assent (and this lack of assent were a matter of common knowledge), the treaty would "incontestably" not be internationally

binding on that State. The same would be true of a treaty for the alienation of territory if made without the assent of the legislature when such assent is required by the constitution of the State.

As to the second group of constitutional requirements mentioned above by McNair, namely, those which are essential merely for the application and enforcement of a treaty, such as those which require an appropriation of money by the legislature or the enactment of certain legislation, the failure of the legislature to comply with such requirements may render it impossible to execute the treaty, but that does not affect the international binding force of the treaty; and the State cannot effectively plead, in answer to a charge of violation of a treaty, the failure of its legislature to comply with such requirements of its constitution. In other words, while practically the treaty would be unenforceable, legally it would be an internationally binding engagement, for the non-execution of which the State would be responsible and liable for injuries suffered by the other party.

Reference may be made here to the provisions of the several proposed codes, relating to the status of treaties concluded by incompetent organs or authorities. Bluntsehli's draft (Article 404 *bis*) declares that "the chief of State, when he is bound by the constitution to obtain the concurrence and assent of the legislative body (Senate, Parliament, Federal Council, Chamber of Deputies), is not considered in international law as capable of binding the State by a treaty concluded without this concurrence and assent." Fiore's draft (Art. 752) reads as follows: "When, by the constitutional law of a state, the executive is given the power to negotiate treaties, reserving to another governmental body a final assent to their definitive conclusion, the rules of the constitution govern the competency of the various parties in the conclusion of treaties." Evidently it is Fiore's view that the competence of a treaty-making organ is derived not from international law but from the constitutional law of its own State. The draft of the International Commission of (American) Jurists (Art. 1), adopted at Rio de Janeiro in 1927, provides that "treaties will be concluded by the competent powers of the contracting States according to their domestic law or by their legal representatives properly accredited."

Finally, reference should be made to the Havana Convention on Treaties, of 1928 (Article 1), which provides that "Treaties will be concluded by the competent authorities of the States or by their representatives, according to their respective internal law."

PRACTICE

Turning from an examination of the doctrine to the practice, it may be stated that generally States have denied the binding force of treaties concluded in violation of their own constitutions, although they have sometimes insisted upon execution of those which had been ratified by the other parties in violation of their constitutions. As to American pronouncements in this

sense, see Moore, 5 *Digest of International Law* (1906), pp. 169 and 171, especially the opinions of Secretaries of State Marcy, Blaine, and Foster to the effect that treaties, the making of which was not within the competence of the treaty-making authority, or which were not made "in conformity with the constitution," are not binding on the United States.

The President of the South African Republic in 1871 refused to recognize the validity of an arbitral award against that republic (Lapradelle et Politis, 2 *Recueil des Arbitrages Internationaux*, 1905, p. 695) on the ground that his predecessor had exceeded his constitutional powers in concluding the *compromis* on which it was based, and that he was legally incompetent to bind his country without the consent of the legislature. In a doctrinal note on the award (*ibid.*, p. 703), Westlake expressed the opinion that if the *compromis* was really made in excess of the constitutional authority of the President (as he thought it was), both it and the award based on it were invalid and not binding on the South African Republic. The power of public agents, whatever their rank, to bind the State which they represent is, he added, derived solely from their constitutions, and acts done by them in excess of their authority are not internationally binding upon their country. He concluded that the competent authority according to the interpretation given to the constitution of the Transvaal Republic was not the President alone, but the President with the consent of the legislative power. In signing alone the *compromis*, President Pretorius exceeded his competence; he did an act which was void; therefore, the award was not binding on his country.

One of the grounds on which China denies the validity of the treaties of 1915 with Japan is that they were concluded by the President in excess of his constitutional authority, and that they were not ratified by the Chinese Parliament. Young, *International Legal Status of the Kwantung Leased Territory* (1931), p. 169. Indeed, it has been asserted in defense of China's claim to free herself from various treaties by which she is alleged to be bound that "many of them have been made, or alleged to have been made, by individual Chinese officials upon their own personal responsibility," while others were made by the President without the approval of the Parliament, although its approval was required by the Constitution. Willoughby, *Foreign Rights and Interests in China* (1920), pp. 3-6.

A somewhat inconclusive incident was the controversy which arose in 1921 between Austria and Rumania concerning the provisional commercial convention of August 14, 1920, which contained a clause for its denunciation upon three months' notice. After having been in force for a year or more it was proposed that it be replaced by a new convention on the same subject. The Austrian Government replied that the convention of August 14, 1920, not having been denounced, was still in force, and that there was no need to conclude a new one. To this the Rumanian Government replied that the convention was not binding because it had never been approved

by the Rumanian Parliament, as required by the constitution. The Austrian Government, while maintaining its point of view in principle, nevertheless agreed to enter upon negotiations for a new treaty which was concluded in 1924. McNair, "Constitutional Limitations upon the Treaty-Making Power," in Arnold, *Treaty-Making Procedure* (1933), p. 12.

In 1932 the Government of the Irish Free State repudiated two agreements which had been entered into with the Government of the United Kingdom in 1923 and 1926 for the payment of certain land annuities to the latter government, on the ground, among others, that the agreements had never been ratified by, nor otherwise approved, by the Dail of the Free State as required by the constitution. See McNair, *loc. cit.*, p. 13; Jennings, "*Le Traité Anglo-Irlandais de 1921 et son Interprétation*," 13 *Revue de Droit International et de Législation Comparée* (3rd ser. 1932), p. 502 ff; and British *Parliamentary Paper*, *Cmd.* 1932, 4056.

The validity of the accession by the President of Argentina to the Covenant of the League of Nations in 1919 was challenged on the ground that he did not obtain the approval of Parliament as required by the Constitution. In brief, the facts were that on July 18, 1919, the Argentine Minister at Paris notified the Secretary-General of the League of Nations of his instructions "to adhere unreservedly to the League of Nations in the name of the Argentine Republic." (*League of Nations Official Journal*, 1920, p. 13.) In reply to a letter from the Secretary-General inquiring if that communication could be regarded as a formal act of accession to the Covenant, the Argentine Minister (July 29, 1919, *ibid.*, p. 14) said: "Such is, in fact, the interpretation that should be given to my note of the 18th July: the Government of the Argentine Republic adheres to the League of Nations, and it will ratify this adhesion as soon as the Chambers have given their approval." (*Ibid.*, p. 14.) A delegation was in the meantime sent to the first Assembly of the League, and contributions were paid by Argentina with the authority of the Congress. The Congress was requested by the President of the Republic to approve the appointment of the delegates, which it did, but it does not appear that he ever submitted the Covenant to the Congress for its approval, as the Constitution required. Later, when a new President had come into power, he urged the Congress to approve the Covenant and regularize Argentina's relations with the League, but nothing was done. In April, 1926, the cabinet considered the question of sending delegates to the committee on the composition of the Council and to the Preparatory Commission for the Disarmament Conference. The decision was reached that "Argentina was a member of the League of Nations from the international point of view, but not from an internal constitutional viewpoint." See Kelehner, *Latin American Relations with the League of Nations* (1930), p. 47 ff. Finally, in September, 1933, the Congress passed a bill approving the Covenant and the act of accession, thus regularizing the ambiguous situation.

Whether Argentina was legally a member of the League of Nations, and as such bound by the Covenant, during the period from 1920 to 1933, depends on whether the President was competent to accede on behalf of his country to the Covenant without the approval of the Congress, which appears to be necessary under Article 67 of the Argentine Constitution. Unless there is a principle of international law which confers competence on the head of a State alone to bind his State through accession to a treaty without obtaining the legislative assent required by the constitution of his State, the President's accession was legally ineffective. Professor Hudson, who has discussed the legal nature of the Argentine accession (28 *American Journal of International Law*, 1934, p. 125 ff), expresses the opinion, however, that "if the clear indications of the decision of the Permanent Court of International Justice in the Eastern Greenland Case are to be followed, there could be little doubt that the telegram addressed by the President of the Argentine Republic to the President of the Peace Conference on January 16, 1920, constituted a binding accession, even though the Argentine Constitution required previous assent by the Congress."

JURISPRUDENCE

Turning now to a consideration of the jurisprudence on the subject, it may be stated that national courts, as might be expected, have generally refused to admit the validity of and to apply treaties which have been entered into in contravention of their constitutions, and especially without the approval of the legislature where that is required. See *Grus c. Ricordi* (French Court of Cassation), Dalloz, 1888, l. 5; *Etablissements Coullerez c. Maison Stein* (Court of Appeal of Colmar), *Journal du Droit International* (1926), p. 604; *Witt et Grobauer c. Dame Veogelin* (Court of Appeal of Paris, 1924), 12 *Bulletin de l'Institut Intermédiaire International*, p. 93; and other cases cited by Chailley, *La Nature Juridique des Traités Internationaux* (1932), p. 240 ff. National courts derive their jurisdiction from their own constitutions or laws; hence, they may be bound to refuse to apply treaties which have been concluded by the treaty-making authorities in excess of their constitutional competence. Their decisions are not entitled to great weight on the question as to whether such treaties are internationally binding. No purpose therefore would be served here by a discussion of such decisions.

Unfortunately decisions by international tribunals on the question of the status of such treaties have been rare and where such decisions have been made they have not always been clear or conclusive on the point here under discussion.

The award of President Cleveland of March 22, 1888, in the dispute between Nicaragua and Costa Rica relative to the validity of the boundary treaty of April 15, 1858, between those countries, is sometimes cited as authority for the view that treaties in order to be internationally binding

must have been concluded in conformity with constitutional requirements. The treaty in question had been ratified on April 26 by the President of Nicaragua without the approval at that time of the legislative assembly; but a month later it was formally approved by the assembly, and on August 19 the stipulations of the treaty were incorporated in the text of a new Constitution. In 1870 the Nicaraguan Government decided to contest the validity of the treaty on the ground that it had not been ratified in accordance with the Constitution. President Cleveland, to whom the dispute was submitted for arbitration, held the treaty to be valid in view of the circumstances mentioned above. 2 Moore, *History and Digest of International Arbitrations*, p. 1964. The award was based on a report (text *ibid.*, p. 1946 ff) made, at the request of the President, by George L. Rives, who maintained that the validity of a treaty is determined by the constitutional law of the parties, as Nicaragua contended, and consequently that a treaty made in violation of the constitution of one of the parties is not binding upon that party. Mr. Rives said: "The general doctrine that in determining the validity of a treaty made in the name of a State, the fundamental laws of such State must furnish the guide for determination, has been fully and ably discussed on the part of Nicaragua, and its correctness may certainly be admitted." He added, however, "But it is also certain that where a treaty has been approved by a government, and an effort is subsequently made to avoid it for the lack of some formality, the burden is on the party who alleges invalidity, to show clearly that the requirements of the fundamental law have not been complied with."

The question of the obligatory character of an oral declaration made by the Minister of Foreign Affairs of one country to the Minister of another country, on his own authority and without the assent of the head of the State, when, as it was contended by the former State, his formal assent was required by the constitution of that State, was one of the questions before the Permanent Court of International Justice in the Eastern Greenland Case (*Publications of the P.C.I.J.*, Series A/B, No. 53, p. 69 ff). So far as the question of competence was involved, the facts were briefly the following: On July 22, 1919, M. Ihlen, Norwegian Minister of Foreign Affairs, in the course of a conversation with the Danish Minister, stated orally that the Norwegian Government "ne ferait pas de difficultés au règlement de cette affaire" (*i.e.*, the question raised on July 14 by the Danish Government respecting the proposed extension of Danish sovereignty over the whole of Greenland). This statement was recorded in a minute by M. Ihlen (*ibid.*, p. 36). The Norwegian Government admitted the facts as to the content of the declaration (*ibid.*, p. 69). In its case before the court the Danish Government contended that the declaration of the Norwegian Minister of Foreign Affairs was binding upon Norway, since he was competent, both under the rules of international law and the Constitution of Norway, to bind the State by such a declaration; it apparently admitted, however, that

when the constitution of a State requires the concurrence of the head of the State or the parliament, an international engagement made without such assent is not binding on that State, but it denied that the Constitution of Norway required the formal approval of the King to such declarations as that of M. Ihlen of July 22. (Series C, No. 63, p. 876 ff.) The Norwegian Government denied, however, that M. Ihlen's declaration was binding upon Norway, for the reason that he was not competent to make it without the assent of the King, which was not, formally, at any rate, given. It relied upon Article 26 of the Constitution of Norway as amended in 1911, which requires proposals on "important matters" of policy to be presented to the Council of Ministers and that decisions on such matters shall take the form of a resolution adopted in the Council of Ministers. Since the King must be present at the meetings of the Council the decisions must be "in virtue of a royal resolution." This implies that his concurrence is necessary to the validity of all decisions made on such matters. Since M. Ihlen's declaration was manifestly an "important matter" within the sense of Article 26 of the Constitution, and since it was not, so Norway claimed, laid before the Council of Ministers of which the King is a part, it was not constitutionally valid and therefore was not binding on Norway. The opinions of numerous writers were cited in support of its contention that a diplomatic agreement entered into by a constitutionally incompetent authority is not binding on the State on behalf of which such authority acts. (Series C, No. 62, p. 545 ff; No. 63, p. 1411 ff.)

The decision of the court was against the Norwegian contention. Adverting to the character of M. Ihlen's declaration, and the circumstances under which it was made, the court said (*Publications of the P. C. I. J.*, Series A/B, No. 53, p. 71):

The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

The court considered that the statement made by M. Ihlen did fall "within his province"; it was not, therefore, the act of an incompetent agent. The decision, however, is no authority for the view that a diplomatic agreement made by an incompetent authority is nevertheless binding on the State on behalf of which it was purported to have been made. In a dissenting opinion, Judge Anzilotti said: "As regards the question whether Norwegian constitutional law authorized the Minister for Foreign Affairs to make the declaration, that is a point which, in my opinion, does not concern the Danish Government." Series A/B, No. 53, p. 91. Apparently, if the court had been convinced that the Norwegian Minister of Foreign Affairs had not been legally competent to make the declaration of July 22, it would not have held the declaration to be binding on Norway.

It seems clear from this summary of the doctrine, the practice, and the jurisprudence, that the preponderance of authority is in favor of the view: (1) that the competence of the treating-making organs of a State is determined by the law of that State; and (2) that treaties made on its behalf by organs which are not competent under that law to conclude them are not binding, internationally, upon such State. Article 21 of this Convention lays down that rule.

DUTY OF A STATE TO BE COGNIZANT OF CONSTITUTIONAL PROVISIONS OF
OTHER STATES RELATIVE TO TREATY-MAKING POWER

In applying the rule that a treaty is binding on the State on behalf of which it is concluded only when the organs or authorities which concluded it are competent under their own law to do so, the question is likely to arise: is a State which concludes a treaty under a duty to satisfy itself in advance by inquiry or investigation that the organs or authorities of the other State were really competent to enter into that treaty, and, if so, whether the constitutional requirements relative to the participation or assent of those organs were actually complied with in the process of making the treaty. As to this, the opinions of writers on international law are not in agreement. As the quotations given above show, there is one group of writers who maintain that international law assumes that a State when entering into negotiation with another State is presumed to be cognizant of the constitutional provisions of the other State relative to what organs are competent to conclude treaties and what, if any, are the constitutional limitations on that competence or on the manner of the exercise of the treaty-making power. Others go even further and lay it down that a State is not only presumed to be cognizant of the existence and nature of such provisions, but that it is also duty bound to satisfy itself that they have actually been complied with by the State with which it concludes a treaty. As already stated earlier in the comment, some writers distinguish between constitutional provisions of an essential or fundamental character, such as those requiring the concurrence or assent of the legislative chambers, and other less fundamental provisions of a procedural character, each State being bound to satisfy itself that the former have been complied with, but not being so bound as regards the latter. Others maintain that while a State is bound to be cognizant in general of the competence of the treaty-making organs of the other State with which it concludes a treaty, it is not bound to know the extent of that competence or the exact import of the limitations, if any, upon it, especially when these matters are a subject of controversy in the latter State, and the law and practice regarding them are not settled.

There is a second group of writers who maintain that there is not only no duty on the part of a State to inquire into the constitutional provisions of another State with which it enters into negotiations, but that it has no right

to do so, since it might involve intermeddling in the internal affairs of such State. They conclude therefore that a treaty made by an organ which represents itself to be the competent treaty-making authority is binding on such State even though it was not under its own law competent to conclude the treaty. This is all the more true if the treaty is one which is ratified by the head of the State, who, by his act of ratification, thereby attests the validity of the treaty. His act may indeed contain a recital by him that the treaty has been made in conformity with the constitutional requirements of the State of which he is the recognized spokesman in international affairs.

Professor Quincy Wright expresses the opinion that while governments are supposed to know what organs of foreign States with which they deal are competent under their own constitutions to conclude treaties, they are not expected to be familiar with or entitled to discuss matters relative to the extent of that competence or the nature of "obscure constitutional limitations." As he points out, serious practical difficulties would be encountered if one negotiator were required to be fully cognizant of the nature and extent of the constitutional restrictions upon the treaty-making power of the other State, because they may be a matter of controversy in the latter State. They may also have been the subject of extensive judicial interpretation, the exact import of which it might be difficult for other States to understand. *Control of American Foreign Relations* (1922), p. 56. Thus, in France it is a controverted question, both of doctrine and jurisprudence, as to what particular treaties require the approval of Parliament under Article 8 of the constitutional law of July 16, 1876. See 1 Carré de Malberg, *Contribution à la Théorie Générale de l'Etat* (1922), p. 534; Barisien, *Le Parlement et les Traités* (1913), p. 78 ff, who remarks that many Frenchmen have honestly differed as to whether particular treaties should or should not have been submitted to the parliament for its approval; Esmein, 2 *Droit Constitutionnel* (3d ed.), p. 200; and Basdevant, "*La Conclusion et la Rédaction des Traités, etc.*," 15 *Recueil des Cours* (1926), p. 579). There is similar uncertainty in the United States as to the extent of the President's competence to conclude so-called "executive agreements," *i.e.*, agreements without the consent of the Senate.

Professor McNair, who has discussed the question in some detail ("Constitutional Limitations upon the Treaty-Making Power," in Arnold, *Treaty-Making Procedure*, 1933, p. 4 ff), distinguishes between the duty of a State, on the one hand, to be cognizant of the constitutional limitations on the treaty-making power and the exercise thereof of other States with which it enters into negotiations, when they are of such a fundamental character that they must be regarded "as possessing international notoriety"; and its duty, on the other hand, in respect to other less fundamental provisions or requirements resulting from practices which are not matters of common knowledge. As to the first-mentioned group of provisions, other States may be presumed to know of their existence, and if they conclude a treaty

with a State whose constitution contains such provisions and the treaty has not been made in conformity with such provisions, it is not binding on the State whose constitution has thus been contravened. Examples of such constitutional provisions would be those which require the assent of the legislative assembly or a particular branch thereof, to the conclusion of a particular type of treaty (*e.g.*, one for the alienation of a portion of the territory of the State) without the approval of the legislature. In such cases the "other contracting party neglects at its peril to satisfy itself that the necessary consent to ratification has been obtained and it cannot hold the State bound by a ratification made without the necessary consent." But suppose the constitutional requirements are not a matter of common knowledge, or, if they are, their precise import is uncertain—and may be a matter of controversy within the State whose constitution lays them down—is the other State bound to satisfy itself of the existence of such requirements and of the fact of compliance with them by the treaty-making organs of the State with which it negotiates? Or suppose, if, after making an investigation with this end in view, a State is still left in uncertainty as to whether those requirements have been actually complied with. In such cases, must it be said that the latter State acts at its peril, and if it enters into a treaty with the former State, which as it subsequently turns out, was not made in conformity with its constitutional requirements, it cannot hold the latter State to be bound by the treaty? Mr. McNair's conclusion is that in such cases a State is not required to satisfy itself that the conclusion of the treaty was in conformity with the constitutional provisions of the other State, since such a requirement might be unreasonable or even impossible of fulfillment. In short, the State does not act at its peril; its ignorance is justifiable; and it has a right to regard the treaty as binding. He thus states his conclusion (p. 6):

It seems more reasonable to adopt the latter view [that is, "State B is only bound to know those constitutional provisions of State A which are matters of common knowledge, and, in the absence of specific notice, cannot be deemed to have notice of other and less obvious provisions"], and to say that in concluding it if one party produces an instrument "complete and regular on the face of it" (to borrow an expression from another department of law) though in fact constitutionally defective, the other party, if it is ignorant and reasonably ignorant of the defect, is entitled to assume that the instrument is in order, and to hold the former to the obligations of the treaty. If that view is correct, then the repudiation of such a treaty constitutes an international wrong.

The distinction which McNair makes between constitutional provisions which States are presumed to know, such, for example, as those contained in written constitutions, and those which they are not presumed to know, such as those contained in unwritten constitutions, is criticized by Mr. G. G. Fitzmaurice in an article entitled "Do Treaties Need Ratification?" in the *British Year Book of International Law* (1934), p. 112 ff). It is doubtful, he

says, whether as a matter of law one State can ever be regarded as having official knowledge of the law or constitution of another State unless it requests that knowledge officially and receives an official reply. Consequently, one State cannot be presumed to be cognizant of the laws of other States.

An intolerable situation would, it seems, be created if states were forced to make minute and often invidious inquiries before they could feel certain of their position; if, even after making such inquiries they could still often not be sure of how they stood; and if further, it were at any time open to states, after apparently becoming regularly bound by the provisions of a treaty and possibly acting thereon and causing other states to change their position, thereafter to allege that they had never become bound at all on account of their own failure to obtain the necessary legislative consents. (*Ibid.*, p. 135.)

He concludes as follows:

On the whole, therefore, it is submitted that the only rule which is both logical and readily applicable from the practical point of view is to the effect that states have no concern whatsoever with, and cannot as a general proposition be held to have any knowledge of each other's laws or constitutions; that a state which purports to become regularly bound by an international engagement, by giving its international ratification thereto, or otherwise, must be presumed to have complied with all necessary internal constitutional requirements, and that other states are entitled to assume that this is so. If it afterwards turns out that such requirements have not in fact been complied with, the state must nevertheless be regarded as being internationally bound and cannot plead the failure in question as absolving it from its obligations: any state whose executive has placed it in this position must seek its remedy by proceeding internally against the executive in question or its individual members, and externally by denouncing the treaty at the earliest possible moment: but it cannot plead that the treaty is void *ab initio*. (*Ibid.*, p. 136.)

The only "apparent exception" to the rule which Fitzmaurice admits is the case where a treaty by its own terms declares that it shall not be binding until the consent or approval required by the constitution or laws of the State has been obtained. In that case the parties may be considered as having official notice that this consent or approval is necessary. Even then, a "definite intimation" that it had been given, "would have to be regarded as conclusive and binding and that if the State concerned proceeded to ratify the Convention internationally this should be regarded as amounting to an implied assurance that all necessary constitutional or legislative requirements had been fulfilled." (*Ibid.*, pp. 136-137.)

REPRESENTATION AS TO COMPETENCE

Considering the wide difference of opinion among writers on international law as to the degree of knowledge which a State is required to have concerning the constitutional provisions of other States relative to the making

of treaties, as to its duty to inform itself by inquiry of the existence and meaning of such provisions and of the fact of compliance therewith by the treaty-making organs of the other State, and as to the juridical effect of non-compliance with such rules, and considering that neither international jurisprudence nor practice on these points have been sufficiently abundant or conclusive to justify the attempt to deduce therefrom a settled rule, it does not seem expedient to propose a rule on the subject as a part of this Convention.

On one cognate point, however, the doctrine, the practice, and the jurisprudence seem to be in sufficient agreement to justify the laying down of a rule. It is, that when those who, either in virtue of constitutional provisions or of the rules of customary international law, in case there are no constitutional provisions, are competent to represent the State in its international relations and to speak with authority on its behalf in such matters, make official declarations or representations, addressed either to the general public or to a diplomatic representative or other agent of another State, that a proposed treaty falls within the competence of the treaty-making organs of the State on behalf of which such representation is made, or that a particular treaty already concluded was within the competence of the organs which concluded it, such declaration or representation is admitted to have a certain juridical value.

Take the case of a representation made by the head of the State in his act of ratification. As the competent authority of the State to perform this act, and as the State's official spokesman in its international relations, he ratifies and promulgates a treaty, thus announcing to the world that he considers it to be a valid one and binding upon his State. He may, indeed, in his act of ratification or in the act of promulgation recite expressly that the treaty was concluded in conformity with the constitution of his own country in behalf of which he speaks. In practice the ratification of the President of the United States always contains such a recital. In either case, and especially in the latter case, the other party to the treaty has a right, within certain limits, to assume that the representation was a correct statement of the facts, and it is entitled to rely on that representation. We say "within certain limits," because if the head of the State was notoriously not competent to make such a declaration (*e.g.*, if he was manifestly a usurper) and this fact was known to the other State, or if he was competent to make it, but it was a notorious misrepresentation of the facts, known to be such by the other State, the latter State is not entitled to rely on the declaration.

A case which might be cited in illustration of this point would be the following: A diplomatic representative of one country enters into negotiation with the Minister of Foreign Affairs of another country. There being doubt in the mind of the one as to whether the other is competent under the laws of the latter country to conclude the particular treaty under consideration,—a doubt which could not be removed by an examination of the constitution,—

the Minister of Foreign Affairs of the latter country represents that he is competent. Under these circumstances, the former is entitled to rely on the assurances of the latter as to his competency and without acting at his own peril.

RESPONSIBILITY OF STATE FOR INJURIES

Article 21 provides that a State may be held responsible for an injury which is sustained by another State in consequence of reliance by the latter upon a representation that an organ or authority was competent to conclude that treaty. Thus State A enters upon negotiations with State B for the conclusion of a treaty for the demilitarization of a certain zone on each side of their common frontier, and there being doubt in the mind of A's plenipotentiary as to whether such a treaty falls within the competence of the treaty-making authorities of State B, the latter's plenipotentiary, or its Minister of Foreign Affairs, gives assurance that it does. Relying upon these assurances State A proceeds with the negotiations and the treaty is concluded, and in due course comes into force. Subsequently after State A has destroyed or removed the armaments within the said zone on its side of the frontier, State B contests the validity of the treaty on the ground that it was not within the constitutional competence of the treaty-making authorities of State B, and therefore refuses to be bound by it. As a consequence, State A suffers a loss on account of the expense involved in removing its armaments, to say nothing of the risk to which it is exposed on account of the weakening of its means of national defense. Under Article 21, State B would not be bound by the treaty if it was not made by an organ or authority which was constitutionally competent to make the treaty; but a high public official of State B, one who is competent to speak for it in its international relations, having represented that the treaty-making authority did possess such competence, State A was entitled to rely on such a representation, and State B should be held responsible for the injury suffered by State A in consequence of its reliance thereupon.

Article 21 is not to be interpreted as meaning that one State is not presumed to have any knowledge whatever of the constitutional provisions relative to the competence of the treaty-making organs of another State with which it concludes a treaty, and that it may rely under all circumstances upon statements made by the agents of the latter state regarding the competence of its treaty-making organs. Nearly all writers on international law are agreed that there are certain fundamental constitutional provisions relative to the competence of the treaty-making organs which are a matter of such common knowledge that they are presumed to be known to the treaty-making authorities of all States, and ignorance of them is no excuse. It is only when the ignorance may be said to be justifiable or excusable, as where the precise meaning of the constitutional provisions is not clear or may indeed be a matter of controversy in the State whose constitution contains them,

that the other State is entitled to rely upon the representations of the former state that its treaty-making organs are competent in a given case. If, for example, the constitution plainly requires the approval of the legislature as a condition of the validity of the particular treaty in question, another State would hardly be entitled to rely on a contrary representation. Or if when such legislative approval is required, it is a matter of common knowledge that it was not in fact given, reliance on a contrary representation would not be justifiable, and the State relying upon it would do so at its peril. It is for this reason that Article 21 says simply that a State "*may be* responsible for an injury—etc.", rather than "is" or "shall be" responsible. It would not be responsible in cases where, for reasons like those just mentioned, it would be manifestly unreasonable to hold it to any such responsibility.

ARTICLE 22. EFFECT OF LATER TREATIES

(a) A later treaty supersedes an earlier treaty between the same parties, to the extent that the provisions of the later treaty are inconsistent with the provisions of the earlier treaty.

COMMENT

The conclusion of a new treaty for the replacement of an earlier one is one of the common methods by which treaties are terminated. See Article 33 and the comment thereon. That the parties to a treaty may, whenever they so elect, conclude a new treaty between themselves to supersede an earlier one, no one could contest without denying the very existence of the treaty-making power of States as affirmed by Article 3 of this Convention. The treaty collections are full of examples of treaties which were intended to and did in fact supersede earlier ones. Sometimes the later treaty expressly abrogates certain clauses in the earlier treaty but leaves the others in force. See, *e.g.*, the convention declaring the principles of the rights of neutrals at sea between the United States and Peru, signed July 22, 1856 (Article 2). 2 Malloy, *op. cit.*, p. 1403. Occasionally, it is provided that while the earlier treaty is superseded certain principles which it enunciated remain in force. For example, Article 1 of the Hay-Pauncefote Treaty of 1901, expressly declared that it was the intention of the parties that this treaty should supersede the Clayton-Bulwer Treaty of April 19, 1850, but the preamble declared that it was not their intention to impair the general principle of neutralization established by Article 8 of the latter treaty.

Sometimes, the later treaty provides that contrary stipulations in the earlier treaty are "repealed" or "abrogated". For example, the General Act of July 2, 1890, for the repression of the African slave trade (Art. 96), 2 Malloy, *Treaties, etc.*, p. 1989, and the 1874 treaty of the General Postal Union (Art. 20), 65 *British and Foreign State Papers*, p. 13. It may be noted in this connection that the administrative arrangement of 1904 on white slavery expressly laid down the converse provision, namely, that the provi-

sions of its Articles 3 and 4 should not "infringe upon the provisions of special conventions which may exist between the contracting governments." Cf., also, the nationality conventions and protocols adopted by the Hague Codification Conference of 1930 all of which contained the following article: "Nothing in the present Convention [or Protocol] shall affect the provisions of any treaty, convention or agreement in force between any of the High Contracting Parties relating to nationality or matters connected therewith." Texts in 24 *American Journal of International Law* (1930), Supp., pp. 192, 201, 206, and 211. In these cases it is the inconsistent provisions of the earlier treaties which prevail rather than those of the later ones.

In many cases, however, the later treaty contains no provision as to its effect upon inconsistent stipulations in the earlier treaty, and it is for such cases that paragraph (a) provides a rule. The rule which it lays down is that the later treaty supersedes the earlier one only in respect to those provisions. The other provisions, that is, those which are not inconsistent with the corresponding provisions of the later treaty, remain in force.

An express declaration in the later treaty of an intention to replace the earlier one is not necessary. Such an intention may be clearly implied from the history of the negotiations, the *travaux préparatoires*, or better still from the very terms of the treaty itself. Thus, if the stipulations of the later treaty are on their face clearly inconsistent with those of the earlier one, as where they establish a régime or relationship, or confer rights or create obligations, which are irreconcilable with those provided for in the earlier treaty, it must be presumed to have been the intention of the parties to replace the earlier treaty by the new one. See, for example, the decision in *La République Française v. Schultze* (1893), 57 Fed. Rep. 37, where it was held that the Trade Mark Convention of April 16, 1869, between the United States and France was "impliedly repealed" by the industrial property treaty of 1883 which covered the whole subject-matter of the former convention. See also the case of the *Franciska* (1855), Spinks' Prize Cases, III, where Dr. Lushington admitted that a treaty may be "impliedly revoked"; but it must, he added, be a clear case of inconsistency between the earlier and the later treaty, it must be proved that the stipulations contained in the later treaty are "absolutely irreconcilable" with those of the earlier treaty and that the two orders of things cannot reasonably exist. He added further that the presumption must always be against an implied revocation, because if the parties to the later treaty had an intention of modifying a provision of an earlier treaty they would naturally have done it in express fashion and by the use of a "revocatory form."

The rule here laid down is based on the principle that where States have expressed at different times two conflicting wills in their treaties with one another on a particular subject, it must be presumed to have been their intention that the will later expressed should prevail over the earlier one. This appears to be the rule applied in practice. See the opinion of Secretary

of State Bayard apropos the question whether the treaty of March 20, 1833, between the United States and Siam was superseded by the treaty of May 29, 1856, between the same countries. As to this Mr. Bayard said:

As a general rule . . . , unless a particular contract undertakes to abrogate all former contracts between the parties, it only vacates such portions of former contracts as are inconsistent with its terms. The same rule is applied to statutes covering more or less the ground of former legislation. If this rule be applied in the present case, then the clause in the treaty of 1833 precluding the importation or sale in Siam (except to the King) of 'munitions of war' is still in force. . . . My conclusion, under all the circumstances, is that it is so in force. (5 Moore, *Digest of International Law*, 1906, p. 364.)

This rule has likewise been approved and applied by the courts. See, e.g., *Junkers v. Chemical Foundation* (1922), 287 Fed. 597, where a Federal Court held that the treaty of peace between Germany and the United States, signed August 25, 1921, must prevail over the treaty with Prussia of July 11, 1799, in so far as any of its provisions are inconsistent with the earlier treaty.

Treaties themselves sometimes by their own terms lay down this rule. See, e.g., the General Act providing for the neutrality and autonomous government of the Samoan Islands signed at Berlin June 14, 1889, Article 2 of which provided that in every case where the provisions of the Act were inconsistent with earlier treaties between Samoa and the States which were parties to the Act, the provisions of the Act should prevail. 2 Malloy, *Treaties, etc.*, p. 1576. Even where it was expressly declared by the terms of the later treaty that the earlier one was "revoked" for the reason that "all the provisions" of the earlier one had been incorporated in the later one, the United States Supreme Court held that the earlier one was superseded only in so far as its provisions had actually been incorporated in the later treaty. This conclusion was based on the fact that the revocation of the earlier treaty had been made on the declared assumption that all its provisions had been incorporated in the later treaty which the court found not to have been true. *In re Ross* (1890), 140 U. S. 453, 465. The treaties involved in this case were those of June 17, 1857, and July 29, 1858, between the United States and Japan. 1 Malloy, *op. cit.*, pp. 998 and 1000.

The rule laid down in paragraph (a) seems to be a logical and reasonable one, but in practice it may give rise to controversies owing to the difficulty of determining in a given case whether, and if so to what extent, inconsistency exists between the earlier and the later treaties. This is only one of numerous causes of dispute which may arise in the application of treaties and which make interpretation necessary. A more serious objection is that when certain provisions of a treaty are superseded by a new and later one, the others remaining in force, we have what from the point of view of orderliness, scientific arrangement and convenience is an unsatisfactory situation. We then have on the books a treaty which is partly in force and partly abrogated

and often it is not clear how much of it is the one and how much the other. Moreover, we have a case in which a particular subject is regulated in part by an early treaty and in part by a later one when the considerations mentioned above require that it should be dealt with by one and the same treaty. Nevertheless, it seems impossible to formulate a reasonable and logical rule governing the case of conflicting provisions between earlier and later treaties which would always avoid producing such situations. They can only be avoided by careful drafting to insure against the existence of inconsistent stipulations or by the conclusion of a new (third) treaty, when they are found to exist.

Finally, it may happen that when there is inconsistency between the stipulations of an earlier and a later treaty, the former being superseded by those of the later treaty, while the remaining provisions are left to stand, the latter are incapable of standing alone because they are dependent upon or otherwise inseparable from those which have been superseded by the later treaty. In such a case the entire treaty and not merely the inconsistent provisions must be regarded as having been superseded. See Hall, *International Law* (6th ed., 1909), p. 334. Paragraph (a) of this article must be interpreted in this sense. It is of course impossible to lay down any precise tests by which a separable stipulation may be distinguished from an inseparable one. As to the separability of treaty provisions, see the comment on Article 30 of this Convention. The question will have to be determined in each case from a careful examination of the stipulations and purpose of the particular treaty.

It must be emphasized that a later treaty may supersede an earlier one, only when the parties to the later treaty include all the parties to the earlier one. See Vattel, *Droit des Gens* Bk. II, ch. 17, sec. 315; Hall, *International Law* (6th ed., 1909), p. 333; 2 Phillimore, *International Law* (3d ed., 1882), p. 128; Wright, "Conflicts between International Law and Treaties," 11 *American Journal of International Law* (1917), p. 576; Otéreléchano, *De la Valeur Obligatoire des Traités Internationaux* (1916), p. 65; and Strupp, *Eléments du Droit International Public* (Blociszewski trans., 1927), p. 179, who observes that: "La règle '*lex posterior derogat legi priori*' n'est valable qu'entre les mêmes parties; elle n'est pas opposable à d'autres parties vis-à-vis desquelles il y a '*res inter alios acta*'." Thus, the Declaration of Paris of 1856, which laid down certain rules relative to the conduct of maritime warfare, had the effect of abrogating the contrary rules contained in previously concluded treaties between States which were also parties to the declaration, but it did not modify or abrogate contrary provisions of earlier treaties between any party to the Declaration and other States which were not parties to it.

The principle that some only of the parties to a multipartite treaty cannot alter or abrogate that treaty except as between themselves was emphasized by Judges Nyholm and Negulesco in their opinions in the *Case concerning the Competence of the European Commission of the Danube between Galatz and*

Braila, in 1927 (*Publications of the P. C. I. J.*, Series B, No. 14). Referring to the jurisdiction of the commission under the convention establishing the definitive statute of the Danube which was adopted by a conference of certain powers at Paris on July 23, 1921, acting under authority of the Treaty of Versailles, Judge Nyholm pointed out that the statute, framed as it was by a relatively small group of States parties to the Treaty of Versailles, could not modify or abrogate the latter treaty without the consent of all the parties to that treaty. He said (*ibid.*, p. 73):

The mandate given by the Allied and Associated Powers to a limited number of Powers, assembled in conference at Paris, does not contain an authorization to depart from the principles and rules contained in the Treaty. Although the Conference had the power to amplify these rules, any decision taken by it in contradiction of the Treaty would be null, and might so be regarded by each of the Powers signatory of the Treaty of Versailles.

On the same point Judge Negulesco (*ibid.*, p. 129) said:

The Statute of the Danube could not modify the provisions of the Treaty of Versailles; for 26 Powers had taken part in that Treaty, whereas at the Convention on the Danube only twelve Powers were represented, eight with the right to vote, namely: Belgium, France, Great Britain, Greece, Italy, Roumania, Yugoslavia and Czechoslovakia, and four in an advisory capacity, namely: Germany, Austria, Bulgaria and Hungary.

It is true that in practice there have been exceptional cases in which existing treaties were abrogated or replaced by later ones without the express consent of certain of the parties to the earlier one; but for the most part, they have been cases of multipartite treaties of European settlement which were imposed by a group of Powers, including the greater ones, upon the non-contracting States, in the general interest. It should be said, however, that in some cases the interests of the parties to the earlier treaties, who were ignored or not consulted as to the later treaties, were slight and inconsequential and that in other cases they acquiesced without protest and thus gave their tacit consent to the abrogation of the earlier treaty and its replacement by the later one. See as to this Tobin, *The Termination of Multipartite Treaties* (1933), Ch. IV.

The Hague Conventions of 1907 which were intended to replace the corresponding conventions of 1899 contained a clause that "the present Convention, duly ratified, shall replace, as between the contracting Powers, the Convention" [name of the convention replaced]. The meaning of this clause was that the 1907 conventions replaced those of 1899 only as between those States which were parties to both the earlier and later ones. The 1899 conventions therefore remained in force as between States which were parties to them but which did not become parties to the 1907 conventions. Obviously, the States which concluded the 1907 conventions could not abrogate for all the parties those of 1899 without the consent of all the parties to the 1899 conventions. See also the International Sanitary Convention of

January 7, 1912, Article 160 of which provided that, as among ratifying Powers, it should supersede the earlier conventions, but that the latter conventions should remain in force as between the parties which signed or adhered to them but which might not ratify or accede to the convention of 1912. 3 *Treaties, etc. between the United States and Other Powers*, p. 3010. Likewise the Sanitary Convention opened for signature June 21, 1926 (Art. 168) contained a similar provision in regard to the conventions of 1903 and 1912. 3 Hudson, *International Legislation* (1931), p. 1972.

Anomalous situations are produced by such provisions as these. For example, as a result of such a provision in the Hague Convention of October 18, 1907, for the Pacific Settlement of International Disputes, it is binding on the United States and France *inter se*, but these States are bound to Great Britain and Italy by the corresponding convention of 1899, since these latter States have never ratified the convention of 1907. A like situation resulted from a similar provision in the Convention on Motor Traffic of April 24, 1926, which replaced the one of October 11, 1909, but which left the earlier convention in force between the parties to it which did not become parties to the later one. 1 Hudson, *International Legislation* (1931), p. lvi, n. 5. It may happen as a result of such a provision that there will be two or three treaties concluded on different dates which govern the relations of the members of an international administrative union. This is true, for example, of the members of the International Sanitary Union. Thus, a party to the convention of 1926 which was also a party to the conventions of 1903 and 1912 may have three sets of relations within the same union: (1) one under the convention of 1926 with the other parties to that convention; (2) one under the convention of 1912 with the parties to that convention which have not become parties to the convention of 1926; and (3) one under the convention of 1903 with the parties to that convention which have not become parties either to the convention of 1912 or that of 1926.

The awkwardness and inconvenience of such a situation as that described above in which there is a set of complicated relationships between members of an international union has led to the adoption of a different solution in the cases of the Universal and Pan American Postal Unions. The former union has long adhered to the practice of considering the prior acts of the Congress of the Postal Union as being abrogated as between the parties thereto from the date on which the new acts come into force. See Article 13 of the Universal Postal Convention of June 28, 1929, which reads: "From the date fixed for the entry into force of the Acts adopted by a Congress, all the Acts of the preceding Congress are abrogated." 4 Hudson, *International Legislation* (1931), p. 2877. Article 25 of the Pan American Postal Convention of November 9, 1926, declares:

The stipulations of the Pan-American Postal Convention sanctioned in Buenos Aires September 15, 1921, are abrogated, beginning with the date on which the present Convention enters into force.

In case that the Convention is not ratified by one or more of the con-

tracting countries, it will none the less be valid for those which have ratified it. (3 Hudson, *op. cit.*, p. 2043.)

In the case of the Acts of the Universal Postal Congress, the later ones supersede the earlier ones whether all the parties to the earlier ones become parties to the later ones or not. That is, the parties to the earlier Acts of the Congress are simply left the choice of accepting the later Acts or of ceasing to be members of the Postal Union. The same is true of the Pan-American Postal Conventions. Whatever may be the merits of this somewhat rigorous rule, it is a question of policy and it does not seem desirable to lay down such a rule in this Convention. If States wish to adopt it in a particular case they may do so; if they do not, or do not make other provision in their treaties, the rule proposed by this Convention would seem to be a logical and reasonable solution.

(b) Two or more of the States parties to a multipartite treaty to which other States are parties may make a later treaty which will supersede the earlier treaty in their relations *inter se*, only if this is not forbidden by the provisions of the earlier treaty or if the later treaty is not so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose.

COMMENT

This paragraph recognizes the right of two or more States parties to a multipartite treaty, to conclude a later treaty among themselves which will supersede the earlier treaty in their relations *inter se*, only upon the condition, first, that the conclusion of such a treaty is not forbidden by the earlier one, and, second, that the later treaty is of such a character as not to be likely to frustrate the general purpose of the earlier treaty.

The rule here proposed differs from that of the Havana Convention of 1928 (Art. 18) which affirms the right of two or more States, parties to a multipartite treaty to which there are other parties, to conclude treaties among themselves for the regulation of their relations *inter se* according to other rules than those laid down in the multipartite treaty—this apparently without condition or restriction and without regard to the effect which such treaties may have on the multipartite treaty or upon their relations with the other parties to that treaty. Paragraph (b) of this article is much more limited.

The first of the conditions referred to above affirms an existing principle of treaty law, namely, that treaties are binding on the parties (*pacta sunt servanda*); the parties are not, therefore, free to do what a treaty forbids them to do. If two or more of the parties to a multipartite treaty should conclude among themselves a later treaty which they have bound themselves by the former treaty not to enter into, they would be guilty of a violation of their treaty obligations and would be responsible to the other parties for

such violation. Cf. Cavaglieri, "*Règles Générales du Droit de la Paix*," 26 *Recueil des Cours* (1929), p. 510.

Examples of treaties which expressly forbid the conclusion of future treaties of the kind envisaged by paragraph (b) are not lacking. See, *e.g.*, the treaty regarding principles and policies to be followed in matters concerning China (the so-called "Nine-Power Pact") signed at Washington February 6, 1922, Article 2 of which reads as follows: "The Contracting Powers agree not to enter into any treaty, agreement, arrangement, or understanding, either with one another, or, individually or collectively, with any Power or Powers, which would infringe or impair the principles stated in Article I." 2 Hudson, *International Legislation* (1931), p. 823. See also Art. 15 of the Convention of March 20, 1883, for the International Protection of Industrial Property, by which the parties pledged themselves not to enter into separate treaties between themselves which would interfere with the provisions of that convention. 2 Malloy, *Treaties, etc.*, p. 1935. To the same effect is Article 20 of the Berlin Convention of 1908 for the protection of literary property. 4 Martens, *Nouveau Recueil Général de Traités* (3d ser.), p. 590. Members of the League of Nations are bound by Article 20 of the Covenant to regard the Covenant as having abrogated "all obligations or understandings *inter se* which are inconsistent with the terms thereof" and to refrain from entering into any future engagements "inconsistent with the terms thereof."

In case the parties to a multipartite treaty are *not* forbidden to enter into the sort of treaty referred to in paragraph (b), then they are free to do so, subject to the second condition mentioned in that paragraph—*i.e.*, that the later treaty be not one which is so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose. To "frustrate" the purpose of a treaty is to defeat the accomplishment of that purpose. As applied in municipal law, the word has reference in general to an act, event or condition which renders performance of a contract impossible. Anson, *Principles of the Law of Contract* (5th American ed. by Corbin, 1930), sec. 374.

Unlike the first condition, this one rather enunciates a rule of reason or of policy than of law, although fundamentally it does not differ in principle from the first condition. Under the first condition, what the parties are forbidden to do is prohibited by an express provision of the earlier treaty; under the second condition, they are forbidden to do what is prohibited by the spirit, *i.e.*, the general purpose of the earlier treaty. In both cases, therefore, the entering into of the later treaty is really forbidden by the earlier one. Hence, both prohibitions can be justified on the principle of *pacta sunt servanda*. It would seem to be a sound conclusion that the obligation which the parties to a treaty are under not to enter into a later treaty which would have the effect of defeating what is obviously the general purpose of the earlier treaty, unless all of them give their consent, is not different in principle from their obligation not to enter into another treaty which is

expressly forbidden by the terms of the earlier one. It may be emphasized in this connection that the general purpose of a treaty no less than that of its particular stipulations is one of the considerations—perhaps the most important one—which must always be taken into account in the process of interpretation. There is no dissent on this point among writers on international law. See Article 19 and the comment thereon. The frustration of the general purpose of a treaty is something, therefore, which is as much to be avoided as is the frustration of any particular stipulation.

If some of the parties to a treaty were free at any time in the future to conclude between themselves another one which would have the effect of defeating the manifest object of the earlier one, an essential foundation of the treaty system would be left with only a precarious value. It is believed that if they were permitted to act on such a theory States would hesitate to become parties to multipartite treaties, because there would be no assurance that their purpose would not be rendered illusory by the action of some of the parties in concluding later treaties among themselves which would nullify all their efforts. The rule here laid down which forbids such action enunciates a logical and necessary principle of any code of treaty law which is designed to promote the integrity and utility of the treaty system.

Obviously, the prohibition referred to in paragraph (b) should not be interpreted to apply to a case in which the later treaty is itself a multipartite treaty dealing with the same subject as the earlier one, and which in effect is therefore a revision of the earlier treaty, its purpose being to advance rather than frustrate the object of the earlier treaty. For example, the Convention on the Control of Trade in Arms and Ammunition signed at St. Germain-en-Laye September 10, 1919, was intended to replace the Brussels Act of July 2, 1890, and to promote more effectively the purposes of the latter Act.

What paragraph (b) envisages primarily is the case of important multipartite treaties, such as those of a legislative or administrative character to which there are numerous parties, perhaps the great majority of the States of the world, the utility and effectiveness of which depend upon uniform application by all the parties. Manifestly the purpose of such treaties might, and normally would, be defeated if some of the parties to them were to enter into separate agreements among themselves which would be inconsistent with the main object of the general treaty, and it is such action which paragraph (b) is intended to forbid. It must be recognized that there are certain great multipartite treaties which by reason of their nature and purpose have something of the character of a constitution in its relation to a statute and which must therefore be regarded in a different light from ordinary multipartite treaties which do not have this character. The Covenant of the League of Nations and the Statute of the Permanent Court of International Justice are examples. It is believed that certain parties to such instruments do not have the same freedom to alter them by particular agreements among themselves that they may have in respect to other multipartite

treaties not having such a character. Such treaties may be regarded as creating something more than obligations for the parties; they may be considered as constituting veritable limitations on the treaty-making capacity of the parties in their relations *inter se*, with the result that the entering into posterior conflicting treaties among groups of those parties would not be permissible. Some such limitation seems essential to the encouragement and integrity of international legislation, and it is this necessity which paragraph (b) is intended to serve.

Apparently, it was the value of such a principle as that which paragraph (b) enunciates as a means of promoting the cause of international legislation, which the Hague Conference of 1930 on the Codification of International Law had in mind when it adopted a recommendation that "in the future, States should be guided as far as possible by the provisions of the Acts of the First Conference for the Codification of International Law in any special conventions which they may conclude among themselves." It was the idea of the conference that if the parties to the conventions and protocols adopted by it were to enter into subsequent separate treaties among themselves which were inconsistent with those conventions and protocols, the effect would be to limit the uniformity sought and to handicap the effort at codification. Regarding the purpose of this recommendation, the drafting committee (*Acts of the Conference for the Codification of International Law held at The Hague in 1930*, Vol. I, Plenary Meetings, p. 68) said:

With regard to the treaties, conventions or agreements in force between the parties to the Acts adopted by the Conference, it is fully understood that nothing in the instruments in question affects any treaties, conventions or agreements in force between the parties to these instruments. In the Committee on Nationality, however, some concern was expressed as to how far it would be possible for two States to conclude between themselves special agreements which were not entirely in accordance with the principles contained in the instruments adopted by the Conference. Doubtless nothing prevents the conclusion of such agreements, provided they affect only the relations between the States parties thereto; but it did not appear desirable at the moment when the Contracting Parties were, by signing the instruments adopted by the Conference, about to undertake to apply in their mutual relations the principles and rules contained therein, that provision should be made for the possibility even within these limits of their avoiding this undertaking. On the contrary, a *vœu* will be submitted to the Conference by the Drafting Committee, recommending to States that, when they find it necessary to conclude special agreements upon questions concerning nationality, they should conform, as far as possible, to the provisions of the convention and protocols which have now been adopted.

Professor Hudson, adverting to the purpose of this recommendation ("The First Conference for the Codification of International Law," 24 *American Journal of International Law*, 1930, p. 461), observes that "It was also necessary to safeguard the provisions of existing treaties. Considerable

attention was devoted to the possibility of future treaties which might depart from the terms of the convention: of course, all the parties to an instrument may modify its effect by a later instrument; but can two of the parties, where there are more than two, proceed to modify its effect *inter se* by a later agreement? Such action would, in a sense, be contrary to the spirit of codification. . . . ” But, as he points out, it was clearly admitted in the report of the drafting committee that future conventions which “affect only the relations between the States parties thereto” may be entered into, even though their terms have an effect different from that of the multipartite convention.

Paragraph (b) does not prohibit the entering into of such conventions by two or more parties to a multipartite convention; it forbids only those which might have the effect of defeating the general purpose of a multipartite treaty by which they, along with other parties, are bound.

The problem has seldom been raised before international tribunals, but it was presented to the Permanent Court of International Justice in the recent *Oscar Chinn Case*, decided on December 12, 1934. (*Publications of the P.C.I.J.*, Series A/B, No. 63.) In contending that Belgium had violated her international obligations in her treatment of Chinn, a British national, the British Agent relied mainly on provisions of the Convention of Saint-Germain of September 10, 1919, by which certain States purported to effect *inter se* modifications in the General Act of Berlin of February 26, 1885, as modified by the General Act and Declaration of Brussels of July 2, 1890. For the text of the Berlin Act, see 76 *British and Foreign State Papers*, p. 4; of the Brussels Act, 82 *ibid.*, p. 55; of the 1919 convention, 1 Hudson, *International Legislation* (1931), p. 343. The parties to the Berlin Act were Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, Netherlands, Portugal, Russia, Spain, Sweden and Norway, and Turkey; the parties to the Brussels Act included these States and the United States, the Independent State of the Congo and Zanzibar. The Berlin Act does not provide for its denunciation, nor does it authorize the parties to conclude separate agreements among groups of themselves. By Article 36, the signatories reserved to themselves to introduce into the Act by common accord such modifications and improvements as experience might show to be necessary. The Convention of St. Germain of 1919 was entered into by the United States, Belgium, the British Empire, France, Italy, Japan and Portugal, but it was open to accession by States exercising authority over African territories and by other states, members of the League of Nations, which were parties to the Berlin Act or the Brussels Act. It provided (Art. 13) that the Berlin Act and the Brussels Act were to be considered as abrogated (with some exceptions) “in so far as they are binding between the Powers which are parties to the present Convention.”

The court did not address itself to the validity of the Convention of St. Germain, contenting itself with the following statement:

The Convention of Saint-Germain was the successor—so far as the Parties in the case are concerned and as regards the relations between them—of the General Act of Berlin of February 26th, 1885, and of the Act and Declaration of Brussels of July 2nd, 1890—to which Acts it is linked up by its preamble; but it should be pointed out that, according to the terms of Article 13 of the Convention signed by the two Governments concerned:

“Except in so far as the stipulations contained in Article 1 of the present Convention are concerned, the General Act of Berlin of 26th February, 1885, and the General Act of Brussels of 2nd July, 1890, with the accompanying Declaration of equal date, shall be considered as abrogated, in so far as they are binding between the Powers which are Parties to the present Convention.”

No matter what interest may in other respects attach to these Acts—the Berlin Act and the Act and Declaration of Brussels—in the present case the Convention of Saint-Germain of 1919, which both parties have relied on as the immediate source of their respective contractual rights and obligations, must be regarded by the Court as the Act which it is asked to apply; the validity of this Act has not so far, to the knowledge of the Court, been challenged by any Government.

In a vigorous dissenting opinion, Judge van Eysinga expressed the view that the court was bound to raise the question of its own motion:

The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute *jus dispositivum*, but it provides the Congo Basin with a regime, a statute, a constitution. This regime which forms an indivisible whole may be modified, but for this the agreement of all contracting Powers is required. An inextricable legal tangle would result if, for instance, it were held that the regime of neutralisation provided for in Article 11 of the General Act of Berlin might be in force for some contracting Powers while it had ceased to operate for certain others. . . .

In 1919, some of the Powers parties to the General Act of Berlin including the two States which have submitted the present case to the Court, acted in an entirely different manner. Without inviting the other contracting Parties to take part in the Conference which they held, they thought themselves entitled at that Conference to modify the General Act of Berlin *inter se*. It seems clear that in proceeding thus they acted contrary not only to an essential principle of international law but also to Article 36 of the General Act of Berlin, which expressly provides that modifications may only be made in the General Act by common accord. This is a legal situation of such importance that a tribunal should reckon with it *ex officio*. The only convention which the Court could apply is the Act of Berlin. If the Court had done so, it would have applied the Act of Berlin alone. It should be observed here that the validity of the Convention of Saint Germain cannot, as the Court seems to hold, be dependent on the question whether or not any Government has disputed its validity; moreover the Court has not gone into this question.

This view was shared by Judge Schücking, who added the following observations:

M. van Eysinga's dissenting opinion appears to me to show that the Congo Act intended to prohibit a limited group of its authors from making any changes in the Act; if that is so, the Court cannot refrain from considering what are the ensuing consequences as regards the validity of a convention concluded in violation of that prohibition by some of the authors of the Congo Act.

The doctrine of international law in regard to questions of this kind is not very highly developed. There is no clear and generally recognized doctrine regarding "acts which are automatically null and void," and acts of which the nullity is only relative, that is to say that they are valid in relations between their signatories, but are open to be impugned by other parties. The Court seems to have proceeded on the assumption that, even if there was a prohibition which debarred a limited group of the signatories of the Congo Act from modifying its terms—a question which the Court has not gone into—the new Convention continues nevertheless to be legal and valid, until such time as the Powers which were not invited to participate in it take steps to assert their rights.

In my opinion, this view is not in conformity with the will of the States which drew up the Congo Act. Once it is recognized that the intention was to create a Statute of the Congo which should not be liable to be altered by some only of its authors, the will of the Powers must be interpreted as being that no convention can acquire valid existence that is contracted in disregard of the rule forbidding a limited group of signatories of the Act to modify its terms. The antecedents of the Berlin Conference show that the intention was to set aside all treaties concluded between certain Powers, solely in regard to their interests in the Congo Basin. Indeed, two States (the United Kingdom of Great Britain and Portugal) had to discard a commercial treaty concluded prior to the Berlin Act (February 26th, 1885) and that particular treaty was the direct cause of the Berlin Act. It is beyond doubt that the signatory States of the Congo Act desired to make it absolutely impossible, in the future, for some of their number only to amend the Congo Act, seeing that any modifications thus introduced would have been a danger to their vested rights in that vast region. Accordingly, in my view, the nullity contemplated by the Congo Act is an absolute nullity, that is to say, a nullity *ex tunc*, which the signatory States may invoke at any moment; and the Convention concluded in violation of the prohibition is automatically null and void. The fact that, up to the present time, those signatories of the Berlin Act who did not participate in the Convention of Saint-Germain have not impugned the latter instrument, cannot, therefore, in any way remedy the absolute illegality of its conclusion. It remains null and void, because it transgresses the bounds which the authors of the Berlin Act established for themselves when they subscribed to that act.

I think that the case in which a convention has to be regarded as automatically null and void is not an entirely isolated case in international law. The Covenant of the League of Nations, as a whole, and more particularly its Article 20, in which the Members undertake not to enter into obligations or understandings *inter se* inconsistent with the terms of the Covenant would possess little value unless treaties concluded in violation of that undertaking were to be regarded as absolutely null and void, that is to say, as being automatically void. And I can hardly believe that the League of Nations would have already em-

barked on the codification of international law if it were not possible, even to-day, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void. If that is the situation, and if the Convention of Saint-Germain is not merely an act which the Signatory States of the Congo Act are entitled to impugn, but one which is, in itself, invalid, then, as M. van Eysinga has already pointed out, the Court ought not to apply the Convention. Our Court has been set up by the Covenant as the custodian of international law. It is an essential principle of any court, whether national or international, that the judges may only recognize legal rules which they hold to be valid. There is nothing to show that it was intended to disregard that legal principle when this Court was instituted, or that it was to be obliged to found its decisions on the ideas of the parties—which may be entirely wrong—as to the law to be applied in a given case. The terms of Article 38 of the Statute—which indicates, in the first place, as the source of law for the Court's decisions "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States"—cannot be intended to mean that the Court is bound to apply conventions which it knows to be invalid. The Court would never, for instance, apply a convention the terms of which were contrary to public morality. But, in my view, the Court finds itself in the same position if a convention adduced by the parties is in reality null and void, owing to a flaw in its origin. The attitude of the Court should, in my opinion, be governed in such a case by considerations of international public policy, even when jurisdiction is conferred on the Court by virtue of a Special Agreement.

On the other hand, President Hurst refused to deal with the question, saying:

The more important argument advanced by the United Kingdom is that the Belgian measures ran counter to the Convention of Saint Germain. This treaty was concluded in 1919 as part of the peace settlement of that year. Its purpose appears to have been to replace the Berlin and Brussels Acts by something more suitable to the conditions of the moment, while maintaining the general principles which those instruments embodied. By Article 13 the earlier Acts are abrogated as between the Powers which are parties to the new Convention. Both the United Kingdom and Belgium are parties to the Convention and have in this case treated it as the operative instrument.

In these circumstances I do not propose to express any opinion as to a question which, it is true, was not raised by the parties in this case, but which must strike any one who studied the published *proces-verbaux* of the Berlin Conference of 1885. That question is whether both Belgium and the United Kingdom had not already pledged themselves by the terms of the Berlin Act not to terminate or to modify, even as between themselves, the provisions of that instrument except in agreement with all the other States which were parties to it. Nor do I propose to express any opinion as to what would be the effect of such a pledge, if it had been given, that is to say, whether a new treaty made in violation of

such a pledge would be devoid of juridical effect, or whether it would merely be a wrongful act entitling a State which was not a party to the Convention of Saint Germain, but was a party to the Berlin Act to demand reparation.

(c) If a State assumes by a treaty with another State an obligation which is in conflict with an obligation which it has assumed by an earlier treaty with a third State, the latter obligation takes priority over the former.

COMMENT

The rule laid down in this paragraph has its justification in the principle *pacta sunt servanda*. It affirms in effect the principle that when a State has bound itself by a treaty with another State, it cannot thereafter relieve itself of the obligations it has thereby assumed by concluding a later treaty with another State under which it assumes obligations the performance of which would involve an impairment or repudiation of the obligations which it has already assumed *vis-à-vis* the State with which it concluded the earlier treaty. To admit its right to do so would be tantamount to admitting the right of unilateral termination or repudiation of treaty obligations. What a State gives by treaty to another State it cannot take away by a treaty subsequently concluded with a third State, at least not without the consent of the first-mentioned State. Manifestly that would be in contravention of the rule *pacta sunt servanda*.

Paragraph (c), however, does not say that a State may not enter into a subsequent treaty with a third State by which it assumes obligations *vis-à-vis* that State which are in conflict with obligations which it has assumed under a prior treaty with another State. It only says that the obligations assumed under the earlier treaty "take priority" over those which it has assumed by the later treaty in case there is a conflict between them. Thus, if State A agrees by a treaty with State B to cede B a particular portion of its territory, and if later, before the territory is delivered, State A concludes a treaty with State C by which it agrees to cede the same territory to that State, the obligation to State B takes priority over the obligation to State C, and B is entitled to performance. If State C is aware at the time it concludes the treaty with A that A has already bound itself by treaty to cede the territory to B and, in spite of this knowledge, goes ahead and concludes the treaty with A, it does so at its own risk. B is entitled to the territory and its right thereto takes priority over the right of C, just as the obligation of A to deliver the territory to B takes priority over its obligation to C. Even if, on the other hand, C was not aware of A's treaty with B when it concluded its treaty with A and if its ignorance was excusable, though C may have a just ground for complaint against A and may in some cases be entitled to an indemnity, nevertheless B's right takes priority, and A's obligation to C is to be subordinated to A's obligation to B. Cf. 2 Rivier, *Principes du Droit des Gens* (1896), p. 58.

Writers on international law seem to be unanimous in opinion as to the general principle that the obligations assumed by a State in a treaty with another State should prevail over those assumed by the same State under a later treaty with a third State. Vattel, who was one of the first writers to discuss the subject (*Droit des Gens*, Bk. II, ch. 12, sec. 165, *Classics of International Law*, Fenwick trans., p. 163), seems to have put it on the ground of capacity:

A sovereign who is already bound by one treaty can not enter into others in conflict with the first. The matters concerning which he has entered into an agreement are no longer at his free disposal. If a later treaty should be found to be in conflict on some point with an earlier treaty, the later one is void as to that point, being an attempt to dispose of a thing over which the contracting party did not have full control.

In another place (Bk. II, Ch. 17, sec. 315), he said on the same point:

If there is a conflict between two treaties made with two different States, the earlier treaty prevails, for a State can not bind itself by a subsequent treaty to do anything contrary to an earlier one, and if the later treaty is found, in a given case, to be incompatible with the earlier one, its execution is regarded as impossible, because the State has not the power to act contrary to its previous engagements.

Many writers go to the length of asserting that if a State concludes a treaty with another State which is in contradiction with a prior treaty which it has concluded with a third State, the later treaty is null and void. Thus, Oppenheim (1 *International Law*, 4th ed. 1928, p. 713) declares that "an obligation inconsistent with obligations under treaties previously concluded by one State with another cannot be the object of a treaty with a third State." Likewise Woolsey (*International Law*, 6th ed. 1899, sec. 105) says that "a treaty contradicting a prior treaty with another power is void, and, if observed, an act of injustice"; Hall (*International Law*, 6th ed. 1909, p. 334) declares that "until all the parties to a treaty have consented to forego their rights under it, no subsequent treaty incompatible with it can be valid"; Phillimore (2 *International Law*, 3d ed. 1882, p. 128) declares that the earlier treaty must be executed because "it was not within the competence of the party promising, to act in derogation of his antecedent engagements to another"; and De Louter (1 *Droit International Public Positif* (1920), p. 480), declares such treaties to be without "obligatory force". Bluntschli's draft code (*Droit International Codifié*, 1881, Art. 414) declares that treaties whose content is in contradiction with treaties previously concluded with other States are null, in so far as the State whose anterior rights are menaced objects to their execution. Substantially the same rule was laid down by Field in his *Outlines of an International Code* (Art. 198). Fiores draft (*International Law Codified*, Borchard trans. 1918, Art. 762) lays it down that an engagement which violates, to the injury of another State, an obligation previously contracted by treaty with one of the parties, can-

not constitute the object of a convention. None of the other draft codes of international law deal with the matter at all.

The Havana Convention on Treaties of February 20, 1928, appears to contain no direct pronouncement on the point here under discussion, although Article 10 lays it down emphatically that no State can relieve itself of the obligations of a treaty or modify its stipulations except with the consent of the other contracting parties.

It may be repeated that the rule of paragraph (c) does not go to the length of pronouncing the treaties or particular stipulations to which it refers to be null and void, as some of the writers quoted above do. The party to the earlier treaty may raise no objection to the later conflicting one, regarding the conflict of no great importance.

Examples of treaties by which States assumed obligations *vis-à-vis* another State which were in conflict with obligations previously assumed by them *vis-à-vis* a third State have not been lacking. G. F. de Martens mentions the treaty of 1774 between Russia and the Ottoman Empire, by which the latter State promised to accord the Russian Minister at Constantinople rank immediately after that of the Roman Emperor, although the Ottoman Government had previously agreed by the treaties of 1604, 1673 and 1740 with France to accord this place of honor to her minister. 1 *Précis du Droit des Gens* (1864), p. 167, n. (b). Pradier-Fodéré, 2 *Traité de Droit International Public* (1885), p. 753, mentions the Treaty of Worms of 1743 between Austria and Sardinia by which Austria promised to cede to the King of Sardinia certain territory which Austria had already ceded to the Republic of Genoa. Austria was therefore bound to indemnify Sardinia, which she did, though inadequately, by the treaties of Aix-la-Chapelle of 1748.

A well-known case of the kind was the alleged conflict between Articles 17 and 22 of the treaty of amity and commerce of February 6, 1778, between France and the United States, and Articles 24 and 25 of the Jay Treaty of November 19, 1794, between Great Britain and the United States. Under the former and earlier treaty the United States apparently bound herself to admit French privateers with their prizes to American ports for purposes of repair and obtaining supplies, whereas under the later treaty with Great Britain the United States bound herself to forbid this privilege to all belligerents, including France. As to the controversy between France and the United States to which the conclusion of the Jay Treaty gave rise, see 5 Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), p. 4415 ff. In the case of the *Amity* (Fed. Cas. 9741), a United States District Court in 1796, while refusing to take jurisdiction of a case involving a British vessel captured and brought into a port of the United States, admitted that the obligations of the United States to France under the treaty of 1778 took precedence over those of the United States to Great Britain under the treaty of 1794, in so far as there was a conflict between them. See also the case of the *Phoebe Ann* (1796), 3 Dall. 319.

The abrogation of the treaty of 1778 in 1798 removed the possibility of further controversy over the conflicting provisions

Another well-known case was the Treaty of San Stefano of 1878 between Russia and Turkey which was inconsistent with the Treaty of Paris of 1856 and the Convention of London of 1871, to both of which Russia as well as various other Powers were parties. Great Britain protested against the conclusion of the Treaty of San Stefano and, upon her demand, Russia consented to the calling of the Congress of Berlin (1878) at which a new treaty consistent with the earlier ones was agreed upon. Oppenheim, who denies that an obligation which is inconsistent with the existing treaty engagement of a party with a third State can be made the object of a valid treaty (1 *International Law*, 4th ed. 1928, p. 713), asserts that, had Russia insisted on carrying out the terms of the Treaty of San Stefano, Great Britain and the other parties to the treaties of London and Paris would have had the right to intervene to prevent it (*ibid.*, p. 264).

There was apparently a conflict between the convention of November 18, 1903, between the United States and Panama for the construction of a ship canal, and the treaty of November 18, 1901 (the Hay-Pauncefote Treaty), between the United States and Great Britain, to facilitate the construction of a ship canal. By Article 19 of the former convention the United States agreed to exempt the Government of Panama from the payment of tolls on its vessels while using the canal for the transport of troops and munitions of war. But by Article 3 of the latter treaty the United States promised Great Britain that all vessels using the canal should pay tolls in accordance with the principle of equality and without discrimination against any nation or its citizens and subjects. The privilege accorded to Panama by the later treaty was therefore apparently in conflict with the earlier treaty. The Government of Great Britain protested against Article 5 of the Panama Canal Tolls Act of August 24, 1912, which exempted vessels of United States nationality from the payment of tolls, on the ground that the exemption was in contravention of Article 3 of the treaty of 1901, and in the same note referred to the Panama exemption as being contrary to the same article. Note of Sir Edward Grey of November 14, 1912, *Diplomatic History of the Panama Canal*, United States Senate Doc. No. 474, 63d Cong., 2d Sess., pp. 91, 95; Oppenheim, *The Panama Canal Conflict* (Cambridge, 1913), p. 48. It does not appear, however, that Panama ever protested against the provision of the later treaty. This was probably due to the fact that, in view of the peculiar position of Panama as regards the canal, the exemption of her vessels being one of the conditions on which she permitted the canal to be constructed in her territory, the British Government was not disposed to press the matter of the exemption of her vessels from the payment of tolls. See Wright, "Conflicts between International Law and Treaties," 11 *American Journal of International Law* (1917), p. 577.

The validity of the treaty of November 17, 1905, between Japan and Korea

establishing a Japanese protectorate over the latter country was denied at the time on the ground that it violated previous engagements between Japan and other Powers. Rey, "*La Situation Internationale de la Corée*," 13 *Revue Générale de Droit International Public* (1906), p. 55.

Reference may be made in this connection to Judge Schüeking's dissenting opinion in the case of *The Wimbledon* in which he argued that, among the reasons why Germany did not have the right to permit *The Wimbledon* to transport munitions of war consigned by the Polish mission in Salonika through the Canal for the use of Poland, which was at war with Russia, was the fact that Article 380 of the Treaty of Versailles as interpreted by the majority of the court was in conflict with Articles 2 and 7 of the fifth Hague Convention of 1907 concerning the rights and duties of neutral Powers and persons in land warfare. It could not, he concluded, have been the intention of the Powers which imposed upon Germany the Treaty of Versailles to require her to violate obligations which she and they had assumed under an earlier treaty. *Publications of the P.C.I.J.*, Series A, No. 1, p. 47.

There are undoubtedly inconsistencies between the International Air Convention concluded at Paris in 1919 and the Pan American Convention for Air Navigation, concluded at Havana in 1928, although Panama, after having become a party to the former convention, ratified the later one and became a party to it. Five other States signed both of them but have not ratified either. The conflicts between them are such as to make it almost impossible for a State to perform the obligations which both impose upon it. See Warner, "The International Convention for Air Navigation and the Pan American Convention for Air Navigation: A Comparative and Critical Analysis," 3 *Air Law Review* (1932), p. 225. Under the rule laid down by this Convention, Panama's obligations under the convention of 1919 take priority over those under the convention of 1928 as between Panama and a State which is a party to the 1919 convention but not a party to the 1928 convention, in so far as there is a conflict between her obligations under the two conventions.

An important case of conflict between an earlier and a later treaty was afforded by the Bryan-Chamorro Treaty of August 4, 1914, between Nicaragua and the United States, by which Nicaragua granted to the United States the right to construct an inter-oceanic ship canal by way of the San Juan River and the Lake of Nicaragua, including the right of absolute ownership over the San Juan route. The validity of this provision of the treaty was contested by Costa Rica on the ground that it was in conflict with the Canás-Jerez Treaty of April 15, 1858, between Nicaragua and Costa Rica, as interpreted by the arbitral award of President Cleveland of March 22, 1888. The latter treaty provided, among other things, that Costa Rica should have perpetual rights of free navigation over certain portions of the San Juan River through which the canal was to be constructed. Nicaragua had therefore, by the Bryan-Chamorro Treaty, granted to the United States

rights over the San Juan River which she had no right to grant, in view of her treaty of 1858 with Costa Rica. Costa Rica also contended that Nicaragua's grant to the United States was in conflict with Article 9 of the General Treaty of Peace, Amity and Commerce of December 20, 1907, between the five republics of Central America, relative to the privileges of navigation by the ships of the signatory states. 2 Malloy, *Treaties, etc.*, p. 2395. The Central American Court of Justice (the Nicaraguan member of the court dissenting), to which this and other questions arising out of the conclusion of the Bryan-Chamorro Treaty was submitted in 1916, upheld the contentions of Costa Rica; but, in view of the fact that the United States was not subject to the jurisdiction of the court, it refused to pass upon the validity of the Bryan-Chamorro Treaty. On the particular point here under discussion the court said: "It is declared that the government of Nicaragua has violated, to the injury of Costa Rica, the rights granted to the latter by the Canás-Jerez treaty of Limits of April fifteen, eighteen hundred and fifty-eight, by the Cleveland award of March twenty-second, eighteen hundred and eighty-eight, and by the Central American Treaty of Peace and Amity of December twentieth, nineteen hundred and seven." *Costa Rica v. Nicaragua*, Central American Court of Justice, 11 *American Journal of International Law* (1917), p. 181 ff. The decision is given on p. 229. See also the editorial comment of P. M. Brown, *ibid.*, p. 156 ff, and of Geo. A. Finch, 10 *ibid.*, p. 344 ff. Text of the Cleveland award in 2 Moore, *History and Digest of International Arbitrations* (1898), p. 1945 ff.

On May 22, 1929, the Government of Poland protested against certain phrases in the Final Protocol of January 29, 1928, between Germany and Lithuania relative to the frontiers of Poland, on the ground that they were in "obvious contradiction" with the Treaty of Versailles of January 20, 1920, to which Germany and Poland were parties. The note stated that in consequence of this contradiction Poland was "compelled to make the most formal reservations regarding the tenor of the said Protocol." *League of Nations Official Journal*, 1929, p. 1322.

From this review it may be concluded that the practice and the jurisprudence are in harmony with the rule here proposed. Apparently in no case in practice has the general principle of the priority of the obligations previously assumed by a State over those subsequently assumed by it with a third State, ever been seriously denied, and no decision of an international tribunal is known in which the contrary principle has been sustained.

ARTICLE 23. EXCUSES FOR FAILURE TO PERFORM

Unless otherwise provided in the treaty itself, a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omissions in its municipal law, or because of any special features of its governmental organization or its constitutional system.

COMMENT

The phrase "unless otherwise provided in the treaty itself" is intended to exclude the application of this article to treaties which by their own terms expressly provide that the parties shall not be bound to perform the obligations stipulated therein in the event they are prevented from so doing by existing or subsequently enacted provisions in their municipal law, because of absence of such provisions, or because of special features in their governmental or constitutional system. Such provisions in treaties or other international acts have been rare, although they have not been entirely lacking. See, for example, the provision in a number of exchanges of notes between the United States and other States to this effect: "but should either party be prevented by future action of its legislature from carrying out the terms of this arrangement, the obligations thereof shall thereupon lapse." Exchange of notes of February 10, 1925, between the United States and Poland, *United States Treaty Series*, No. 727; exchange of notes of March 2, 1925, between the United States and Estonia, *ibid.*, No. 722; exchange of notes of February 26, 1926, between the United States and Rumania, *ibid.*, No. 733; exchange of notes of December 23, 1925, between the United States and Lithuania, *ibid.*, No. 742. See also the provision in the so-called "liquor treaties" between the United States and various States to the effect that such treaties should "lapse" if either party were prevented by legislative action or judicial decision from giving full effect to the treaty. 26 *League of Nations Treaty Series*, p. 43.

In case a treaty does not expressly relieve the parties from the duty of performance for either of the reasons mentioned in Article 23, they are bound to carry out in good faith the obligations which they have assumed under the treaty, and they cannot justify their failure to do so on either of the grounds mentioned in Article 23. The words "cannot justify" mean that the parties cannot under international law excuse or avoid responsibility for their failure to perform the obligations which the treaty imposes. A defense to the charge of non-performance, therefore, based on either ground is not a sufficient one. If such excuses were recognized as valid, the integrity and utility of the whole treaty system would be undermined, because in that case the duty of performance would be dependent upon the action or inaction of the law-making authority of either party, or upon the character of the governmental organization or constitutional system which it chooses to maintain. Manifestly, these are not proper criteria for determining the obligatory force of treaties between States.

It will be seen that Article 23 envisages and rejects two types of excuses which a party to a treaty might otherwise seek to invoke in defense of its failure to discharge its obligations: (1) the existence of municipal law which is inconsistent with the treaty and which if applied would render compliance with the terms of the treaty impossible, or the lack of municipal law which may be necessary to the execution of the treaty, and (2) the existence of a

form of government or constitutional régime under which, by reason of its special features or particular character, the national government lacks the necessary competence to execute the treaty obligations which the State has assumed. These two types of excuses will be considered in turn.

PROVISIONS OR OMISSIONS IN MUNICIPAL LAW

The term "municipal law" is to be understood as referring to both the constitution and the statutory legislation of a State. Article 21 of this Convention also refers to the "law" of a State and recognizes that a State is not bound by a treaty made on its behalf by an organ or authority not competent under its "law" to conclude the treaty. There is no conflict, however, between that article and the one here under discussion. This article assumes that the treaty in question is one which has been properly concluded by the duly authorized and competent authority of the State, and it provides that the obligations of such treaty cannot subsequently be evaded or avoided by a State on the ground that provisions or omissions in its law other than those referred to in Article 21 interfere with or prevent its carrying out those obligations.

The term "provisions in its municipal law" refers not only to provisions in the constitution or legislation of a State existing at the time the treaty is entered into, but also to provisions enacted subsequent to the conclusion of the treaty. In either case the provisions, if in conflict with the treaty, cannot be pleaded by the State in justification of a failure on its part to carry out its obligations under the treaty.

The question of conflict between a treaty and an existing constitutional provision arose in connection with the *Dillon Case* in 1854. See 5 Moore, *Digest of International Law* (1906), pp. 78-81. The French Government protested that the issuance of process compelling Mr. Dillon, French consul at San Francisco, to appear in the United States District Court as a witness for the defendant in a criminal case, was a breach of the consular convention of February 23, 1853, between the United States and France, Article 2 of which exempted consuls from being compelled to appear as witnesses before the courts. The United States Secretary of State replied that the sixth amendment to the Constitution of the United States entitling persons accused of crime to compulsory process for obtaining witnesses overrode the provisions of the treaty. The American contention, however, was not acquiesced in by the French Government, which demanded that proper reparation be made for the alleged indignity to their consul. After a protracted correspondence, the French Government finally agreed to accept as sufficient satisfaction an expression of regret by the United States Government and a national salute to the French flag.

In the case of *In re Dillon* (1854), 7 Sawy. 561, 7 Fed. Cas. 710, the United District Court for the District of California held that the provision in the United States Constitution which secures to an accused person in criminal

prosecutions the right to have compulsory process for obtaining witnesses in his favor, does not authorize the issuing of such process to foreign consuls who by express treaty stipulation are exempt therefrom.

In 1872 the following instruction was issued by the Secretary of State:

The contention of Mr. Marcy in the case of Mr. Dillon, French consul at San Francisco, that the sixth amendment to the Constitution of the United States, which provides that an accused party shall have compulsory process for obtaining witnesses in his favor, should be considered as qualifying the general and absolute terms of the consular convention with France, "was not acquiesced in by the French Government, which required their flag, when raised to the mastheads of certain of their men-of-war at San Francisco, to be saluted as a reparation for the alleged indignity to their consul." It is therefore desirable that in any future consular convention no such oversight should be committed. (5 Moore, *Digest of International Law*, 1906, p. 81.)

The facts in the above case seem to support the principle that a State cannot rely upon a provision in its constitution existing at the time a treaty was entered into to evade or justify non-performance of provisions in the treaty with which the constitutional provision is in conflict. It is that principle which is laid down in this article.

If a constitutional provision existing at the time a treaty is entered into cannot be relied upon to avoid performance of provisions in the treaty with which it conflicts, it must be even clearer that constitutional provisions adopted subsequent to the conclusion of the treaty are not to be relied upon for that purpose. Were the contrary principle to prevail, a State would have only to write into its constitution provisions which conflicted with its existing treaties in order to be freed from the obligations imposed by those treaties. The question of a conflict between a treaty and a constitution subsequently adopted was raised in connection with a provision of the Constitution of the Netherlands of 1848 which was in contravention of the Concordat of 1827 between that country and the Holy See. The conclusion reached by the parties in the course of the diplomatic discussion relative to the matter was that treaty engagements cannot be derogated from by constitutional provisions adopted by one of the parties. Judge van Eysinga, in discussing the case, has maintained that treaty engagements cannot be modified, derogated from or abrogated by any unilateral act of a State, whether the act be in the form of a statute or a constitution or an amendment to a constitution. "*Le Droit de la Société des Nations et les Constitutions Nationales*," *I Revue de Droit International et de Législation Comparée*, 3d ser. (1920), p. 145. In support of his position, he refers to the Declaration of London of 1871 which affirmed "a fundamental principle of international law" when it denied the right of a State to modify or free itself from its treaty engagements without the assent of the other contracting parties. This limitation on the right of the State, he concludes, applies equally to the action of the constituent power and the legislative power. Professor Ver-

dross reaches the same conclusion, namely, that a State is "internationally bound to conform its legislation, and even its constitution, to the prescriptions of the law of nations," including of course the treaties to which it is a party. "*Le Fondement du Droit International*," 16 *Recueil des Cours* (1927), p. 293.

The question here under consideration was also raised by Article 61 of the German Constitution of 1919, which provided for the possible admission of Austria into the German Reich—a provision which contravened Article 80 of the Treaty of Versailles relative to the inalienability of the independence of Austria. In consequence of the protest of the Allied and Associated Powers, Germany abrogated Article 61. It may be remarked that Article 61 was in conflict with Article 178 of the same Constitution which declared that nothing therein should affect the provisions of the Treaty of Versailles; Germany therefore was prohibited not only by the Treaty of Versailles, but also by her own Constitution from adopting Article 61. Mattern, *Constitutional Jurisprudence of the German National Republic* (1928), p. 641. The German Reichsgericht has in fact held that the Treaty of Versailles takes precedence over certain conflicting provisions of the German Federal Constitution. V. K. und S., 62 *Entscheidungen des Reichsgerichts in Strafsachen* (1928) 65.

In the *Case concerning the Treatment of Polish Nationals in the Danzig Territory*, the Permanent Court of International Justice declared that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force"; the question of the treatment of Polish nationals in Danzig was therefore to "be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig." *Publications of the P.C.I.J.*, Series A/B, No. 44, p. 24.

If a State cannot plead provisions in its fundamental law in justification of a failure on its part to perform its binding treaty obligations, it follows *a fortiori* that it cannot rely upon provisions in its ordinary legislation for any such purpose. To hold otherwise would be equivalent to holding that a State might, by its own unilateral legislative action, free itself of its treaty obligations. See, in this sense, the vigorous protest of Count Apponyi against the "idea which places the national legislation of a country above . . . conventional international law." "What would be the object of concluding treaties or of undertaking international obligations," he asked, "if it were open to those who had undertaken them to escape from their effects by a legislative, executive, or constitutional act or by any act of any other kind arising from their own authority?" *League of Nations Official Journal*, 1923, p. 887.

With the principle embodied in this article the great majority of writers are in agreement. See, for example, W. Kaufman, *Die Rechtskraft des Internationalen Rechts* (1899), pp. 73, 78; Verdross, "*Zur Konstruktion des Völkerrechts*," 8 *Zeitschrift für Völkerrecht* (1914), p. 329 ff, where the prin-

ciple that the treaty obligations of a State cannot be modified by the unilateral legislative set of the parties is emphasized; Pillaut, "*Nature Juridique et effets généraux des Traités Internationaux*," 46 *Journal du Droit International* (1919), p. 595; Noel, *De l'Autorité des Traités comparée à Celle des Lois* (1921), pp. 133 ff and 159 ff, where the French jurisprudence is reviewed; Réglade, "*De la Nature Juridique des Traités Internationaux*," 41 *Revue de Droit Public et de la Science Politique en France et à l'Etranger* (1924), p. 523; Pillet et Niboyet, *Manuel de Droit International Privé* (1924), p. 37; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 352; 1 Oppenheim, *International Law* (4th ed., 1928), p. 755; Mestre, "*Traités et Droit Interne*," 38 *Recueil des Cours* (1931), p. 277 ff. See also the opinions of certain Japanese jurists quoted by Colegrove, "The Treaty-making Power in Japan," 25 *American Journal of International Law* (1931), p. 285.

That a State may not enact legislation in violation of its treaty engagements and then justify its non-fulfillment of those engagements because of such legislation has frequently been asserted in international practice. Certainly that principle was implicit in the Declaration of London of January 7, 1871. It is likewise implicit in statements to the effect that a State cannot avoid its obligations under customary international law because of conflicting municipal law; the rule would apply, if anything, with greater force in the case of obligations created by conventional international law. See, in this connection, the following statement of the United States Secretary of State made with reference to the *Cutting Case*:

. . . if a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law and in either case that law furnishes the test of the nation's liability and not its own municipal rules. This proposition seems now to be so well understood and so generally accepted, that it is not deemed necessary to make citations or to adduce precedents in its support." (U. S. Foreign Relations, 1887, p. 751; 2 Moore, *Digest of International Law*, 1906, p. 235.)

The principle here under discussion has been asserted by the Permanent Court of International Justice, expressly or by implication, in several cases. See especially its judgment in the *Case concerning Certain German Interests in Upper Silesia* (*Publications of the P.C.I.J.*, Series A, No. 7, p. 81); and its advisory opinion of September 15, 1923 on the *Question Concerning the Acquisition of Polish Nationality*, where the court affirmed that, while a state has the right to decide what persons shall be regarded as its nationals, the exercise of the right was subject to the State's treaty obligations. Series

B, No. 7, p. 16. See also the advisory opinion of July 31, 1930 in the *Case relative to the Greco-Bulgarian Communities*, where the court, replying to the question drawn up by the Bulgarian Government, said: "It is a generally accepted principle of international law that in the relations between Powers who are contracting parties to a treaty, the provisions of the municipal law cannot prevail over those of the treaty." And in reply to a question submitted by the Greek Government whether, if the laws in force in the territory of one of the parties were in conflict with the convention, they were to be regarded as having any effect, the court answered that "they would not prevail as against the Convention." Series B, No. 17, pp. 32, 35. See also the order of the court (December 6, 1920) in the *Case of the Free Zones of Upper Savoy and the District of Gex* (Series A, No. 24, pp. 11-12), where it was emphasized that France could "not rely on her own legislation to limit the scope of her international obligations."

The jurisprudence of arbitral tribunals is no less positive on this point. See, for example, the award of William R. Day in the case of *Metzger and Co. against the Republic of Haiti* (September 27, 1900), where the arbitrator, confronted with the fact that Haitian officials sought to enforce a law which was in violation of a treaty between Haiti and the United States, said:

The law which they [the officials of Haiti] were attempting to enforce was a law of the Republic of Haiti in violation of the treaty between the two nations. It need hardly be stated that the obligations of a treaty are as binding upon nations as are private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here. (*U. S. Foreign Relations*, 1901, p. 275.)

See also the award of the Senate of Hamburg in the case of *Yuille, Shortridge et Cie* (2 Lapradelle and Politis, *Recueil des Arbitrages Internationaux*, 1923, pp. 105-106), where it was said:

It goes without saying that the edicts of the Portuguese sovereigns or the laws promulgated in Portugal can not in any way alter the obligations contracted by the government. That follows from the nature of a treaty, which obliges the parties to execute it. It is true that there is nothing to prevent the royal government of Portugal from putting itself in the position of not being able to execute the treaty without violating the laws of the country. But that affects in no way whatsoever the rights stipulated in favor of the other contracting party. (trans.)

Article 23 of this Convention is to be interpreted as denying that a State may justify its failure to perform a treaty engagement because of any provisions in its municipal law, even though its courts uphold the validity of such legislation and give effect to it rather than to the stipulations of the treaty with which the legislation is in conflict. Under the jurisprudence or practice of many States the courts are obliged to apply, and the executive authorities to enforce, municipal legislation rather than treaty stipulations

with which the legislation is inconsistent. If the enactment of legislation of this kind affords no such excuse, the action of the courts of the State which enacted it in upholding its infra-territorial validity, or of the executive authorities in enforcing it, when they are obliged under their own municipal law to do so, does not add anything to the legitimacy of the excuse for non-performance. The municipal law of the State which thus obliges its courts and executive authorities is itself inconsistent with the principle here asserted, namely, the obligation of a State to fulfill its treaty engagements regardless of what its municipal law may require. Hyde (2 *International Law*, 1922, p. 60) thus states the principle:

It must be clear that while an American court may deem itself obliged to sustain an Act of Congress, however inconsistent with the terms of an existing treaty, its action in so doing serves to lessen in no degree the contractual obligation of the United States with respect to the other party or parties to the agreement. The right of the nation to free itself from the burdens of a compact must rest in each instance on a more solid basis than the declaration of the Constitution with respect to the supremacy of the laws as well as treaties of the United States.

See also, 1 Oppenheim, *International Law* (4th ed., 1928), p. 755; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 352; Verdross, "Zur Konstruktion des Völkerrechts," 8 *Zeitschrift für Völkerrecht* (1914), p. 329 ff; and Potter, "Relative Authority of International Law and Municipal Law in the United States" 19 *American Journal of International Law* (1925), p. 315 ff.

Article 23 denies that a State may rely upon actual provisions in its municipal law to justify its failure to perform its obligations under a treaty to which it is a party; it likewise denies that the State can, by pleading omissions or deficiencies in its municipal law, avoid responsibility for the performance of such obligations. Thus, a State may be a party to a treaty which binds it to prevent the building and fitting out within its territory of war ships or the recruitment therein of military forces to be used against the other party in case it should find itself at war with a third State. Nevertheless, the State so bound may not have enacted the necessary legislation to enable the public authorities to prevent the acts forbidden by the treaty, or, in case it has enacted such legislation, it may be defective or inadequate for one reason or another. Under Article 23, such a failure of a State cannot be pleaded as a justification for the non-fulfillment of its treaty obligations.

There are various countries, of which Great Britain is an example, whose practice requires the existence of enabling legislation before a treaty will be applied or executed, if it is one which involves changes in the general law of the country. As to the law and practice in Great Britain, see McNair, "When do British Treaties Involve Legislation," 9 *British Year Book of International Law* (1928), p. 59. See also 2 Anson, *Law and Custom of the Constitution* (3d ed.), p. 107; Picciotto, *Relation of International Law to the Law of England*

and of the United States (1915), p. 59 ff; Wright, "The Legal Nature of Treaties," 10 *American Journal of International Law* (1916), pp. 708 and 735; and the cases of *Walker v. Baird* (1892) L. R. A. C. 491, and *Re Californian Fig Syrup Co.'s Trade-Mark* (1888), 40 Chancery Division 620. See also the recent decision of the Supreme Court of Canada in *Re Arrow River and Tributaries Slide and Boom Co. Ltd.* (1932), 2 D. L. R. 250, where it was said: "A treaty in itself is not equivalent to an Imperial Act and without the sanction of Parliament the Crown cannot alter the existing law by entering into a contract with a foreign power." If a country where this practice prevails should fail to enact such legislation it could not under Article 23 justify itself on that ground for failure to execute the treaty.

According to the doctrine and jurisprudence of many countries treaties do not become binding in municipal law or enforceable by the courts or other public authorities, where their intervention is necessary, until they have been "incorporated" or "transformed" by legislative action in some form into their municipal law and thus made a part of the law of the land. The doctrine and jurisprudence as to transformation are reviewed by Masters, *International Law in National Courts* (New York, 1932). See also Triepel, "Les Rapport entre le Droit Interne et le Droit International," 1 *Recueil des Cours*, p. 79 ff; Schoen, "Staatsverträge (Völkerrechtliche und staatsvechtliche Geltung)," in 2 Strupp's *Wörterbuch des Völkerrechts und der Diplomatie*, p. 658 ff; Beer, "Krieg und Völkerrecht vor dem deutschen Reichsgericht," 25 *Niemeyers Zeitschrift für Internationales Recht* (1915), p. 321 ff; Walz, "Die Bedeutung des Art. 4 der Weimarer Reichsverfassung für das nationale Rechtssystem," 13 *Zeitschrift für Völkerrecht* (1924-1926), p. 165 ff, and Grimm, "Abschluss und rechtliche Wirksamkeit der Staatsverträge des deutschen Reiches seit 1918," 14 *ibid.* (1927-28), p. 477 ff. One of the purposes of Article 23 of this Convention is to make it clear that if the law or practice of a State requires a treaty to be "incorporated" or "transformed" into its municipal law before it can be executed, such requirement shall not affect in any way the international obligation of the State to execute the treaty. Consequently, the failure of the State to perform its obligations under the treaty during the interval between the date on which the treaty comes into force and the enactment of the "transformation" legislation cannot be pleaded as a legitimate defense to the charge of non-performance by the State of its treaty obligations. In short, Article 23 affirms the principle that the duty to execute the stipulations of a treaty from the date at which, by agreement of the parties, it becomes legally binding upon them, is not dependent upon some posterior unilateral act of a party which may be required by its own jurisprudence or practice—unless, of course, the treaty itself contains an express provision to the effect that there shall be no duty of execution prior to such act.

Obviously also, when a treaty, as is frequently the case, expressly obligates the parties to enact new legislation or modify their existing legislation in

order to ensure the execution of the treaty, the obligation is not discharged by a mere recommendation addressed by the executive to the legislature to the effect that the promised legislation be enacted. In such cases the State's duty involves action by its legislature, and a failure to discharge that duty is no justification for non-execution of the treaty.

There seems to be quite general agreement upon the principle here discussed; namely, that a State is under a duty to enact whatever legislation may be necessary to ensure the execution of its treaty obligations, and, consequently, that it may not plead the lack of such legislation as a justification for its failure to perform those obligations. See, for example, Fiore, *International Law Codified* (Borchard trans., 1916), Art. 838; 2 Wharton, *Digest of the International Law of the United States* (1887), p. 67; 5 Moore, *Digest of International Law* (1906), p. 222; 1 Willoughby, *The Constitutional Law of the United States* (1910), pp. 515, 517; Cavaglieri, "Règles Général du Droit de la Paix," 26 *Recueil des Cours* (1929), p. 529; Despagnet "Les Difficultés internationales venant de la Constitution de Certains Pays," 2 *Revue Générale de Droit International Public* (1895), p. 189; Triepel, *Droit International et Droit Interne* (Brunet trans., 1920), ch. 2, sec. 3; Wright, *Control of American Foreign Relations* (1922), p. 18, n. 12. See also *Foster v. Neilson* (1829), 2 Peters, 253.

In this connection reference may be made to the award of September 14, 1872, in the *Alabama Claims Case*, which referred to the failure of a State to enact the legislation necessary to enable it to meet its international obligations, in these words: "And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed." 7 Moore, *Digest of International Law*, 1906, p. 1061. This pronouncement was in line with the contention of the United States in this case that:

It must be borne in mind, when considering the municipal laws of Great Britain, that, whether effective or deficient, they are but machinery to enable the Government to perform the international duties which they recognize, or which may be incumbent upon it from its position in the family of nations. The obligation of a neutral State to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation; but it can neither create nor destroy it, for it is an obligation resulting directly from international law, which forbids the use of neutral territory for hostile purpose. (*Papers Relating to the Treaty of Washington, Geneva Arbitration*, 1872, p. 47.)

The Permanent Court of International Justice in its opinion in the *Case relative to the Exchange of Greek and Turkish Populations* declared it to be a "self-evident" principle that "a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to insure the fulfillment of the obligations undertaken." *Publications of the P.C.I.J.*, Series B, No. 10, p. 20. Likewise in its opinion

on the *Jurisdiction of Danzig Courts*, the Permanent Court, adverting to the contention of Poland that her courts could not apply the convention in question because its provisions had not been incorporated into the Polish law, observed that Poland could not invoke as an excuse for failure to fulfill her obligations to Danzig the fact that she had not enacted the "incorporation" legislation. Series B, No. 15, p. 26.

SPECIAL FEATURES OF GOVERNMENTAL ORGANIZATION OR
CONSTITUTIONAL SYSTEM

The second part of Article 23 denies the right of a State to excuse itself for failure to perform its treaty obligations "because of any special features of its governmental organization or its constitutional system." Among the most common cases here envisaged is that of a composite State, as, for example, one organized on the federal principle, in which the powers of government are divided between the national and local authorities in such a way that the national government may lack the necessary constitutional competence to execute the stipulations of treaties which it has concluded, because they deal with matters not falling within its jurisdiction. In such a case the national government of the State which has bound itself by a treaty to perform certain obligations may seek to disclaim responsibility for the execution of the treaty, and it may attempt to justify the non-performance of its obligations thereunder, on the plea that, because of the special character of its constitutional arrangements and governmental organization, it lacks the necessary power to perform those obligations. Article 23 of this Convention lays down the rule that such a plea is not admissible. In other words, it recognizes the principle that when a State, acting through its competent treaty-making organs or authorities, concludes a treaty with another State, that treaty is binding on the State which concluded it, and it cannot thereafter avoid the duty of performance by pleading lack of constitutional competence.

The correctness of this principle is affirmed by virtually all writers on international law; it is based on the theory that, generally, a State, in so far as concerns its treaty relations and international obligations, is regarded as a unit and that its territorial or political subdivisions are, internationally speaking, non-entities. When, therefore, one State concludes a treaty with another State and obligates itself to perform the stipulations thereof, the latter State is not concerned with the character of the internal or constitutional organization of the former State; indeed, it is not, under the rules of international law, required to be cognizant of the constitutional relations which exist between the other State and its political subdivisions. It has, in general, a right to assume that the national government of the other party, in obligating itself to do certain things, possesses the necessary constitutional competence to fulfill its promises and that it will not seek to relieve itself from those obligations by a subsequent plea of constitutional

incapacity. See, in this connection, Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 201; Wright, *Enforcement of International Law Through Municipal Law in the United States* (1916), p. 97; Eagleton, *The Responsibility of States* (1928), p. 32. See also Le Fur, *L'Etat Fédéral et Conférences d'Etats* (1896), p. 792; 1 Willoughby, *Constitutional Law* (1st ed., 1910), pp. 515; Stoke, *Foreign Relations of the Federal State* (1931), pp. 59, 173; Kunz, *Die Staatenverbindungen*, in Stier-Somlo, *Handbuch des Völkerrechts* (1929), p. 665; Clunet, "Protection des Nationaux à l'étranger," 18 *Journal du Droit International*, (1891), p. 1147 ff; Gammans, "The Responsibility of the Federal Government for the Violation of Rights of Aliens," 8 *American Journal of International Law* (1914), p. 73 ff; Despagnet, "Les Difficultés Internationales Venant de la Constitution de Certains Pays," 2 *Revue Générale de Droit International Public* (1895), p. 184 ff; Fauchille, 14 *ibid.* (1907), p. 664 ff. See also Article 3 of the draft on the Responsibility of States by the Research in International Law (23 *American Journal of International Law*, 1929, Special Supplement, p. 145); Article 9 of the Project of the American Institute of International Law, 1927 (*ibid.*, p. 229); and the Article 5 of the draft rules of the Japanese Association of International Law (*Kokusaiho-Gakkwai*), *ibid.*, p. 231.

The jurisprudence of arbitral tribunals has been in accord with the above view. In the case of the *Montijo* (2 Moore, *History and Digest of International Arbitrations*, 1898, pp. 1439-40), where the Colombian Government denied its liability for certain acts attributable to the State of Panama, which were in violation of Article 8 of the treaty of December 12, 1846 with the United States, Umpire Bunch said:

For treaty purposes the separate States are nonexistent; they have parted with a certain defined portion of their inherent sovereignty, and can only be dealt with through their accredited representative or delegate, the federal or general government. But, if it be admitted that such is the theory and the practice of the federal system, it is equally clear that the duty of addressing the general government carries with it the right to claim from the government, and from it alone, the fulfillment of the international pact.

Concerning the latter decision, Butler (1 *Treaty-Making Power of the United States*, 1902, p. 165) remarks: "This decision may at some future time be used as a precedent against the contention of the United States that it is not responsible for violations of treaty stipulations resulting from the acts, or negligence, of the states composing the union." See also the opinion of Findlay in the *de Brissot Case* (3 Moore, *History and Digest of International Arbitrations*, 1898, p. 2971) where he said: "whatever may be the relations *inter sese* between the constituent parts of a federative body, admitted as such into the family of nations, they can play no part in determining the liability of the body by its own distinctive name to other nations for wrongs inflicted by any of the parts or within the domestic jurisdiction of the

same." In the course of his opinion in this same case, Commissioner Little said: "For redress of injuries to her citizens the United States must look to Venezuela and not to any of her political subdivisions."

The plea of irresponsibility of the national government of the United States for the non-fulfillment of its obligations under international law, conventional or customary, has never been admitted by States to which it was addressed, and in recent years the Government of the United States appears to have ceased to invoke it. 1 Hyde, *International Law* (1922), p. 520; Eagleton, *Responsibility of States* (1928), p. 65 n 71. It may be remarked that whenever the United States has been a claimant against foreign States having the federal system of government, it has never recognized the validity of this plea. See, e.g., Secretary of State Fish's communication of March 5, 1875, to the American Minister to Brazil, in which it was said:

. . . the reference of the claimant to the authorities of the province for redress will not be acquiesced in. These authorities cannot be officially known to this Government. It is the Imperial Government at Rio de Janeiro only which is accountable to this Government for any injury to the person or property of a citizen of the United States committed by the authorities of a province. It is with that Government alone that we hold diplomatic intercourse. The same rule would be applicable to the case of a Brazilian subject who, in this country, might be wronged by the authorities of a State. (6 Moore, *Digest of International Law*, 1906, p. 816).

On account of the lack of competence, both legislative and judicial, of the national government of the United States in respect to matters which are often the subject of treaty regulation and, consequently, on account of a supposed lack of constitutional power to execute the stipulations of treaties dealing with such matters, the United States has sometimes refused to become a party to treaties concerning certain subjects. For example, at the Peace Conference of Paris in 1919 the American delegation stated that it could not accept the obligations imposed by that part of the original draft of Article 405 of the Treaty of Versailles relative to the ratification of draft conventions agreed upon by the International Labor Conference, when those conventions dealt with matters falling within the competence of the individual States of the Union and over which the national government had no jurisdiction. The reason given was that the national government could not guarantee that the States would pass the necessary legislation to give effect to such conventions, or, if they should pass it, that the legislation would be enforced by them. Moreover, it could not guarantee that if such legislation were passed it would not be declared unconstitutional by the Supreme Court. Consequently, it would be unwise for the United States to undertake by treaty to do something which was not within its constitutional power to do and non-performance of which would involve its international responsibility. 1 *Official Bulletin, International Labor Office*, pp. 75, 86, 177, 179. The commission on international labor legislation, while regretting that an exception

should be made in favor of federal States which would put them under a lesser degree of obligation than other States in regard to the ratification of draft conventions, nevertheless felt obliged to recognize the constitutional difficulties which such States were under and to exempt them from an obligation which would bind other States. See the report of the commission, in *International Conciliation*, No. 140, July 1919, especially pp. 857-858. The draft finally adopted therefore was made to read as follows:

In the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only, and the provisions of this Article with respect to recommendations shall apply in such case.

In the preamble to the Joint Resolution approved by the President on June 19, 1934, providing for membership of the United States in the International Labor Organization (78 *United States Congressional Record*, 1934, p. 12359), reference was made to the fact that under the Constitution of the Organization "membership of the United States would not impose or be deemed to impose any obligation or agreement upon the United States to accept the proposals of that body as involving anything more than recommendations for its consideration."

As illustrating the attitude of the United States regarding treaties dealing with matters concerning which the national government was alleged to have no competence, reference may be made to the position taken by the United States in regard to the Geneva Convention of June 17, 1925, for the Supervision of the International Trade in Arms and Ammunition and Implements of War. From 1927 to 1934 the United States refused to ratify the convention for the reason that it dealt with matters over which the national government had no jurisdiction but which fell within the control of the states. But in 1934 this position was abandoned. See the message of the President of May 19, 1934, urging ratification of the convention. *Department of State Press Release*, No. 242, p. 293. See also Hudson "The Treaty-Making Power of the United States in connection with the Manufacture of Arms and Ammunition," 28 *American Journal of International Law* (1934), p. 736, where the earlier attitude of the United States in regard to treaties dealing with this matter is reviewed and criticized. Mr. Hudson refers to the supposed constitutional impediment as an unnecessary "self imposed paralysis." He says (*ibid.*, p. 739):

Here, then, is a situation where an erroneous view of the constitutional powers of the Government of the United States with respect to the making of treaties has been clearly and unmistakably abandoned and corrected. It is unfortunate that for a period of five years the assertion of that view obstructed American participation in international coöperation. It is fortunate, however, especially when the United States has accepted an invitation to become a member of the International Labor Organization, that our position has been set right on this problem.

Again he says, concerning the treaty-making power of the United States ("The Membership of the United States in the International Labor Organization," *ibid.*, p. 678):

Is the United States "a federal state, the power of which to enter into conventions on labor matters is subject to limitations"? Certain members of the American Delegation at Paris in 1919 would have answered this question in the affirmative, but a negative answer would be more in keeping with the practice of the United States, more consonant with the development of our national life in the United States, and more appropriate to our position in world affairs.

The Constitution itself does not limit the President's power to make treaties, and it would greatly cripple the United States in the conduct of our international relations if that power were limited to those matters over which a general legislative competence has been allocated to the Federal Government. The fact that in the United States general power to legislate with reference to labor conditions is vested in the legislatures of the States, does not impose a necessary limitation on the treaty-making power of the Federal Government, for many treaties of the United States have dealt with matters as to which the federal legislative power is otherwise limited.

In any event, the attitude of the United States Government in this and similar cases suggests that at times it labors under the view that, were it to conclude one of the types of treaties in question, it would subsequently have to bear responsibility for the performance of the provisions thereof, and could not avoid that responsibility by pleading the peculiarities of the constitutional system of the United States.

It may also be said that if, as a result of the governmental organization of a State, the execution of its treaty obligations is dependent in part upon the action of the local governments and it is within the power of the national government to remedy this situation by withdrawing from the local governments the authority which they have in respect to the execution of treaties and transferring it to the national government, and if it refuses to do this, it should likewise bear the responsibility for the non-performance of any treaty obligations which may result therefrom. This appears to have been admitted by Presidents Harrison, McKinley, and Roosevelt, who urged Congress to enact legislation of this kind which would enable the United States to enforce more effectively its treaty obligations in respect to the treatment of aliens. *U. S. Foreign Relations*, 1891, p. 6; *ibid.*, 1899, p. xxiii; and *ibid.*, 1906, p. xliii. Also 1 Hyde, *International Law* (1922), p. 520, and 7 *Proceedings of the Academy of Political Science*, p. 40, and Eagleton, *Responsibility of States* (1928), p. 34. Switzerland acted on this principle when, after becoming a party to the Paris Convention of March 20, 1883, for the protection of industrial property, a matter to which the legislative competence of the Confederation did not extend, Article 64 of the Swiss Federal Constitution was amended to bring the protection of industrial property within the competence of the national government and thus enable the State to execute the

stipulations of the treaty. Triepel, *Droit International et Droit Interne* (Brunet trans., 1920), p. 303. It may be assumed that the Congress of the United States acted on the same principle when, by the Act of August 29, 1842, passed as a result of the McLeod affair, it extended the jurisdiction of the federal courts to cover such cases, and thus removed the possibility of future conflicts with foreign countries arising out of incidents over which the local rather than the national courts formerly had jurisdiction.

ARTICLE 24. EFFECT OF GOVERNMENTAL CHANGES

Unless otherwise provided in the treaty itself, the obligations of a State under a treaty are not affected by changes in its governmental organization or its constitutional system.

COMMENT

This article should be read in connection with Article 23, which lays down the rule that the existence of special features in the governmental organization or constitutional system of a State cannot be pleaded in justification of its failure to perform its treaty obligations. Article 24 affirms a principle which leads to the same conclusion in respect to the effect of changes introduced by a State in its form of government or constitutional system upon its already existing treaties. Thus, if a State has the federal system of government it cannot at any time, under Article 23, invoke the peculiar features of that system to avoid the duty of performing its treaty obligations. If it has the unitary system of government and later replaces it by the federal system, it cannot, under Article 24, plead the change in its governmental organization as a justification for non-performance of its obligations under treaties concluded prior to the change. It is the same with changes in the constitutional system of the State.

Article 23 refers to provisions or omissions in the municipal law (including the constitution) of a State. The present article refers to larger changes which may involve an alteration of the general scheme of the organization of the State or government, such as, for example, changes in the relation between the constituent parts of which it is composed, the replacement of a monarchical form of government by a republican form or *vice versa*, the replacement of a representative democracy by a pure democracy or *vice versa*, the transformation of a unitary system into a federal system or *vice versa*, etc. The purpose of Article 24 is to lay down the rule that all such changes have no effect upon the treaty obligations of the State which has undergone the changes—except, of course, in the case of treaties which expressly provide otherwise.

The phrase “unless otherwise provided in the treaty itself” is intended to limit the application of the rule to treaties which do not by their own terms stipulate that such changes as those mentioned in the article shall affect in some specified manner the obligations created by the treaty. Treaties which

contain such stipulations have been rare, no doubt for the reason that if the obligations of a treaty were made to depend upon the continuance, unchanged, of the governmental organization or constitutional system of the States parties to it, the utility of the treaty would necessarily be impaired, since the rights which it created or the obligations which were assumed under it would have only a precarious existence. The nearest approach to an example of such a treaty appears to be the Convention for the Establishment of a Central American Court of Justice, signed at Washington, December 20, 1907, by the five Central American Republics. 2 Malloy, *Treaties, etc.*, p. 2399. Article 27 of this convention provided that "In the event of the change or alteration of the political status of one or more of the Contracting Republics, the functions of the Central American Court of Justice created by this Convention shall be suspended *ipso facto*; and a conference to adjust the constitution of said Court to the new order of things shall be forthwith convoked by the respective Governments; in case they do not unanimously agree, the present Convention shall be considered as rescinded." The provision seems to have been drafted with a view to possible success in the effort to establish a Central American federal State.

Forms of government and constitutional arrangements in these days are constantly being changed, and if the enjoyment of treaty rights and the duty of performance were dependent upon the continuance of the *status quo* in respect to the governmental organization or constitutional system of the parties, one State would never be able to count with certainty on rights which have been promised it by another—and promised, it may be, for a period of indefinite duration. If changes in the organization of a State's form of government or modifications of its constitutional system had the effect of terminating or altering its treaty obligations or of rendering them voidable, a State which desired to avoid or reduce its obligations would need only to introduce a change in the organization of its government or alter its constitutional system. If such changes produced that effect, States would hesitate to enter into treaties, because in that case one of the foundations of the treaty system, namely the permanence of treaties, would cease to exist and treaty obligations would be terminable or impairable at the will of any party.

This is not to say that there may not be treaties or particular stipulations in treaties the execution of which is necessarily dependent, in some degree at any rate, upon the continuance of the particular form of government or constitutional system which was in existence at the time the treaty was concluded. Thus, a treaty between two States having the monarchial form of government may provide for the mutual protection of their respective monarchs or relate to matters affecting their royal families or with other matters peculiar to the monarchial form of government. Manifestly, the obligations of such a treaty would necessarily be affected by a transformation of one or both of these States into a republic. However, treaties dealing with

matters which relate to the particular form of government or constitutional régime of the States which enter into them, or the obligations of which are inseparably dependent upon the continued existence of that governmental or constitutional system, are not likely to be numerous. In fact there appear to have been few examples in the past. It seems, therefore, unnecessary to make an express exception in the rule to cover such cases.

Occasionally, negotiators out of superabundant caution, have expressly inserted in treaties concluded by them a clause to the effect that any changes in the governmental organization of the States parties thereto shall have no effect on the obligations stipulated for. See, for example, the convention for the construction of a ship canal, concluded between the United States and Panama, November 18, 1903 (2 Malloy, *Treaties, etc.*, p. 1356), Article 24 of which reads:

No change either in the Government or in the laws and treaties of the Republic of Panama shall, without the consent of the United States, affect any right of the United States under the present convention, or under any treaty stipulation between the two countries that now exists or may hereafter exist touching the subject matter of this convention.

It is believed, however, that such a provision is merely declaratory of the existing rule of international law and does not need, therefore, to be expressly affirmed in the treaties which States enter into with one another. It is that rule which Article 24 is intended to declare.

Turning now to the opinions of writers on international law, we find that they appear to be in complete agreement that, as a general principle, changes in the governmental organization or constitutional system of a country, including dynastic changes in those having the monarchical system, have no effect on the treaty obligations of States which undergo such changes. Grotius (*De Jure Belli ac Pacis* lib. II, ch. XVI, sec. 16, *Classics of International Law*, Kelsey trans., p. 418), observed that "even if the condition of the State shall be changed into a Kingdom, the treaty will continue for the reason that, although the head has changed, the body remains the same." Cf. also *ibid.*, ch. IX, sec. 8. See also Pufendorf, *Elementorum Jurisprudentiae Universalis* (lib. II, def. XII, sec. 123, *Classics of International Law*, Oldfather trans., p. 108); Bynkershoek, *Questionum Juris Publici* (lib. II, ch. XXV, sec. 1, *Classics of International Law*, Frank trans., p. 276) referred with approval to the opinion of Grotius on the subject, adding:

The nation, however, is not changed with a change in the form of government. The same is certainly true of a state when it is governed now by this form, now by that. Otherwise one might suppose that a state in its present form is freed from the agreements and debts contracted under a different form of government. Grotius agrees that this does not hold true in the case of debts; and the same argument that holds in the case of debts applies convincingly to agreements.

See also Vattel, *Droit des Gens* (liv. II, ch. 12, secs. 185 and 191, *Classics of International Law*, Fenwick trans., pp. 170 and 172). Vattel declared that

since treaties bind the entire nation the obligations which they impose on the State pass to all succeeding rulers. He said:

Since, therefore, a treaty of this kind relates directly to the body of the State, it continues in force even though the State should change its republican form of government and should even adopt the monarchical form; for State and Nation are always the same, whatever changes take place in the form of the government, and the treaty made with the Nation remains in force as long as the Nation exists.

See also Wheaton, *Elements of International Law* (8th ed., Dana, 1866), pp. 45-46; 1 F. de Martens, *Traité de Droit International* (1883), sec. 65; Bluntsehli, *Le Droit International Codifié* (Lardy trans., 1895), Arts. 40-42; Field, *Outlines of an International Code* (1876), Art. 19; Fiore, *International Law Codified* (Borchard trans., 1918), Arts. 183, 776, 836; 5 Moore, *Digest of International Law* (1906), p. 341 ff; 1 Oppenheim, *International Law* (4th ed., 1928), p. 734; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 423; Listz, *Le Droit International* (Gidel trans., 1928), p. 54; Chailley, *La Nature Juridique des Traités* (1932), p. 132 ff; McNair, *La Terminaison et la Dissolution des Traités*, 22 *Recueil des Cours* (1928), p. 481 ff; Verdross, *Le Fondement du Droit International*, 16 *ibid.*, (1927), p. 269 ff; Nippold *Der völkerrechtliche Vertrag* (1894), pp. 239-240; 2 Pradier-Fodéré, *Traité de Droit International* (1885), p. 928; Otétéléchano, *De la Valeur Obligatoire des Traités Internationaux* (1916), p. 72; and 1 Rivier, *Principes du Droit des Gens* (1896), p. 62. Moore thus states the rule (1 *Digest of International Law*, 1906), p. 249:

Changes in the government or the internal polity of a State do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations, unimpaired. There may be produced, however, a change in rank, as by the conversion of a kingdom into a principality, or the reverse. The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. The governments of Louis XVIII and Louis Philippe so far as practicable indemnified the citizens of foreign states for losses caused by the government of Napoleon; and the King of the Two Sicilies made compensation to citizens of the United States for the wrongful acts of Murat.

The general principle laid down in Article 24 was affirmed by a Protocol of the Conference on Belgian Affairs at London in 1831 which declared that:

D'après ce principe d'un ordre supérieur que les Traités ne perdent pas leur puissance, quels que soient les changements qui interviennent dans l'organisation intérieure des Peuples. . . . Les changements survenus dans la condition d'un Etat ancien ne l'autorisent à se croire délié de ses engagements antérieurs. (Protocol No. 19. 4 De Clereq, *Recueil des*

Traité de la France, p. 12, and 18 *British and Foreign State Papers*, p. 780.)

This protocol was signed by the plenipotentiaries of Austria, France, Prussia and Russia. F. de Martens (1 *Traité de Droit International*, Léo trans. 1883, p. 363) remarks, apropos of this declaration, that the "necessity and wisdom" of the rule which it laid down is evident. See also the joint declaration of Great Britain and France of March 28, 1918, apropos of the action of the Government of the Soviet Union, affirming that "no principle is better established than that according to which a nation is responsible for the acts of its government without a change in its authority affecting the obligations incurred." Quoted by Chailley, *op. cit.*, p. 132. Other similar pronouncements by governments and statesmen are quoted by Lecharny, *La Validité des Actes Internes des Gouvernements de Fait à l'égard des Etrangers* (1929), p. 37 ff. The principle was embodied in Article 11 of the Havana Convention on Treaties of February 20, 1928. This article declares that "treaties shall continue in effect even though the internal constitution of the contracting States has been modified."

The decisions of national and international tribunals are in accord with the principle here laid down. In the case of *Lepeschkin v. Gosweiler* (71 *Journal des Tribunaux et Revue Judiciaire*, 1923, p. 582), the Swiss Federal Tribunal in 1923 said:

It is a principle of international law, recognized and absolutely uncontested, that the modifications in the form of government and in the internal organization of a State have no effect on its rights and obligations under the general public law; in particular they do not abolish rights and obligations derived from treaties concluded with other States.

See also the decision of the same tribunal on February 10, 1928, in the case of the *Canton of Thurgau v. St. Gallen*, where it was said that "even a change in the internal legislation or in the constitution of the servient Canton cannot suffice to justify the repudiation of an agreement of this type" [an agreement between the two Cantons which the Court admitted was governed by the law applicable to treaties between independent States]. 54 *Entscheidungen des Schweizerischen Bundesgerichts* I, 188, and McNair and Lauterpacht, *Annual Digest of Public International Law Cases*, 1927-1928, Case No. 289. See also the statement of Mr. Justice Miller of the United States Supreme Court in *The Sapphire* (1871), 11 Wall. 164:

The reigning Emperor or National Assembly or other actual person or party in power, is but the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. . . . A deed to or treaty with a sovereign, as such, inures to his successors in the government of the country.

Mr. Findlay, speaking for the United States-Venezuelan Claims Commission under the convention of December 5, 1885 (Case of *Day and Gar-*

ri son, 4 Moore, *History and Digest of International Arbitrations*, 1898, p. 3552), said:

As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another, cannot alter the relations of the society to the other members of the family of states as long as the state itself retains its personality. The state remains, although the government may change; and international relations, if they are to have any permanency or stability, can only be established between states, and would rest upon a shifting foundation of sand if accidental forms of government were substituted as their basis. . . .

A state subject to periodical changes in the form of its government or in the persons of its rulers has a deeper interest, perhaps, in the maintenance of this doctrine than another more securely rooted in the principles of social order, but it is absolutely necessary to the whole family of States, as the only possible condition of intercourse between nations. If it was not the duty of a state to respect its international obligations, notwithstanding domestic changes, either in the form of the government or in the persons who exercise the governing power, it would be impossible for nations to deal with each other with any assurance that their agreements would be carried into effect, and the consequence would be disastrous on the peace and well-being of the world.

In the same sense, see the award of Umpire Lieber in the case of *Miller v. Mexico* (3 *ibid.*, p. 2974):

There was at this time an unfortunately rapid succession of different parties in power, more or less connected with violence, and it would have been impossible for an individual to adhere formally to one or the other party, nay even to know who was the legitimate ruler. The great principle settled long ago in England regarding governments *de facto* and *de jure*, concerning the individual citizen or inhabitant, comes here into play. The state or civil society or government, or whatever it be called, is a continuity, and succeeding administrations, or officers or rulers, receive and transmit the obligations of the preceding one.

See also the award of M. Borel of April 18, 1925, in the case of the repartition of the annuities of the Turkish public debt under Article 47 of the Treaty of Lausanne of July 24, 1923, in which he said:

In international law the Turkish republic must be considered as continuing the personality of the Ottoman Empire. This point of view is evidently the basis of the Treaty of Lausanne as shown by Articles 15, 16, 17, 18 and 20 which would have little meaning if, in the eyes of the high contracting parties, Turkey was a new State in the same sense as Iraq or Syria. (P. 62 of the award.)

While the French Revolution wholly changed the old political régime, the National Assembly of 1790 recognized the binding force of the treaties which had been concluded by Louis XVI and his predecessors. It is true

that in the assembly of 1793 declarations were made by various radical leaders that treaties concluded by "tyrants" were not binding upon France, but no repudiation of the treaties took place. 1 F. de Marteus, *Traité de Droit International* (Léo trans., 1883), p. 364.

In 1814 the restored Bourbons, although they regarded Napoleon I as an usurper, respected the treaty engagements entered into by him, and the government of Louis Phillipe adopted the same policy regarding the treaty engagements of the government of Louis XVIII. The governments of Napoleon III and the present French Republic recognized that treaties concluded under the régimes which preceded them continued in force and were binding upon them. 1 Fauchille, *Traité de Droit International Public*, pt. I (1922), p. 340, and 2 Hoijer, *Les Traités Internationaux* (1928), p. 472. On March 13, 1860, the French Minister of Foreign Affairs, in a communication to the representatives of the French Emperor at the courts of the Powers signatory to the General Act of Vienna of 1815 said: "L'Empereur, en arrivant au trône, a spontanément déclaré qu'il prenait pour règle de ses rapports avec l'Europe le respect des traités conclus par les gouvernements précédents, et c'est un principe de conduite auquel Sa Majesté se fera toujours une loi de rester fidèle." *Archives Diplomatiques*, 1861, I, p. 369; also Bruns, *Fontes Juris Gentium* (Digest of the Diplomatic Correspondence of the European States, 1856-1871), Series B, Section 1, Tomus 1, p. 753.

The controversy which took place among the members of President Washington's Cabinet in 1793 relative to the binding force of the treaties of 1778 concluded between the United States and Louis XVI of France is well known. Hamilton and Knox maintained that the treaties were no longer binding upon the United States because they were concluded with the head of a monarchy which had been overthrown by the revolution. Jefferson, on the other hand, contended that the treaties had been concluded, not "between the United States and Louis Capet, but between the two nations of America and France" and that the changes which had taken place in their forms of government did not have the effect of annulling the treaties. Hildreth (4 *History of the United States*, p. 414) thus stated the position of Hamilton and Knox:

They admitted the right of France to change her government, but they questioned her right after such a change to hold the United States to treaties made with a view to a totally different state of things, and which, if now carried out, might impose obligations on the United States, and expose them to dangers, never dreamed of when the treaties were made.

Jefferson's view prevailed, and the treaties were recognized by the Government of the United States as continuing in force. 5 Moore, *Digest of International Law* (1906), p. 336, and 2 Wharton, *International Law Digest* (1887), sec. 137. Madison, at the time, in supporting the principle of the

continuity of treaty obligations, observed that "if a change of government is an absolution from public engagements, why not from those of a domestic as well as foreign nature; and what then becomes of public debts, etc.? In fact, the doctrine would perpetuate every existing despotism, by involving, in a reform of the government, a destruction of the social pact, an annihilation of property, and a complete establishment of the state of nature. What most surprises me is, that such a proposition should have been discussed." 5 Moore, *op. cit.*, p. 337.

The principle of the continuity of the State and the survival of treaty obligations is recognized by the Constitution of the United States, Article VI of which declares that "all debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." Thirteen treaties or conventions, not including two loan contracts with France, were concluded by the United States with foreign countries prior to the adoption of the Constitution. Their texts are reproduced in 2 Miller, *Treaties and other International Acts of the United States of America* (1931), pp. 1-244. The larger number of them were still in force at the time the Constitution came into effect, and under Article VI continued to be binding upon the nation. This was recognized by the United States Court of Claims in several cases. *Hooper v. United States* (1887), 22 Court of Claims, 408; the *Brig William* (1889), 23 *ibid.*, 201; the *James and William* (1902), 37 *ibid.*, 303.

When the monarchy of Brazil was overthrown in 1889 the government of the republic which succeeded it announced that it would "respect strictly all engagements and contracts entered upon by the State." Telegram of Mr. Ruy Barbosa to Mr. Blaine, November 23, 1889. *U. S. Foreign Relations*, 1889, p. 70.

Following the first revolution in Russia in March, 1917, the provisional government issued a proclamation (March 2) announcing that it would respect strictly all engagements entered into by the government of the Czar before the revolution. 111 *British and Foreign State Papers*, p. 544 ff. Milioukov, the Minister of Foreign Affairs, based the duty of the government to respect the treaties concluded by the government of the Czar upon the doctrine of the continuity of the State in respect to the inviolability of treaties. Mirkine-Guetzévitch, "*Le Droit International et les Régimes Constitutionnels*," 38 *Recueil des Cours* (1931), p. 351.

While the rule that changes of governmental organization or constitutional arrangements have no effect upon the continuing validity of treaty engagements between States, is generally admitted when a new form of government or constitutional régime replaces another normally and according to constitutional rules, there is a considerable body of opinion in favor of the view that, when the change is the result of a violent revolution or upheaval which upsets completely the existing political régime so that

the old treaties of the State experiencing such changes are no longer compatible with the new order, the new government may at least demand a revision of the old treaties so as to adapt them to the new order, if, indeed, it may not regard them as being no longer in force.

The question of the effect upon treaties of governmental or constitutional changes of a radical, profound or far-reaching character was raised in practice by the action of the Second All-Russian Congress of Soviets on October 25, 1917, in declaring "instantly and irrevocably annulled" all treaties concluded by "the government of landowners and capitalists" from February 1 to October 25, 1917, "insofar as they tend to the augmentation of the profits and the privileges of the Russian capitalists." Against the refusal of the Soviet Government to recognize the international engagements incurred by preceding Russian governments, France and Great Britain, in particular, made energetic protests. In a memorial presented by the Soviet delegation to the Genoa Economic Conference on April 20, 1922 the repudiation of the obligations incurred by former Russian governments was thus defended: "The revolution of 1917, having completely destroyed all the old relationships, economic, social and political, and having replaced the old social order (class divisions) by the new social order, the sovereignty of an insurgent people, turning over the power of the Russian State to a new social class, did by this fact break the succession of those civil obligations which were component elements of the economic relations of the social order now extinct." See also the following from the reply of the Russian delegation at the same conference.

Il n'appartient pas à la Délégation russe de légitimer ce grand acte du peuple russe devant une assemblée de puissances dont beaucoup comptent dans leur histoire plus d'une révolution; mais la Délégation russe est obligée de rapporter ce principe de droit que les révolutions, qui sont une rupture violente avec le passé, apportent avec elles de nouveaux rapports juridiques dans les relations extérieures et intérieures des Etats. Les gouvernements et les régimes sortis de la révolution ne sont pas tenus à respecter les obligations des gouvernements déchus. (From Réponse Remise le 11 Mai 1922 par la Délégation Russe aux Propositions du 22 (?) Mai 1922. Ministère des Affaires Etrangères, *Documents Diplomatiques, Conférence Economique International de Gênes*, Paris, 1922, p. 130.)

As to the policy and doctrine of the Soviet Government relative to the effect of the Russian Revolution on the treaties concluded by old Russia, see Mirkine-Guetzévitch, "*La doctrine Soviétique de Droit International*," 32 *Revue Général de Droit International Public* (1925), p. 313 ff; the same author's article, "*Les Traités Internationaux de l'Etat Soviétique*," 2 *Revue de Droit International* (1928), p. 1012 ff; and his lectures on "*Régimes Constitutionnelles*," at the Hague Academy of International Law, 1931 (38 *Reueuil des Cours*, 1931, p. 353 ff). M. Korovin, Professor of International Law in the State University of Moscow, explains the viewpoint of the Soviet Govern-

ment as follows ("Soviet Treaties and International Law," 22 *American Journal of International Law* (1928), p. 763):

Every international agreement is the expression of an established social order, with a certain balance of collective interests. So long as this social order endures, such treaties as remain in force, following the principle, *pacta sunt servanda*, must be scrupulously observed. But if in the storm of a social cataclysm one class replaces the other at the helm of the state, for the purpose of reorganization not only of economic ties but the governing principles of internal and external politics, the old agreements, in so far as they reflect the preëxisting order of things, destroyed by the revolution, become null and void. To demand of a people at last freed of the yoke of centuries the payment of debts contracted by their oppressors for the purpose of holding them in slavery would be contrary to those elementary principles of equity which are due all nations in their relations with each other. Thus in this sense the Soviet Doctrine appears to be an extension of the principle of *rebus sic stantibus*, while at the same time limiting its field of application by a single circumstance—the social revolution.

The Soviet Government, it may be added, succeeded in concluding with Turkey (1921), Persia (1921), China (1924), Germany (1925), and Japan (1925), treaties in which the governments of those countries accepted, in some degree at least, the Soviet point of view as to the effect of the establishment of the new political régime on the pre-revolutionary treaties of Russia. By the treaties with Turkey, China, and Persia the contracting parties agreed that the treaties between them and old Russia no longer corresponded with their mutual interests and should therefore be abrogated. By the treaty with Japan it was agreed that, with the exception of the Treaty of Portsmouth of September 5, 1905, all treaties and conventions concluded between the two countries prior to November 7, 1917, should be "reexamined" at a conference subsequently to be held, and that they should be considered as subject to revision or annulment as the altered circumstances might require. A treaty of October 12, 1925, between Germany and the Soviet Union enumerated the "collective agreements" which had been concluded by Russia with Germany prior to the revolution and which were to be regarded as being in force in the future. Among them were the metric and telegraphic conventions, the convention relative to the circulation of automobiles, and others. Presumably those not enumerated were regarded as terminated. Texts of these treaties in 118 *British and Foreign State Papers*, p. 990; 114 *ibid.*, p. 901; 122 *ibid.*, pp. 707, 894, 34 *League of Nations Treaty Series*, p. 31. They are summarized by Mirkine-Guetzévitch in "*Les Traités Internationaux de l'Etat Soviétique*," 2 *Revue de Droit International* (1928), p. 1039 ff. The Soviet point of view was also recognized by the Government of France which notified the Soviet Government at the time of France's *de jure* recognition of the latter government on October 28, 1924, that, until a new general treaty should be con-

cluded between the two governments, existing treaties would be considered as having no effect. 53 *Journal du Droit International* (1926), p. 673.

The Swiss Federal Tribunal in 1923, in the case of *Lepeschkin v. Gosweiler* (71 *Journal des Tribunaux et Revue Judiciaire*, p. 582), while declaring it to be a well-established principle of international law that "modifications in the form of a government and in the internal organization of a State have no effect on its rights and obligations under the general public law," nevertheless admitted that the revolution in Russia had produced such a profound alteration in the juridical organization of the State, and in the relations among individuals and between them and the State, and had resulted in a situation contrasting so fundamentally with the order of things prevailing in all the other European States, that such States as were parties to treaties with Russia (in this case the Hague Convention of 1905 concerning Civil Procedure) might, in virtue of the principle *rebus sic stantibus*, withdraw from their treaties with Russia.

It can hardly be denied that there is some foundation for the distinction which the Soviet jurists and the writers on international law cited above make between the effect on treaty obligations of ordinary governmental and constitutional changes, on the one hand, which occur normally in the process of the political and constitutional development of a State, and changes, on the other hand, which are the result of violent revolutions which involve not only an alteration of the governmental organization or constitutional régime of the State but also a complete transformation of the political and even the economic and social organization of the State, and which result in the establishment of a new order of things with which treaties concluded under preceding régimes are wholly or largely incompatible. But like other distinctions in law and political science which may be sound in principle, the lack of precise criteria by which the line of demarcation between the two types of changes can be drawn make it difficult to lay down a rule which would be just and free from danger but which at the same time would recognize exceptions to the general principle that the obligations of a State are not affected by changes in its governmental organization or constitutional system. See, as to this, 1 Calvo, *Le Droit International Théorique et Pratique*, Sec. 100.

Under these circumstances it would seem to be the safer course to adopt a rule which enunciates the general principle and to leave States whose governments and constitutional systems have undergone profound and far-reaching transformations, such as those referred to above, which result in a new order of things to which existing treaties are no longer applicable, to seek by negotiation a revision or abrogation of the treaties or to invoke the application of the rule *rebus sic stantibus* as a means of freeing themselves by an orderly and lawful procedure from the obligation of further performance. Under Article 28 of this Convention a procedure is provided by which States which have undergone such transformations may suspend performance pending an agreement between the parties that treaties affected by such changes are no

longer binding, or pending a decision to the same effect of a competent international tribunal or authority to which the parties have submitted the question whether the treaty is still binding, provided the treaty were entered into with reference to a State of facts the continued existence of which was envisaged as a determining factor moving them to undertake the obligations stipulated for in the treaty. It is believed that this rule is preferable to one which would recognize exceptions to the general principle laid down in Article 24, but which made no attempt to indicate the criteria by which the exceptions could be determined and which provided no procedure by which complaining States could have the question of the continued binding force of treaties concluded under earlier régimes decided by a competent authority.

The question of exceptions to the general rule was discussed by the International Commission of Jurists at Rio de Janeiro in 1927, and Article 11 of the draft convention on treaties adopted by it reads as follows: "A treaty continues in effect even though the constitution of the contracting States has been modified, unless its terms are entirely incompatible with the new condition of affairs resulting from this change." *Projects to be submitted for the consideration of the Sixth International Conference of American States*, Pan American Union, 1927, p. 12. This text is identical in substance with Article 211 of the draft code which was submitted by M. Pessoa to the commission. When the draft of the Commission of Jurists came up for discussion at the Sixth International Conference of American States at Havana in 1928, Dr. Ferrara, Cuban delegate, proposed a substitute draft which omitted the clause in the draft of the Commission of Jurists. *Diario de la Sexta Conferencia Internacional Americana* (1928), p. 256. The first sentence of Article 11 of the convention adopted at Havana reads as follows: "Treaties shall continue in effect even though the internal constitution of the contracting states has been modified." It has been argued that the use of the word "modified" in this article was intended to exclude from the operation of the general rule the effect of constitutional or governmental changes which involve more than a mere "modification," such for example, as radical, "profound" or violent political transformations which result in a new régime with whose fundamental policies the old treaties, if maintained, would be incompatible or involve contradictions. The action of the Havana Conference, however, in rejecting the exception proposed by the Commission of Jurists in respect to such changes, would seem to justify the conclusion that it did not intend to admit a distinction between the two kinds of changes so far as their affect upon treaties is concerned.

ARTICLE 25. EFFECT OF SEVERANCE OF DIPLOMATIC RELATIONS

If the execution of the provisions of a treaty is dependent upon the uninterrupted maintenance of diplomatic relations between the parties thereto, the operation of the treaty is suspended as between any parties upon the severance of their diplomatic relations; in the absence of agreement to the

contrary, however, the operation of the treaty as between such parties will be revived by the reestablishment of their diplomatic relations.

COMMENT

This article contains two rules, the first of which provides that certain treaties are to be regarded as suspended upon the happening of a certain event; the second provides that they are revived upon the removal of the obstacle which causes their suspension. It may be said of the first rule that it is merely declaratory of a fact which necessarily results when one or both of the parties to a treaty, the execution of which is dependent upon the existence of certain conditions, takes action the effect of which is to remove those conditions. The second rule enunciates what would seem to be a logical and reasonable principle which should be applied when the cause of the suspension has been removed.

The rule *pacta sunt servanda* does not require performance of the obligations of a treaty when performance becomes an impossibility, as would necessarily be the case with treaties whose execution is dependent upon the uninterrupted maintenance of diplomatic relations between the parties, if those relations are severed. Article 26 expressly recognizes that territorial changes may relieve a party of the duty of performance when, in consequence of such changes, performance becomes impossible. This principle must apply equally to treaties which become impossible of execution in consequence of the severance of diplomatic relations between the parties.

An alternative to the rule laid down by Article 25 would be to declare such treaties to be terminated instead of merely suspended. But since, in the great majority of cases, the situation produced by the severance of diplomatic relations, unless it is followed by the outbreak of war, is only a temporary one, usually being followed after a relatively short interval by the reestablishment of such relations, it does not seem necessary or reasonable to lay down the rule that treaties are definitively terminated in consequence of the interruption of diplomatic relations between the governments of States which are parties to them. If termination rather than suspension were the consequence of the non-existence of diplomatic relations, a State which wished to free itself of the obligations of a treaty might itself sever diplomatic relations with the other party or might refuse to recognize a newly established government of the other party and enter into diplomatic relations with it. On the other hand, if mere suspension of the operation of the treaty during the period of the non-existence of diplomatic relations is the only result, manifestly a State which desired to free itself of the obligations of a treaty would not have the same inducement to break off diplomatic relations with the other party or to refuse to enter into such relations with it, because in that case the relief from the duty of performance would only be temporary and might not therefore be worth taking advantage of. In the great majority of cases, as stated, the situation produced by the severance

of diplomatic relations, unless it is followed by war, is only a temporary one, usually being followed after a relatively short interval by the reestablishment of such relations; and since it is probable that in the great majority of cases in which there is such an interruption in the diplomatic relations between two or more States they do not wish their treaties to be terminated because of the interruption, there would seem to be no reason for laying down a general rule under which they would necessarily be terminated. If, in a particular case, the States concerned prefer to treat them as terminated, they may do so by mutual agreement. This is recognized by the provision in the article: "in the absence of agreement to the contrary."

It may be pointed out that the rule of Article 25 applies not only to the severance of diplomatic relations between the parties to bipartite treaties, but equally to the severance of relations between the parties to multipartite treaties. If the governments of two States which are parties to a multipartite treaty sever diplomatic relations, the operation of the treaty as between them is suspended in case it is one the execution of which is dependent upon the uninterrupted maintenance of diplomatic relations between them. But the operation of the treaty as between either of them and the other parties or as between any of the other parties themselves is unaffected. Russia is or was a party to various multipartite conventions along with other States which at one time or another did not maintain diplomatic relations with the Soviet Government. Among examples may be mentioned the Convention concerning the Régime of the Straits, signed at Lausanne July 24, 1923, the Universal Postal Convention of 1924, the International Sanitary Convention of 1926 and the Treaty of 1928 for the Renunciation of War. As to this situation, see Lagarde, *La Reconnaissance du Gouvernement des Soviets* (1924), pp. 161-162.

The words "severance of their diplomatic relations" as used in Article 25 must be interpreted to mean the interruption of the diplomatic relations between the States concerned, whether because the government of one refuses to recognize the government of the other, or because these relations are broken off for other reasons. In other words the absence of diplomatic relations resulting from non-recognition of a government produces the same juridical effect as does the severance of already existing diplomatic relations.

It might be argued that this rule would enable a State to avoid the performance of its treaty obligations by breaking off diplomatic relations with the State to which it is bound. But it cannot be lightly assumed that any State would ever resort to either of these courses for such a purpose. The severance of diplomatic relations has often been the preliminary step to a declaration of war; sometimes it has been in the nature of an act of retaliation for wrongs done to the State having recourse to it, or a manifestation of its resentment on account of certain conduct of the State against which it is directed; sometimes its object has been to impress upon the offending State

the seriousness of the situation which its conduct has produced and to cause it to change its course or to make reparation for injuries which its policy has caused. Whatever the object, when it was not a preliminary step to a declaration of war, the duration of the period of interrupted relations has usually been a relatively brief one, followed by a reestablishment of relations. No instance is known in which a State ever severed diplomatic relations with another State, for the purpose of avoiding its treaty obligations to another State. The likelihood that States will ever resort to this course for such a purpose is so improbable that it need not be taken into account in formulating a rule dealing with the effect of the non-existence of diplomatic relations upon the operation of treaties.

The rule of Article 25 envisages only situations resulting from the severance of diplomatic relations, without reference to the effect of events to which such severance may lead. Thus, if the severance of such relations is immediately, or shortly thereafter, followed by the outbreak of war between the States concerned, it is the effect of war and not of the severance of diplomatic relations which then must determine the status of the treaties between the belligerent parties. In that case the rule of Article 35 (Effect of War) applies, rather than Article 25. During the World War the United States severed diplomatic relations with and declared war against Germany and Austria-Hungary, but it only severed diplomatic relations with Turkey. Belgium declared war against Germany, Austria-Hungary and Turkey, but it only severed diplomatic relations with Bulgaria. Bolivia, Ecuador, Peru and Uruguay severed diplomatic relations with Germany, but did not declare war against her or any of her allies. If this Convention had then been in force as among the States mentioned above, Article 35 would have governed in all the cases referred to where there was both a severance of diplomatic relations and a declaration of war; but Article 25 would have applied where there was a severance of diplomatic relations without a declaration of war. Conceivably, however, there might be a long interval between the severance of diplomatic relations and the outbreak of war, during which interval Article 25 would be applicable.

Treaties the execution of which is dependent upon the existence of diplomatic relations between the parties are not uncommon. Sometimes extradition treaties provide that requisitions for the surrender of fugitives shall be made only by the diplomatic representative of the demanding government. If diplomatic relations do not exist between the demanding State and the asylum State parties to treaties containing such provisions, there will be no diplomatic representatives to make the requisitions as the treaties provide. The conventions concluded between the United States and various countries during the World War, providing for the reciprocal military service of their respective citizens, stipulated that certificates of exemption from military service might be issued through their respective diplomatic representatives. See, for example, the conventions with Great Britain (3 *Treaties*,

etc., between the United States and Other Powers, 1923, pp. 2651 and 2656); with Greece (*ibid.*, p. 2664); and with Italy (*ibid.*, p. 2709). Manifestly, these provisions could not be executed if no diplomatic relations between the parties existed. Likewise, treaty stipulations which authorize diplomatic representatives to issue or visé passports, depend for their execution on the presence of such officials in the countries in which they are issued. Treaties for the delimitation of boundaries have sometimes provided for the conclusion of special agreements between the governments of the parties during the period when commissioners are engaged in tracing the boundary line. See, for example, Article 9 of the treaty of April 11, 1908, between Great Britain and the United States (1 Malloy, *Treaties, etc.*, p. 826). Obviously, in case the necessity for such special agreements should arise in the course of the execution of treaties of this kind, the conclusion of the agreements would be impossible in the absence of diplomatic relations between the parties and the execution of the treaties would have to be suspended.

The execution of treaties sometimes requires consultation between the parties. See, for example, the so-called nine-power treaty of February 6, 1922, relating to the principles and policies to be followed in matters concerning China, Article 7 of which provides that "The Contracting Powers agree that, whenever a situation arises which in the opinion of any one of them involves the application of the stipulations of the present Treaty, and renders desirable discussion of such application, there shall be full and frank communication between the Contracting Powers concerned." 2 Hudson, *International Legislation* (1931), p. 823. The "full and frank communication between the Contracting Powers" envisaged by this treaty in certain circumstances would not be possible in the absence of diplomatic relations between them. Likewise the execution of treaties for the settlement of disputes by conciliation, arbitration or recourse to an international court which requires the conclusion of special agreements for the submission of disputes to the tribunal or other authority specified in the treaty, and for the appointment of arbitrators, is necessarily dependent upon the maintenance of diplomatic relations between the parties. See, for example, the following provision found in most of the so-called Bryan treaties for the advancement of peace: "In case a difference should arise between the High Contracting Parties which is not settled by diplomatic methods, each Party shall have a right to ask that the examination thereof be intrusted to the International Commission charged with making a report." The request referred to in this article could hardly be made except through the diplomatic channel.

It may happen that a State, when called upon to execute the stipulations of a treaty, for example, a naturalization or immigration treaty or a treaty of commerce, may find itself in need of information such as can be furnished only by its official representatives in the territory of the other party—information without which it may be impossible to execute the treaty. If, as a

result of the severance of diplomatic relations between the two countries, it has no official representatives from which such information is obtainable, execution will have to be suspended.

In conclusion it may be stated that an examination of many treaties now in force throughout the world will show that the execution of a large number of them or at least of certain of their provisions, is dependent wholly or in some degree upon the existence of diplomatic relations between the parties. In some cases, as pointed out above, the treaties themselves expressly require the intervention of diplomatic representatives for their execution. In other cases their intervention or cooperation, while not expressly required by the treaties, is nevertheless necessary. In all such cases, it would seem reasonable to hold that the operation of the treaty is suspended if, as a result of the severance of diplomatic relations between the parties, the officials charged by the treaty with its execution or whose cooperation is otherwise necessary no longer exist.

It would seem equally reasonable to hold that the operation of the treaty is suspended only so long as the obstacle to execution lasts and that with its removal, by the reestablishment of diplomatic relations between the parties, the operation of the treaty will be revived--unless, of course, the parties agree otherwise, as they will always be free to do. It might happen in a particular case that the period of suspension is a relatively long one, during which and possibly as a result of which, the considerations which were the basis of the treaty undergo a material change, so that the parties will prefer to terminate rather than revive the treaty. But unless they so agree, the operation of the treaty according to Article 25 automatically revives upon the reestablishment of diplomatic relations.

Published diplomatic correspondence unfortunately does not throw much light on the effect in practice of the severance of diplomatic relations on treaties between States which in the past have broken off diplomatic relations with one another. In many cases the severance of diplomatic relations has been followed shortly thereafter by the outbreak of war between the States thus severing their diplomatic relations, in which case the status of their treaties was determined by the rules relative to the effect of war on treaties. In other cases the question appears to have seldom arisen and no pronouncements by governments on the question are known. It seems to have been assumed that such treaties as did not require the existence of diplomatic relations for their execution were considered by both parties as continuing to operate throughout the period of the suspension of diplomatic relations. The operation of those which necessarily required the maintenance of diplomatic relations was probably regarded as suspended during the period of the interruption.

As to the effect upon the operation of treaties of the non-existence of diplomatic relations resulting from the refusal of the government of one State to recognize the government of another State, the practice is somewhat more

instructive although it can hardly be said to be conclusive. Reference may be made to the following cases.

In the case of *Lepeschkin v. Gosweiler and Company*, 71 *Journal des Tribunaux et Revue Judiciaire* (1923), p. 582, the Swiss Federal tribunal held that the non-recognition by certain States of the Government of Soviet Russia and consequently the non-establishment of diplomatic relations with it, did not have the effect of suspending the operation, as between Russia and those States, of the multipartite Hague Convention of July 17, 1905, concerning civil procedure. In this case the *Obergericht* of Zurich, referring to a statement of the Swiss federal department of justice to the effect that the execution of the convention in Russia was at the time impossible, said:

The obstacles to the execution of the treaty may be explained in part by the fact that the Russian government has not been recognized by other states, notably Switzerland. However, this fact is of no importance. The failure to recognize the government of a state does not mean that agreements with this state are abrogated, this being shown by the fact that, when this government or another one of different composition receives recognition, the validity of the treaties is not considered. But, when the treaties only provide for execution when the other contracting parties are in a position to carry out their engagements, then from the moment when it would be contrary to law to consider one party as being in a position to execute, since it is established that it will not do so, the convention should be considered as suspended in its effects, particularly for Switzerland, and the appellant cannot, in his quality of a Russian citizen, prevail in Switzerland.

While the federal tribunal annulled that portion of the judgment of the *Obergericht* which required a guarantee of costs by the appellant, it apparently agreed with the lower court that the non-existence of diplomatic relations between Switzerland and Russia had no effect on treaties whose execution was not dependent upon the existence of diplomatic relations between them.

This view appears to have been adopted by the Belgian courts in the case of the same convention to which Belgium and Russia were parties, and the continuing validity of which was invoked by a Russian litigant in Belgium at the time when Belgium had not recognized the Soviet Government and had not entered into diplomatic relations with it. The Belgian court held that the convention was nevertheless applicable in Belgium so long as the treaty had not been officially denounced by the executive power of Belgium.

For the most part the courts of France held that prior to October 28, 1924, when France recognized the Soviet Government of Russia and reached an agreement with it as to the status of the treaties, the treaties between France and old Russia which granted rights to Russians in France were still in force, notwithstanding the non-recognition by France of the Soviet Government. See, among other decisions, that of the Cour d'Aix of February 7, 1922 in

the case of *Akmatoff v. Consul de Russie* (51 *Journal du Droit International*, 157), and of the Cour d'Appel of Paris of February 9, 1921 (*ibid.*, p. 10). With the exception of two conventions, one relating to consuls and one relating to concessions, both concluded April 1, 1874, which the French Government denounced in accordance with their denunciatory clauses, the French Government regarded all treaties between France and old Russia as being in force throughout the period of non-recognition, notwithstanding the Russian repudiation of them. See the study by Grouber and Tager in 51 *Journal du Droit International* (1924), p. 8 ff.

It has, however, been argued that both Great Britain and France acted on the assumption that the operation of their treaties with Russia was suspended during the period of their non-recognition of the Soviet Government and the non-existence of diplomatic relations with that government. McNair, "*La Terminaison et la Dissolution des Traités*," 22 *Recueil des Cours* (1928), p. 483 ff. This view is deduced from a note of the Government of Great Britain of July 1, 1924, by which *de jure* recognition was accorded to the Soviet Government (*de facto* recognition had already been accorded in March, 1921). This note stated that "His Majesty's Government are advised that the recognition of the Soviet Government of Russia will, according to the accepted principles of international law, automatically bring into force all the treaties concluded between the two countries previous to the Russian Revolution, except where these have been denounced, or have otherwise judicially lapsed. It is obviously to the advantage of both countries that the position in regard to these treaties should be regularized simultaneously with recognition." The note suggested that the U. S. S. R. appoint representatives to confer with representatives of the British Government in London, for the purpose of concluding a general treaty for the regulation of all pending questions between the two governments. The language of this note, according to McNair, implied that, in the opinion of the British Government, the existing treaties between the two countries were not regarded as having been in operation during the period of non-recognition and did not come into operation until the new government of Russia was recognized; *i.e.*, the treaties were considered suspended during the period between the setting up of the Soviet Government and its *de jure* recognition by the British Government.

The French attitude, which was for the most part the same as that of Great Britain, was likewise deduced from a note of the French Government of October 28, 1924, by which the French Minister of Foreign Affairs notified the Government of Soviet Russia that France accorded it *de jure* recognition and at the same time proposed the negotiation of a general treaty dealing especially with economic matters and communications. The note added that: "Until the happy outcome of these negotiations, the treaties, conventions, and arrangements having existed between France or French Citizens and Russia will have no effect." By a note of October 29,

1924, the Central Executive Committee acknowledged the receipt of the French note and expressed its final acceptance of the French proposal for the opening of negotiations. 53 *Journal du Droit International* (1926), p. 673.

There was one difference, however, between the British and French views. While both governments may have considered that the treaties were not in operation during the period of non-recognition, as McNair contends, the British Government considered that they were automatically brought into operation as a consequence of recognition, except those which had been denounced or "otherwise judicially lapsed." The French proposal, on the other hand, while it may have been based on the assumption that the treaties were not in operation during the period of non-recognition, did not provide that they should be revived after recognition but should continue to have no effect until the conclusion of a new treaty for the regularization of the situation. In the case of *Renault v. Roussky-Renault Co.*, 1926 (2 Dalloz, *Recueil de Jurisprudence*, p. 196; 53 *Journal du Droit International*, 1926, p. 671; Hudson, *Cases on International Law*, p. 988), the Court of Appeals of Paris was called upon to determine the status during the period of non-recognition of the conventions of July 15/27, 1896, and the Hague Convention of July 17, 1905, both relating to deposits of guaranty (*cautio judicatum solvi*) by suitors, and to both of which conventions France and Russia were parties. The Roussky-Renault Co. contended that both conventions, never having been denounced by either party, were in force during the period of French non-recognition of the Soviet Government and must therefore be applied by the French courts. The court, however, held that the President of the Republic having the power to denounce or suspend the operation of the treaties, a power which he might and did delegate to the Minister of Foreign Affairs, who in turn had by the note of October 28, 1924, agreed with the Soviet Government that all treaties between France and Russia should be considered as having no effect until the conclusion of a new treaty regularizing their status, the claim of the Russian Company to the benefit of the two conventions was not well founded. It was because the operation of the conventions had been suspended by the French Minister of Foreign Affairs in agreement with the Russian Government that the court held them not to be in effect. It is by no means certain that the court would have decided that the mere suspension of diplomatic relations between the two governments in itself had the effect of rendering the treaties no longer operative, considering that they belonged to the class of treaties the execution of which, by reason of their nature, was not dependent upon the existence of diplomatic relations between the French and Russian Governments. The decision therefore is not inconsistent with the rule enunciated in Article 25 of this Convention.

McNair concludes that these instances support the view that the

operation of treaties is suspended during any period in which the government of one of the parties is not recognized by the government of the other and during which period they do not maintain diplomatic relations with each other, but that their operation is automatically revived by recognition and a resumption of diplomatic relations. He formulates the following proposed rule to be applicable in such cases:

Un changement de gouvernement suivi d'une période pendant laquelle le gouvernement n'est pas reconnu a uniquement pour effet de suspendre pendant cette période les traités existant entre le pays dont le gouvernement a changé et tout État qui refuse de reconnaître le nouveau gouvernement; la reconnaissance *de jure* remet automatiquement ces traités en vigueur. De toute manière, et bien qu'après une période de non-reconnaissance d'un gouvernement le consentement exprès ou tacite des parties soit nécessaire pour remettre les traités en vigueur il paraît clair qu'il est plus exact, dans l'intervalle, de considérer ces traités comme suspendus que comme abrogés. Il nous semble également que dans le cas où un traité peut être valablement dénoncé par une notification de l'une des parties contractantes à l'autre, une dénonciation effective est impossible si l'une des parties refuse à la même époque de reconnaître le gouvernement de l'autre partie. (McNair, *op. cit.*, 22 *Recueil des Cours*, p. 485.)

This rule, however, goes much further than that laid down in Article 25 of this Convention, in that the effect of non-recognition and consequently the non-existence of diplomatic relations between the parties is to suspend during such period all treaties regardless of their character. The rule of Article 25, on the other hand, provides that the operation of only those treaties the execution of the provisions of which are dependent upon the uninterrupted maintenance of diplomatic relations, is suspended. It would seem that a rule which would declare treaties not so dependent to be suspended, would be too sweeping. It is doubtful if any consideration of public policy, expediency or convenience could be adduced in support of it. On the contrary, considerations affecting the principle of the permanence of treaties and the stability of international relations can be invoked against it. It is believed that temporary interruptions in the maintenance of diplomatic relations between the governments of States should be allowed to produce only a minimum of inconvenience. Treaties which cannot be executed in the absence of such relations must necessarily be suspended and this should be recognized; but those which can be, ought to be considered as continuing in effect, unless of course, the parties agree otherwise.

During the sixteen years (1917-1933) when diplomatic relations between the Governments of the United States and Soviet Russia were suspended, there appears to have been no pronouncement by the American Government regarding the status of the treaties between the two countries.

The treaty of commerce and navigation of December 18, 1832, having been terminated in 1911 by a joint resolution of Congress in accordance with

Article 12 (3 *Treaties, etc. between the United States and Other Powers*, p. 2813), and the treaties of April 17, 1824, as to the Pacific Ocean and the Northwest Coast of America, and the treaty of March 30, 1867, for the cession of Alaska, and the claims protocol of August 26, 1900, all having been executed, there remained in force the convention of July 22, 1854, respecting the rights of neutrals at sea, the trade mark declaration of March 20, 1874, the declaration of June 6, 1884, concerning the admeasurement of vessels, the extradition convention of March 28, 1887, the agreement of June 25, 1904, regulating the position of corporations and other commercial associations, the agreement of June 28, 1906, for the protection of trade marks in China, the treaty of October 1, 1914, for the advancement of peace, and the protocol of agreement of September 23, 1915, concerning the exportation of embargoed goods from Russia to the United States (in force only during the continuance of the embargo). Of these, the execution of only three was dependent upon the existence of diplomatic relations between the two governments. They were the extradition treaty, the treaty for the advancement of peace, and the protocol concerning the exportation of embargoed goods. No occasion appears to have arisen for the execution of the extradition treaty. No dispute such as those envisaged by the treaty for the advancement of peace having arisen between the two countries, no occasion arose for having recourse to the procedure provided by the treaty. The protocol relative to the exportation of embargoed goods from Russia does not appear to have been in force after the entrance of the United States into the World War. The other treaties not being dependent for their execution on the maintenance of diplomatic relations between the two countries, there was no obstacle to saying that they continued in force. On account of the lack of occasions for applying the treaties mentioned, the question of the effect of the non-existence of diplomatic relations between the two countries upon their treaties assumed little or no importance. Since the resumption of diplomatic relations between the United States and the Soviet Union, the question has not been answered.

It appears that during the period preceding 1923 when no diplomatic relations existed between the United States and Mexico, the Government of the United States considered that it would not be justified in invoking the provisions of the extradition treaty between the two countries for the purpose of bringing about the surrender to the United States of fugitives from its justice. Apparently the operation of the treaty was regarded as suspended. The same position was taken by the Government of the United States with regard to the extradition treaties between the United States and Honduras and Ecuador during the periods when the governments of the latter countries were unrecognized by the Government of the United States. There appear to have been no instances in which the governments of those countries requested of the United States the surrender of fugitives during the period in which there were no diplomatic relations

between them and the Government of the United States. In each of these instances the operation of the treaties was considered as having revived upon recognition and the reestablishment of diplomatic relations.

ARTICLE 26. EFFECT OF TERRITORIAL CHANGES

Changes in the territorial domain of a State, whether by addition or loss of territory, do not, in general, deprive the State of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as a result of the change.

COMMENT

The views of writers on international law, the conclusions deducible from practice, and the jurisprudence of the courts are in agreement that, as a general rule, neither additions to the territorial domain of a State nor losses of its territory have any legal effect upon the State's treaty rights or obligations. This view is based on the well-recognized principle that such changes do not affect the existence of a State as an international juridical entity. While virtually all writers on political science and international law maintain the necessity of a territorial domain as one of the essential constituent physical elements in the formation of a State, they are equally agreed that there is no principle of international law or political science and no rule of practice which prescribes the extent of the territorial domain essential to the existence of a State. Garner, *Political Science and Government* (1928), pp. 80, 94, and the opinions there cited. Until comparatively recent times the territory of Europe in which there are now 32 States was organized into more than 400 States. Even now the territorial area of States ranges from 160 acres in the case of the Vatican State to many thousands of square miles. There is neither a minimum nor a maximum territorial requirement. No loss or addition of territory, therefore, which does not result in the alteration of the juridical personality of a State or which does not for other reasons render it impossible for the State to fulfill its treaty engagements can deprive it of its rights or relieve it of its obligations under treaties to which it is a party. See F. de Martens, 1 *Traité de Droit International* (Léo trans., 1883), p. 370, who observed:

La diminution du territoire peut être plus ou moins importante, mais en tous les cas elle ne porte pas atteinte au caractère indépendant de l'Etat, au point de vue du droit international. Par conséquent un Etat qui perd des provinces, même fort étendues, conserve cependant toutes les obligations internationales qui lui incombent avant cette perte.

Par exemple la Prusse après la paix de Tilsitt (en 1807), perdit presque le tiers de son territoire, Elle ne cessa pas néanmoins d'exister comme royaume indépendant, et elle resta tenue de remplir les engagements internationaux contractés avant cette époque. Le royaume de Saxe perdit, en vertu du traité de Vienne (de 1815), la moitié de son

territoire, mais ne fut pas, pour cela, dégagé de ses obligations internationales; car il conservait sa situation d'Etat indépendant. L'Autriche perdit, en 1859, sa plus riche province, la Lombardie. En 1866, elle perdit la Vénétie, mais cela ne diminua en rien la validité de ses anciens engagements. On peut en dire autant de la France en 1815 et en 1871, de la Turquie en 1829 et en 1878.

Rivier, 1 *Principes du Droit des Gens* (1896), pp. 62-63, thus stated the rule:

Les Etats, comme les individus, se renouvellent et se transforment sans cesse. Les éléments de la population changent; quelquefois brusquement, par des immigrations et des émigrations en masse; toujours lentement, imperceptiblement par des infiltrations continuës. Le territoire aussi subit des alterations matérielles, des accroissements, des diminutions. Les pays prospèrent ou déclinent; ils s'enrichissent ou s'appauvrissent; ils perdent leur influence, leur prestige. Les constitutions, les gouvernements sont défaits et remplacés. Mais aussi longtemps qu'il reste un territoire, une organisation collective, un gouvernement, une population, et tant qu'il est indépendant, malgré ses transformations et modifications l'Etat subsiste. . . .

Les changements territoriaux, accroissements ou diminutions, sont également sans influence sur l'existence de l'Etat au point de vue du droit international, pourvu que le territoire ne soit pas enlevé entièrement, puisqu'alors l'Etat même ne subsisterait plus.

La simple diminution du territoire n'empêche donc pas l'Etat d'être obligé comme auparavant envers les autres Etats par les traités conclus.

Compare also the following from Fauchille, 1 *Traité de Droit International Public*, pt. 1 (1922), p. 343:

Un Etat se transforme dans sa constitution territoriale lorsqu'il renonce à la souveraineté sur une partie de son domaine ou lorsqu'il étend son autorité sur une portion de celui d'un autre Etat: que cette partie de territoire abandonnée ou ajoutée soit une province ou une colonie, peu importe. Dans la première hypothèse, il y a diminution ou démembrement territorial, et dans la seconde accroissement ou annexion; avec le territoire, la population elle-même de l'Etat se trouve, d'ailleurs, ainsi nécessairement diminuée ou augmentée. Ce démembrement et cette annexion, s'ils produisent une transformation dans la constitution territoriale de l'Etat, ne touchent en rien à son existence. L'Etat est resté la même personne internationale: il n'a pas disparu comme tel, mais est devenu seulement un Etat moins fort et moins grand, plus puissant et plus étendu. Par exemple, la France, diminuée en 1815 et en 1871 et augmentée en 1919, est toujours demeurée la France. De même la Prusse, l'Autriche, l'Espagne, la Bulgarie n'ont pas cessé de rester elles-mêmes quand elles furent respectivement amputées d'une partie de leurs territoires en 1807, en 1859 et 1860, en 1898, en 1919. Le traité du 4 août 1916, par lequel le Danemark céda aux Etats-Unis les Antilles danoises, n'a en aucune façon changé l'individualité de ces Etats.

In the same sense, see 1 Moore, *Digest of International Law* (1906), p. 248; 2 Hoijer, *Les Traités Internationaux* (1928), p. 474; Liszt, *Le Droit International* (Gidel trans., 1928), p. 99; 1 Pradier-Fodéré, *Droit International*

Public (1885), sec. 148; Phillipson, *Termination of War and Treaties of Peace* (1916), p. 303; and Fiore, *International Law Codified* (Borchard trans., 1918), Art. 151.

I. EFFECT OF LOSS OF TERRITORY

Some writers qualify the general principle that loss of territory by a State does not affect its treaty rights or obligations by a statement to the effect that, in case the territory lost embraces the original nucleus of the State, including its capital and seat of government, or that part of its territory which may be essential to the maintenance of the State organization and the performance of its international obligations, its treaty obligations may be affected by such loss. Thus, a State which has been enlarged by annexations of territory or by union with other territories, or a State having a colonial empire consisting in large part of widely scattered territories, might lose that portion of its territory which constitutes the nucleus of the State and which contains the seat of government, retaining only its outlying territories, so that it would no longer be able to discharge its international obligations. In view of this possibility Hall thus states the rule as to the effect of losses of territory on the identity of the State (*International Law*, 6th ed., 1909, p. 22):

The identity of a state therefore is considered to subsist so long as a part of the territory which can be recognized as the essential portion through the preservation of the capital or of the original territorial nucleus, or which represents the state by continuity of government, remains either as an independent residuum or as the core of an enlarged organization.

See, in the same sense, Bluntschli, *Droit International Codifié* (Lardy trans., 1881), Article 46 and his note thereto, where he says that while the loss of territory does not affect the identity of the State suffering the loss, it is necessary to take into account "the principal parts of the country which give the State its special character and which form the *noyau* of the people of this state." See also Schönborn, "*Die Staatensukzession*" (in Stier-Somlo, *Handbuch des Völkerrechts*, Bd. II, Abt. 5, 1913, p. 7), who remarks that in principle the treaties of the parent State which loses a portion of its territory remain binding upon it, so long as it is recognized as the "Fortsetzer des bisherigen Staatswesens." There appear to have been no instances in history in which the losses by a State of its territory included that part which may be said to have been essential to its existence, except of course where the entire territory was lost. States have often lost a part of their territory, but usually the part lost has consisted of outlying provinces, vassal states, colonies, islands, etc., the loss of which did not affect the juridical personality of the State as such or its capacity to perform its treaty obligations.

The qualified rule as stated by the writers just referred to is not irreconcilable with the rule laid down by Article 26, which recognizes that terri-

torial changes do affect the treaty rights and obligations of States if as a result of such changes execution of the treaties becomes impossible.

History is, of course, replete with examples of losses of territory by States resulting from cession, conquest, revolution, secession and other modes, and consequently of additions to the territorial domain of other States which acquired the territories thus lost. Spain lost the larger part of its American territories in the latter part of the eighteenth and the early part of the nineteenth centuries, and, as a result of the World War, various European States suffered extensive losses. In no case does it appear to have been contended that the treaties of the dismembered State were extinguished as a result of its territorial losses. Regarding the extensive territorial losses of Hungary as a result of the World War, the Swiss Court of Appeal (Canton of Zurich), in a decision of July 5, 1920, adverting to the survival of the Hague Convention of November 23, 1908, on civil procedure to which Hungary was a party, declared that "no importance can be attached to the fact that the Hungarian territory has been diminished as a result of the Peace treaty." *In re Ungarische Kriegsprodukten-Aktiengesellschaft*, Williams and Lauterpacht, *Annual Digest of Public International Law Cases*, 1919-1922, Case No. 45.

It is conceivable, however, that the loss of territory by a State might be so extensive in area or might embrace so large a part of its natural resources or population as to destroy the capacity of the State to fulfill certain at least of its treaty obligations. This might be especially true in the case of treaties of alliance and guarantee, treaties of mutual protection against aggression, treaties for the payment of subsidies, for the delivery of the natural products of the soil or waters, and, indeed, treaties generally which involve burdens upon the financial resources of the parties and particularly those which are inseparable from the territory lost. Impossibility of execution might result, also, as pointed out above, from the loss of that part of its territory which is essential to the preservation of the juridical identity of the State. The execution of particular kinds of treaties or particular provisions thereof which relate in some way to the territory of the State would obviously become impossible with the loss of such territory. Thus, the execution of a treaty provision granting the right of navigation on a river or lake is possible only so long as the river or lake remains within the possession of the State granting the right. So it would be with a treaty granting fishery rights within waters which are subsequently lost by the State granting the right, or a treaty relating to maritime matters, when by reason of territorial losses a State ceased to be a maritime power, or a treaty granting economic concessions or privileges within territory which ceases to belong to a State, or a treaty by which a State obligates itself to furnish another State or its nationals a specified quantity of mineral or other products of its soil, when those materials are produced only in certain parts of its territory which are subsequently lost by the State. It might also happen that the loss of

territory which is rich in natural resources and from which the State derives extensive revenues, as for example territory containing state-owned coal, potash or nitrate mines or deposits, or territory in which are situated important state-operated public utilities or industries from which the State derives revenues, would destroy the capacity of a State to fulfill treaty-engagements which involve financial obligations. Other examples could be given. Those mentioned are sufficient to show that treaties the execution of which may become impossible because of territorial losses by a party are not inconceivable. Under Article 26 of this Convention, a party to such treaties, if left in a situation where performance by it is no longer possible, ceases to be bound by the duty of performance.

In order, however, that a State may justify its failure to perform the obligations of a treaty on the ground that performance has become an impossibility because of territorial losses which it has sustained, it must be an actual case of impossibility. The State alleging its inability must establish it by proof, otherwise any State which has sustained a considerable loss of territory might avoid the performance of its treaty obligations by merely asserting that the loss had made further performance impossible.

When the loss of a State's territory is the result of secession or revolution and the territory lost is formed into a new State, the treaty rights and obligations of the dismembered State are not affected. Whether the new State continues to be bound by the treaties concluded by the old State prior to the dismemberment is a question which involves the law of State succession. A well-known case of the kind was the separation of Holland and Belgium in 1831. While there are writers who maintain that the effect of the division was to destroy the juridical existence of the old State which was replaced by two new States, neither of which was any longer bound by the treaties concluded by the old State prior to the division (so argues Kiatibian, *Conséquences Juridiques des Transformations Territoriales des Etats sur les Traités*, 1892, pp. 64, 74), the Netherlands did not put forward such a claim, although Belgium did. In the case of Belgium, the Powers intervened and by a protocol concluded at London February 19, 1831, declared that Belgium was bound by the treaties of general European interest concluded with the Kingdom of the Netherlands prior to the separation. See Otététélechano, *De la Valeur Obligatoire des Traités Internationaux* (1916), p. 84, and Kiatibian *op. cit.*, p. 66. Article 26, however, does not cover the case of Belgium's obligations, because so far as Belgium was concerned it was not a case of a State acquiring or losing territory; but it would govern the case of the Netherlands because that was a case of a State suffering a loss of territory. Since the loss did not render impossible the continued execution of her treaties, she was not relieved of the obligation of performance, unless that obligation related specifically to the territory lost.

It hardly seems necessary to say that when a State loses territory it ceases to be bound to apply its treaties in the territory lost. Obviously it no

longer has any legal power to apply or execute its treaties within territory which has ceased to be subject to its sovereignty and has become part of another State. See Strupp, *Eléments du Droit International Public* (1927), p. 58; Fiore, *op. cit.*, Art. 154; and an article in 17 *Revue de Droit International Privé* (1921), p. 311 ff, entitled "*Traités Applicables dans les Territoires réintégrés de l'Alsace et de la Lorraine*," where the French doctrine and jurisprudence are reviewed. The author of this article says: "les traités de l'Etat démembré cessent de s'appliquer dans les provinces cédées; ils ne peuvent être invoqués ni par lui, ni contre lui." See also a decision of the French Court of Cassation (53 *Journal du Droit International*, 1926, p. 989), where it was said: "when two States bound by a diplomatic convention effect between themselves a cession of territory, the convention becomes *de plein droit*, inapplicable in the territory ceded. Alsace and Lorraine having ceased to belong to Germany since November 11, 1918, and forming part of France, the convention concluded October 14, 1890 [Convention of Berne], between the French State and the German State, for the purpose of regulating the relations between the two countries with respect to rail communication, has necessarily ended, as having no more purpose in so far as it concerns transportation carried on between the rest of France and the three departments which constituted the territory of Alsace-Lorraine." See also, to the same effect, the decision of the same court of February 9, 1925 (53 *ibid.*, p. 675); in a note on this decision (p. 676), M. Nast observes that one can deduce from it the principle that "when a State is annexed to a foreign State the annexation causes the immediate lapse (caducity) in the relations of this State and of the annexed territory, of the diplomatic conventions existing between that State and the dismembered State. . . . The territory ceded is, in fact, withdrawn from the sovereignty of the dismembered State and integrated in the sovereignty of the annexing State; but if one should continue to apply the conventions concluded between the ceding State and third States, this would be treating the ceded territory as if it still formed part of the ceding State."

II. EFFECT OF ADDITION OF TERRITORY

When the territorial changes of a State consist of additions of territory rather than losses, it is hard to see how such changes could render impossible the execution of the treaty obligations of the State acquiring the territory. Indeed the increased wealth, resources and population which the new territory would in some cases bring, might increase the capacity of the State for the execution of its treaties, especially those which involve financial burdens or military aid. It is conceivable, however, that an agricultural State, which had concluded commercial treaties with other States providing for the admission into its ports free of duty or at low rates of commodities produced in those countries, might thereafter acquire a highly developed industrial region. The State might, as a result of the competition with its

newly acquired industries which the low tariff rates would cause, find its own interests seriously affected and might seek to repudiate the treaties or demand their modification on the ground that when States enter into such treaties they do so subject to the tacit condition that their territorial domains shall remain as they were at the time the treaties were concluded. Such a State might possibly invoke the rule of *rebus sic stantibus* in support of its demand, but under Article 26 of this Convention it could not claim to be freed from the duty of performance, because performance had not, in the case assumed become an impossibility as a result of the addition of the new territory. It would seem to be reasonable to hold that if a State enters into treaties granting commercial privileges to other States and subsequently enlarges its territorial domain in such a way that the continuance of the concessions is incompatible with the conditions produced by the addition of the territory, it must bear the consequences. It has no right to repudiate the obligations which it has assumed, merely because it has by its own action done something which has created a situation in which the continued execution of the treaty would be detrimental to its interests.

It is conceivable also that the treaty rights of a State might be put into question as a result of the acquisition on its part of territory. In this connection it may be recalled that, during the World War, certain German jurists put forward the claim that the treaty of 1839 for the neutralization of Belgium was not binding on Germany at the time of her invasion of Belgium, among other reasons because of the alteration of Belgium's position as a European Power resulting partly from the annexation by her of the African Congo territory which transformed the Belgian State into "an immense colonial empire eighty-one times as large as herself." See the arguments of Professors Schönborn and Hampe in *Modern Germany in Relation to the Great War* (Whitelock trans., 1916), pp. 363, 547; Burgess, *The European War* (1915), p. 171; see also 2 Garner, *International Law and the World War* (1920), p. 217 ff, where the German contentions are analyzed and criticized. To put a hypothetical case of this same kind, let us assume that agricultural State A acquires by treaty the right to send its exports into industrial States B and C, free of duty. Subsequently State A itself acquires a highly industrialized territory, and thereupon States B and C, finding the products of State A competing with those of their own industries, might seek to interfere with State A's right of free entry. Under Article 26, however, States B and C would be compelled to continue to accord that right to State A so long as the treaty remained in force, it being, of course, entirely possible for them to do so. Although States B and C might have other remedies, State A could not be deprived of its treaty rights because of its own increase in territory under the rule here laid down.

When the addition of territory consists not of parts of the territory of another State but of the territory of a number of other States in their entirety, that is, where the latter join themselves to, or merge themselves with,

another State and thereby lose their juridical existence as States, the question may arise as to whether a new State is brought into existence or whether the transformation consisted merely in the expansion of the annexing State, and in either case whether the change had any effect upon its treaties. This question arose in connection with the formation of the Kingdom of Italy.

During the years 1859–1861 Lombardy, Tuscany, Emilia, Parma, and the Kingdom of the two Sicilies united with Sardinia to form the Italian Kingdom. At the time, most or all of these States, including Sardinia, were parties to treaties with other States. At the outset, the Italian Government took the position that all the States, save Sardinia, had ceased to exist, and with them the treaties and conventions to which they were at the time parties. As a legal proposition this view was approved by Fiore, Bluntschli, Holtzendorff and others, except that they maintained that Sardinia as an international person had likewise ceased to exist, along with the other States, and had been replaced by a new State. Whatever may have been the correct view as to this, the Italian Government considered the treaties of Sardinia alone as surviving and they were made to replace those of the other uniting States and were extended to the entire Kingdom. This solution of the problem appears to have been based on the theory, not that a new State had come into existence by the formation of the Kingdom of Italy, but that an existing State, serving as a nucleus, had expanded into a larger State through the absorption by it of a number of other Italian States. As to this, there has been much controversy among jurists. Esperon and Gabba maintained the theory of expansion, whereas Fiore, and, as stated above, Bluntschli and Holtzendorff, argued that all the component States, including Sardinia, had ceased to exist and were replaced by an entirely new and larger State. This latter view is defended by Kiatibian (*Conséquences Juridiques des Transformations Territoriales des Etats sur les traités*, 1892, p. 94) and Larivière (*Des Conséquences des Transformations Territoriales des Etats sur les Traités Antérieures*, 1892, p. 101). The controversy, however, has only an academic interest. The courts of both Italy and France held that the treaty of March 4, 1760, concluded between France and Sardinia, relative to the execution of judgments, survived the formation of the Kingdom of Italy and was applicable throughout the Kingdom of Italy and binding on both countries—this on the theory that the Italian Kingdom was merely an expansion or enlargement of the State of Sardinia. The jurisprudence of the French and Italian courts is partially reviewed by Kiatibian, *op. cit.*, p. 97, ff. For the French decisions, see, among others, the cases of *La Modération c. La Chambre d'Assurances* (Court of Paris, 1879), *Mantil c. Pompilis* (Tribunal Cor. of the Seine, 1883, 10 *Journal du Droit International Privé*, 1883, p. 500), and *Vincent c. Bardini*, Dalloz, 1901, 2. 257 and the note thereon by Pic. See also the decision of the Court of Montpellier of July 10, 1872, in the case of *Iconomidis v. Coude* (6 *Journal du Droit Inter-*

national Privé, 1879, p. 69), where it was emphasized that additions to the territory of a State have no effect upon the State's treaty obligations:

Attendu que l'agrandissement postérieur d'un Etat n'est pas un obstacle nécessaire à l'exécution des traités qui existent, que ces traités aient été conclus soit avec l'Etat que s'agrandit, soit avec celui qui s'incorpore. En effet, l'Etat qui absorbe l'autre est censé de l'annexer avec ses obligations et les droits, les charges et les avantages résultant de ses traités, à moins qu'il ne manifeste une intention contraire dans la forme et dans les limites du droit international.

For the Italian jurisprudence, see, among others, the decision of the Italian Court of Cassation of December 3, 1927, in the case of *Gastaldi v. Lepage Hémery* (9 *Rivista di Diritto Internazionale*, 3d ser. 1930, p. 102), where the survival of the treaty of 1760 between France and Sardinia was affirmed, on the principle that the Italian State was merely an expansion of the Kingdom of Sardinia. See also the decisions of various Italian Courts cited or summarized in 5 *Journal du Droit International Privé* (1878), p. 244, and 6 *ibid.* (1879), p. 305 ff.

It may be added that the Permanent Court of International Justice in the *Case of the Free Zones of Upper Savoy and the District of Gex*, recognized that the treaty of Turin of March 16, 1816, between Sardinia and Switzerland survived the transformations which resulted in the formation of the Italian Kingdom. *Publications of the P.C.I.J.*, Series A, No. 22, p. 18, and Series A, No. 24, p. 17.

The conclusion deducible from the practice in the case of the formation of the Italian Kingdom is that when a State enlarges its territorial domain by the annexation of other States, its treaties continue to bind it. This precedent therefore supports the rule laid down in Article 26 that the enlargement of a State's territorial domain does not relieve it of its treaty obligations—unless execution becomes impossible as a result of the increase of its territory.

The formation of the Kingdom of Yugoslavia gave rise to a somewhat similar controversy as to the effect of the processes by which that Kingdom was brought into existence, namely, the joining with Serbia of Montenegro, Croatia and Slovenia. On the one hand, it was argued that the Kingdom of Yugoslavia was not a new State but merely an expansion of the old Serbian State, as the Italian Kingdom was only an expansion of Sardinia. Such was the opinion of M. Yovanovitch, *Le Droit Constitutionnel du Royaume des Serbes, Croates et Slovènes* (1924), p. 12 ff. But the contrary view was maintained by Peritch in his lectures on "*Droit International Yougoslave*," at the Hague Academy of International Law in 1928 (28 *Recueil des Cours*, p. 390 ff). Serbia, he argued, disappeared as a State by its merger with Montenegro, Croatia and Slovenia and was replaced by the new State of Yugoslavia. The Kingdom of Yugoslavia was not, therefore, a mere expansion of the State of Serbia. His conclusion was that in consequence of the extinction of Serbia her treaties became *caduc*. But this view was not ac-

cepted by the Powers. By Article 12 of the treaty of September 10, 1919, relative to the protection of minorities, concluded between the Allied and Associated Powers and the Kingdom of the Serbs, Croats and Slovenes, it was provided that:

Pending the conclusion of new treaties or conventions, all treaties, conventions, agreements and obligations between Serbia on the one hand, and any of the Principal Allied and Associated Powers, on the other hand, which were in force on the 1st August, 1914, or which have since been entered into, shall *ipso facto* be binding upon the Serb-Croat-Slovene State. (1 Hudson, *International Legislation*, 1931, p. 312.)

This article appears to have been based on the view that the Yugoslav Kingdom was not a new State but an expansion of the Kingdom of Serbia. Serbia was admittedly the nucleus of the Yugoslav Kingdom, she had concluded treaties with foreign States which were in force at the time of the formation of the Yugoslav Kingdom, and it could hardly be maintained that her union with the other territories destroyed her capacity to perform the treaty obligations which she had assumed prior to the territorial and political transformations which she underwent. If, as Peritch argues, a new State came into existence through the union of Serbia, Montenegro, Croatia and Slovenia, Article 26 of this Convention would not apply because the question involved would be one of State succession. If, however, what took place was merely an expansion of the Serbian State through the addition of other territories, the effect upon Serbia's treaties would be determined by the rule laid down in Article 26.

There are various other questions which may and sometimes do arise in practice as a result of additions to the territorial domain of a State or of losses of territory, with which Article 26 does not deal. Its application is limited to providing the answer to one simple question, namely, what is the effect, if any, on the treaty rights and obligations of a State, of additions to its territorial domain or losses by it of territory.

One of the questions with which it does not deal is whether, when a State annexes additional territory to its domain, its treaties in force at the time extend automatically or *de plein droit* to the annexed territory in so far as they are applicable, in case the treaty contains no provision in regard to the matter and provided the other parties do not object to the extension; or whether they so extend only when the annexing State has by its own act formally extended them to the annexed territory. Some writers defend the rule of automatic extension, for example, Crandall, *Treaties, Their Making and Enforcement* (2d ed. 1916), p. 429; Fiore, *International Law Codified*, Art. 154, and 1 Fauchille, *Traité de Droit International Public*, pt. 1, (1922), p. 345. Others, for example, Phillipson, *Termination of War and Treaties of Peace* (1916), p. 304, and Hyde, *2 International Law* (1922), p. 85, maintain that it is generally though not always the duty of the State to extend its treaties to territory annexed by it. Most of those who defend the principle

of automatic extension recognize that there are exceptions to the rule. Kiatibian, *Conséquences Juridiques des Transformations Territoriales des Etats sur les Traités* (1892), p. 79 ff.

In practice, annexing States have often by their own acts extended their treaties to the new territory annexed in so far as they were applicable within such territory. Sometimes the claim of the other parties that they applied to the annexed territory automatically from the date of annexation was acquiesced in by the annexing State. In view of the lack of a settled practice and the divergence of opinion among writers on international law as to this matter it seems best not to attempt to lay down a rule in this Convention dealing with the question.

Nor does Article 26 deal with the status of the treaties of a State which ceases to be such in consequence of its annexation to another State, or as a result of its entrance into a union or confederation, or its fusion with another State or States to form a new State, nor with treaties to which a union is a party, when the union is subsequently dissolved into two or more States, nor with the question whether, when a new State is formed out of territory which has been lost by another State in consequence of revolution, secession or other process of dismemberment, it succeeds to the treaty rights and obligations of the dismembered State. These and other similar cases which might be mentioned involve questions of State succession concerning the rules of which there is no agreement among writers on international law, no uniform jurisprudence and no settled practice. It is felt that an attempt to formulate rules for the solution of these difficult and complicated questions really lies beyond the scope of our task. The formulation of such rules might very well be made the subject of a separate convention.

It is because Article 26 is not intended to cover cases of State succession that the words "in general" are inserted in the text. "In general", if a State either acquires or loses territory, it does not thereby become a new and different State; it continues as the same juridical person, and it is therefore neither deprived of its rights nor relieved of its obligations under a treaty to which it became a party prior to the change in its territorial domain. It is conceivable, however, that there may be exceptional cases where, as a result of additions to or losses from the territory of a State, that State may disappear and a new State come into existence in its stead. As pointed out above, it was maintained by some writers that the Kingdom of Sardinia disappeared and was replaced by a new State as a result of the territorial additions involved in the formation of the Kingdom of Italy.

The position of Austria seems to be that a new Austrian State came into existence following old Austria's extensive losses of territory at the close of the World War. Hungary, on the other hand, claims to have had a continuous existence, despite the recent territorial changes.

To the exceptional case where, as a result of additions or losses of territory, a new State actually does appear and takes the place of the one whose terri-

torial domain was thus increased or diminished, Article 26 does not apply. Such a case would, to be sure, be one involving changes in the territorial domain of a State, but at the same time it would involve a question of State succession with which this Convention does not purport to deal. In short, Article 26 lays down a rule which is intended to be applicable, not to all cases where there are changes in the territorial domain of a State, but only to those cases where the addition or loss of territory does not at the same time result in a situation involving a question of State succession. The words "in general" are to be understood as qualifying in this sense the rule laid down in Article 26.

ARTICLE 27. VIOLATION OF TREATY OBLIGATIONS

(a) If a State fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting within a reasonable time after the failure, may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.

COMMENT

The purpose of this article is to provide a procedure whereby States which observe their obligations under a treaty may be relieved of further performance of those obligations *vis-à-vis* parties to the treaty which fail to fulfill that duty; and at the same time to accomplish this without giving to the former States the right to be the final judges in their own causes by permitting them unilaterally to terminate the treaty as between themselves and the party or parties alleged to have violated the treaty. The view that a State may, simply by its own unilateral act, terminate a treaty as between itself and a State which it regards as having violated the treaty, although supported by some authority, is largely the product of an earlier day when the community of nations was unorganized and without machinery for the settlement of disputes by judicial processes and when the whole philosophy regarding the possibility of settling international differences by such processes was only beginning to develop. It is believed that such a view should no longer prevail in an age which has at its disposal the elaborate and efficient machinery for the orderly and just settlement of international differences such as has come into existence in recent years.

It is laid down in Article 20 of this Convention, as a fundamental rule of international law, that: "A State is bound to carry out in good faith the obligations which it has assumed by a treaty (*pacta sunt servanda*)."¹ A State which commits overt acts in contravention of its obligations under a particular treaty (violation), or which through inaction fails to carry out those obligations (non-execution or non-performance), obviously violates that fundamental principle, and, in either case, is guilty of a breach of the treaty involved. What may be the legal consequences of such a breach?

It must, of course, be admitted as axiomatic that the breach of a treaty should not inure to the benefit of the party which is guilty thereof. Consequently, the breach cannot be regarded as automatically terminating the treaty, or as making it terminable at the will of such party. As Vattel put it: "It would be absurd for the party who has violated the treaty to claim that it had been annulled by its own breach of faith, for if that were true engagements could readily be set aside and treaties would be reduced to empty formalities." *Le Droit des Gens*, bk. IV, ch. 4, sec. 54.

Although the party which has committed the breach is thus without option, several courses are, in such a case, open to a party to the treaty which did not commit or cause the breach, and which, for convenience, we may designate as the "innocent party". It is hardly necessary to remark, in the words of the Permanent Court of International Justice, that it is "a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation . . . , if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question. . . ." *Publications of the P.C.I.J.*, Series A, No. 9, p. 31.

In the first place, since the breach of a treaty by one of the parties thereto does not automatically terminate the treaty, it is evident that the innocent party may simply elect to regard the treaty as continuing in force as between it and the party which committed the breach. In that case, the innocent party is itself relieved of none of its obligations under the treaty, for even if it had a right to abrogate unilaterally the treaty relation existing between it and a party committing a breach thereof, failure to exercise that right leaves the treaty binding upon all parties in exactly the same manner as prior to the breach. This principle has been several times recognized by the courts of the United States. Thus, in *Ware v. Hylton* (1796), 3 Dallas, 199, 261, it having been argued that the treaty of 1783 between the United States and Great Britain was to be regarded as suspended or abrogated because of Great Britain's failure to execute certain parts of it, Mr. Justice Iredell said:

It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void. . . . But the same law of nations tells me, that until the declaration be made, I must regard it (in the language of the law) valid and obligatory.

In the case *In re Thomas* (1874), 23 Fed. Cases, 927, it was said by the United States Circuit Court, Southern District, New York, that:

Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent's Comm. 174.

And again, in *Charlton v. Kelly* (1913), 229 U. S. 447, the Supreme Court declared:

If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which, in its judgment, had occurred and conform to its own obligation as if there had been no breach.

In finding that the United States Government in fact had thus waived its right of denunciation for whatever breach there may have been, the court quoted from the memorandum of Secretary Knox, who said:

In this connection, it should be observed that the United States, although . . . consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty, or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect, and has answered the obligations imposed thereby, and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

For discussion of similar views expressed in a British prize case (*The Blonde*, L. R. 1922, 1 A.C. 313), see McNair, "*L'Application et l'Interprétation des Traités d'après la Jurisprudence Britannique*," 43 *Recueil des Cours* (1933), pp. 280-283. In much the same sense, see the following writers: Vattel, *Le Droit des Gens*, bk. IV, ch. 4, sec. 54; Kent's *Commentary on International Law* (rev. ed., 1866), p. 419; Woolsey, *International Law* (6th ed., 1899), p. 172; Hall, *International Law* (6th ed., 1909), p. 341 ff; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), pp. 456, 462 ff; 1 De Loutcr, *Le Droit International Public Positif* (1920), p. 509; Frisch, in 2 Strupp, *Wörterbuch des Völkerrechts und der Diplomatie* (Berlin, 1923-1927), p. 655; 1 Oppenheim, *International Law* (4th ed., 1928), pp. 756-757; McNair, "*La Terminaison et la Dissolution des Traités*," 22 *Recueil des Cours* (1928), pp. 519 ff; Cavaglieri, "*Règles Générales du Droit de la Paix*," 26 *Recueil des Cours* (1929), p. 534.

The innocent party, in addition to its right to regard the treaty as continuing in force as between it and the party committing a breach thereof, has also a right to demand and to receive full reparation for any damage which it may have suffered as a result of the commission of the breach. This has been expressly recognized by the Permanent Court of International Justice, which has declared that: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement

of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself." *Publications of the P.C.I.J.*, Series A, No. 9, p. 21. In its judgment on the merits of the *Chorzów Factory Case*, the court reiterated that principle, adding that it was "a general conception of law". Series A, No. 17, p. 29. In the same case the court gave lengthy consideration to the measure of damages to be applied in such cases, concluding that "the essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." *Ibid.*, p. 47.

Normally the innocent party to a broken treaty will elect to adopt one or the other, or both, of the courses of conduct just outlined with respect to a party to the treaty which has committed a breach. It will consider the treaty as remaining in force, and will either ignore the breach, or, though protesting against it, regard it as necessitating neither alteration or abrogation of the treaty nor the making of reparation. Or the innocent party may register its protest and succeed in causing the party guilty of the breach to alter its conduct and conform to the requirements of the treaty. Thus, Great Britain protested that the Panama Canal Tolls Act passed by the Congress of the United States violated the obligations of the latter under the Hay-Pauncefote Treaty, and as a result of that protest the United States ultimately repealed the act. Or, again, the innocent party may add to its protest a demand for reparation, as did Germany in the *Chorzów Factory Case*. Should a dispute arise between the parties in question as to the existence of the breach complained of, or as to the amount of the indemnity due for its commission, it is one which is generally recognized as highly suitable for settlement by reference to an international tribunal, and the many reported cases involving questions relative to the misapplication or non-application of treaty provisions show that States have often had recourse to such procedure. The rarity of cases in which some course of conduct other than those just mentioned has been followed would seem to indicate that such cases represent the exceptional, while the type referred to above represent the usual, international practice.

So long as some one of the above-mentioned methods of procedure will give satisfaction to the innocent party, there is no apparent reason why it should have recourse to any other, and certainly it is not intended that the present article of this Convention shall be regarded as implying that the particular

procedure provided for must be followed to the exclusion of those mentioned above. It is to be noted, on the contrary, that the procedure provided for in this article "may" be resorted to by a State; presumably a State will not do so if it can obtain satisfaction in one of the other ways already described. Suppose, however, that the breach of the treaty is of such a nature as to render the treaty of no further value to the other party or parties. Or suppose that it takes the form of an absolute refusal to fulfill the obligations imposed by the treaty, or that the offending party violates the treaty provisions again and again despite the protests of the innocent party. Or, still again, suppose that the party alleged to have committed the breach denies having done so, refuses to make any reparation, and likewise blocks all efforts of the innocent party to bring the case before an international tribunal. In short, suppose that the innocent party cannot get what it considers as proper satisfaction in the ways mentioned above. In such cases, it seems clear that it would be unjust, if not indeed impossible, to compel the innocent party to continue to be bound by the treaty with respect to the offending State. On the other hand, it is equally clear that, nations and men being what they are, and the provisions of treaties being sometimes exceedingly difficult to understand, it is entirely possible that a State may choose to consider certain action or inaction by another State as constituting a serious breach of a treaty between them, whereas it is not in fact so. Faced with such a dilemma, what remedy can be offered to the party alleging that the treaty has been broken?

Many writers have said that the violation or breach of a treaty results in making the treaty voidable at the option of the innocent party, or, in other words, that that party may, by its unilateral act, abrogate or terminate the treaty as between it and the party committing the breach thereof. Since the number of actual cases of this nature are few, and since there are apparently no decisions of international tribunals directly in point, it may be well to set forth the statements of some of the jurists.

Crandall, evidently having in mind the sort of situation here under discussion, says:

The difficulty of compelling specific performance, or of obtaining compensation in mitigation of damages, by means other than those which do not assure full reparation to the innocent party, renders it even more necessary and equitable, than in the case of private contracts, that upon a breach of a treaty the continuance of the obligation should be made dependent upon the will of the party faithfully performing. (*Treaties, Their Making and Enforcement*, 2d ed., 1916, p. 456.)

Hall observes that:

In organized communities it is settled by municipal law whether a contract which has been broken shall be enforced or annulled; but internationally, as no superior coercive power exists, and as enforcement is not always convenient or practicable to the injured party, the individual state must be allowed in all cases to enforce or annul for itself as it

may choose. The general rule then is clear that a treaty which has been broken by one of the parties to it is not binding upon the other, through the fact itself of the breach, and without reference to any kind of tribunal. (*International Law*, 6th ed., 1909, p. 343.)

Rivier asserts that:

L'inexécution du traité de la part de l'un des Etats contractants donne à l'autre Etat le droit de le tenir pour résilié, et d'exiger, s'il y a lieu, des dommages-intérêts. (2 *Principes du Droit des Gens*, 1896, p. 135.)

Hyde considers it futile to attempt to lay down rules indicating precisely the circumstances in which a State may properly abrogate unilaterally a treaty to which it is a party, but concludes that:

It is to be acknowledged, however, that failure of a contracting State to observe a material stipulation of its agreement is deemed to justify another party to take such a step. (2 *International Law*, 1922, p. 88.)

Cavaglieri considers the right of unilateral abrogation in these cases to be one which is "assuré par une règle de droit général qui nous paraît incontestable." "*Règles Générales du Droit de la Paix*," 26 *Recueil des Cours* (1929), p. 535. Dupuis points out that normally States are at pains to provide means and procedure for assuring the execution of treaties rather than to develop a correct procedure for voiding them, and he concludes that the right of unilateral abrogation is a remedy of last resort to be used with great circumspection. He adds, however, that it is a remedy "qui ne peut, sans doute, être évité lorsqu'un Etat refuse manifestement et systématiquement d'exécuter les obligations conventionnelles qui lui incombent. La justice, la raison, le simple bon sens protestent, érient et s'insurgent manifestement contre la duperie qui prétendrait infliger à un Etat l'obligation de tenir ses engagements quand son cocontractant s'affranchirait avec désinvolture et cynisme des siens." "*Les Relations Internationales*," 2 *Recueil des Cours* (1924), p. 340. Oppenheim neatly summarizes the views of the publicists by saying:

Violation of a treaty by one of the contracting States does not *ipso facto* cancel the treaty; but it is within the discretion of the other party to cancel it on this ground. There is indeed no unanimity among writers on International Law in regard to this point, since a minority make a distinction between essential and non-essential stipulations of the treaty, and maintain that only violation of essential stipulations creates a right for the other party to cancel the treaty. But the majority of writers rightly oppose this distinction, maintaining that it is not always possible to distinguish essential from non-essential stipulations, that the binding force of a treaty protects non-essential as well as essential stipulations, and that it is for the faithful party to consider for itself whether violation of a treaty even in its least essential parts, justifies its cancellation. (1 *International Law*, 4th ed., 1928, p. 756; but see McNair's note No. 4 on same page.)

For the views of other writers recognizing that breach of a treaty renders it voidable at the option of the innocent party, see: Kent's *Commentary on International Law* (rev. ed., 1866), p. 419; Bluntschli, *Droit International Codifié* (Lardy trans., 1881), Art. 455; Woolsey, *International Law* (6th ed., 1899), p. 172; Phillipson, *Termination of War and Treaties of Peace* (1916), pp. 205-206; Pillet, *Les Conventions de la Haye* (1918), p. 96; 1 De Louter, *Le Droit International Public Positif* (1920), p. 509; Fenwick, *International Law* (1924), p. 342; Liszt, *Das Völkerrecht systemmatisch dargestellt* (1925), sec. 21, Art. IV; Hershey, *The Essentials of International Public Law and Organization* (rev. ed., 1927), p. 453.

In addition to the declarations of the publicists, there are statements, more or less in the nature of *dicta*, by both courts and diplomats to the effect that the innocent party may, at its own option, abrogate a treaty as between it and a party committing a breach thereof. See the remarks of the United States Supreme Court in *Ware v. Hylton* and *Charlton v. Kelly*, cited *supra*. Likewise, the United States Court of Claims in *Hooper v. United States* (1887), 22 Court of Claims, 408, declared (Davis J. speaking) that a treaty, "as between the nations . . . is in its nature a contract, and if the consideration fail, for example, or if its important provisions be broken by one party, the other may, at its option, declare it terminated." In 1791, Mr. Madison wrote:

That a breach on one side (even of a single article, each being considered as a condition of every other article) discharges the other, is as little questionable; but with this reservation, that the other side is at liberty to take advantage or not of the breach, as dissolving the treaty. (5 Moore, *Digest of International Law*, 1906, p. 321.)

In the course of the negotiation of the treaty of September 30, 1800, between the United States and France, the American representatives relied upon Vattel and remarked to the French negotiators "that a treaty being a mutual compact, a palpable violation of it by one party did, by the law of nature and of nations, leave it optional with the others to renounce and declare the same to be no longer obligatory. . . ." United States Senate, Executive Document No. 102, 19th Congress, 1st Session, p. 612; 2 Wharton, *Digest of International Law* (1887), p. 60. In 1884 Secretary Frelinghuysen wrote to Mr. Hall, Minister in Central America:

The Clayton-Bulwer Treaty was voidable at the option of the United States. This, I think, has been demonstrated fully upon two grounds. First, that the consideration of the treaty having failed, its object never having been accomplished, the United States did not receive that for which they covenanted; and, second, that Great Britain has persistently violated her agreement not to colonize the Central American coast. (Cited in *Hooper v. United States* (1887), 22 Court of Claims, 408.)

Secretary Olney, in a memorandum (1896) relative to the Clayton-Bulwer Treaty, observed that Great Britain's failure to comply with the provisions

of that treaty between 1850 and 1860 "might well have been made the ground for an annulment of the treaty altogether." 3 Moore, *Digest of International Law* (1906), p. 205. In March, 1917, in declining to accept the German proposal for a supplementary agreement as to Article 23 of the treaty of 1799, the United States Government complained of Germany's violations of its contractual obligations, and Secretary Lansing declared that his government was seriously considering whether the treaty of 1878 and the revived articles of earlier treaties had "not been in effect abrogated by the German Government's flagrant violations of their provisions." He added: "It would be manifestly unjust and inequitable to require one party to an agreement to observe the stipulations and to permit the others to disregard them. It would appear that the mutuality of the understanding has been destroyed by the conduct of the German authorities." 2 Hyde, *International Law* (1922), p. 90 and n. 1, citing *American White Book, European War*, IV, 415, 417.

For a few examples from the diplomatic correspondence of various European countries expressing opinions similar to those just cited, see Bruns, *Fontes Juris Gentium*, Ser. B, sec. 1, t. 1, pars. 1, fasc. 2, pp. 791-795.

In his award as arbitrator in the *Tacna-Arica Case*, President Coolidge admitted, by way of *dictum*, "that a wilfull refusal of either party . . . [to fulfill a treaty provision] would have justified the other party in claiming discharge from the provision." 19 *American Journal of International Law* (1925), p. 398.

Despite the many statements of publicists and statesmen, the fact remains that, as stated above, the actual cases in which a party has really attempted to abrogate or terminate unilaterally its obligations under a treaty, on the ground that the treaty had been violated by another party thereto, are rare. There seem to be two classical examples most frequently referred to, and these examples will now be considered.

In 1798, when friction between the United States and France was at its height, the United States Congress passed, and the President on July 7th approved, the following act:

Whereas the treaties concluded between the United States and France have been repeatedly violated on the part of the French Government; and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations have been repelled with indignity; and whereas, under authority of the French Government, there is yet pursued against the United States a system of predatory violence, infracting the said treaties and hostile to the rights of a free and independent nation:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the United States are of right freed and exonerated from the stipulations of the treaties and of the consular convention, heretofore concluded between the United States and France, and that the same shall not henceforth be regarded as

legally obligatory on the Government or citizens of the United States. (5 Moore, *Digest of International Law*, 1906, p. 356.)

In 1799 American plenipotentiaries were sent to France to settle all controversies then existing between the two countries. The instructions of the United States plenipotentiaries stated that the latter were to require that compensation be made for "all captures and condemnations" contrary to international law and to the treaty of 1778, while the latter "remained in force". Further, among points which were "to be considered as ultimated" was one to the effect "that the treaties of 1778 and the consular convention of 1788 be not revived in whole or in part, but that all engagements to which the United States were to become parties be specified in a new treaty." 2 *American State Papers, Foreign Relations*, p. 306. It is evident that the United States considered that the treaties had been effectively abrogated.

In accordance with the above instructions, the American plenipotentiaries, in a draft of the articles relating to the adjustment of the claims of individuals, provided that in determining questions of capture or condemnation the commissioners should "decide the claims in question according to the original merits of the several cases, and to justice, equity and the law of nations; and in all cases of complaint existing prior to the 7th of July 1798, according to the treaties and consular convention then existing between France and the United States." 2 *American State Papers, Foreign Relations*, p. 317. Replying to the above proposals, the French plenipotentiaries declared that they were "not aware of any reason which can authorize a distinction between the time prior to the 7th of July, 1798, and the time subsequent to that date, in order to apply the stipulations of the treaties to the damages which have arisen during the first period, and only the principles of the laws of nations to those which have occurred during the second." *Ibid.*, p. 319. The American plenipotentiaries in turn answered that the distinction was based on the fact that it "was not till after the treaty of amity and commerce of February 1778 had been violated to a great extent on the part of the French republic, nor till after explanations and an amicable adjustment, sought by the United States had been refused, that they did on the 7th of July, 1798 by a solemn public act, declare that they were freed and exonerated from the treaties and consular convention which had been entered into between them and France." *Ibid.*, p. 320.

The issue which thus arose over the question as to whether or not the treaties were still in force could not be settled by the plenipotentiaries. The French Government took the view that it could not admit that the treaties had been annulled by the unilateral act of the United States, and with that as a basis, it was willing "to stipulate a full and entire recognition of the treaties, and a reciprocal promise of indemnities for the damages resulting, on the part of either, from their infraction." If, however, the United States persisted in its stand with regard to the treaties, France would be willing to acquiesce in their nullity, but only on the understanding that the declaration

of their abrogation by the United States had constituted "an unequivocal provocation to war", that subsequent acts had been "nothing less than War", and that the new treaty being negotiated must be preceded by a treaty of peace. The French plenipotentiaries added that, if the latter alternatives were adopted, "it would seem that the two Governments ought to be occupied no longer with their respective losses; the rights of war acknowledge no obligation to repair its ravages. . . ." 2 *American State Papers, Foreign Relations*, p. 332.

Since the French refused to separate the question of indemnities for captures and condemnations from that of the treaties, and since the United States plenipotentiaries were without authority to recognize the treaties as still in force or to abandon the claims, it was decided to postpone this thorny problem by providing in Article 2 of the convention of September 30, 1800, that, since no agreement had been possible respecting either the treaty of alliance and of amity and commerce of 1778 and the consular convention of 1788, or respecting the indemnities claimed, the parties would "negotiate on these subjects at a convenient time, and until they may have agreed upon these points the said treaties and conventions shall have no operation."

When the convention as thus concluded came up in the United States Senate, the latter body gave its approval with the proviso, *inter alia*, that Article 2 should be "expunged". The convention, thus amended, was returned to Paris for the exchange of ratifications, whereupon the French Government refused to agree to the striking out of Article 2 except on condition that "the reciprocal pretensions" to which it referred "should not be brought forward at any future period." 6 *American State Papers, Foreign Relations*, pp. 144-145. Bonaparte, as first consul, therefore ratified the treaty subject to the proviso that it should be understood that, by the striking out of Article 2, "the two states renounce the respective pretensions, which are the object of the said article." 2 *American State Papers, Foreign Relations*, p. 344. Ratifications were then exchanged, and subsequently the United States Senate gave its approval to the qualified French acceptance of the treaty and declared it to be "fully ratified." *Ibid.*, p. 345. For a good account of the entire case, see 5 Moore, *History and Digest of International Arbitrations to which the United States has been a Party* (1898), pp. 4429-4432.

On these facts it would seem that it may certainly be said that the United States did not unilaterally terminate the treaties on July 7, 1798, but, on the contrary, that they were only finally terminated by agreement of the parties, the United States having, in effect, purchased that agreement by the renunciation of its spoliation claims against France. 2 Hyde, *International Law* (1922), p. 89, n. 1. It was the decision, not of an international tribunal, but only of the United States' own Court of Claims "that the circumstances justified the United States in annulling the treaties of 1778; that the act was a valid one, not only as a municipal statute, but as between the nations; and

that thereafter the compacts were ended." *Hooper v. United States* (1887), 22 Court of Claims, 408.

On March 30, 1856, Great Britain, France, Russia, Sardinia, and Turkey concluded the Treaty of Paris. Article 11 thereof provided for the neutralization of the Black Sea; Article 13 bound Russia and Turkey not to establish or maintain any military-maritime arsenal on its coast; Article 14 declared that Russia and Turkey had concluded a convention regulating the number of vessels which each of them might keep in the Black Sea, which convention, the article stated, "is annexed to the present Treaty, and shall have the same force and validity as if it formed an integral part thereof. It cannot be either annulled or modified without the assent of the Powers signing the present Treaty." 2 Hertslet, *Map of Europe by Treaty* (1875), pp. 1256-1257.

During the Franco-Prussian War, on October 19/31, 1870, the Russian Government addressed a circular note to the signatory Powers of the Treaty of Paris denouncing the stipulations of the general treaty, and also the annexed convention of the same date, relative to the Black Sea. 3 Hertslet, *op. cit.*, pp. 1892-1895. Prince Gortchakoff justified this act, in part, by declaring that the treaty had previously been violated. He stated that the union of the principalities of Moldavia and Wallachia had been "equally at variance with the letter and spirit" of the treaty, and that "repeatedly and under various pretexts, Foreign Men-of-War have been suffered to enter the Straits, and whole squadrons, whose presence was an infraction of the character of absolute neutrality attributed to those waters, admitted to the Black Sea." He concluded by saying that:

Our illustrious Master cannot admit, *de jure*, that Treaties violated in several of their essential and general clauses, should remain binding in other clauses directly affecting the interests of his Empire.

His Imperial Majesty cannot admit, *de facto*, that the security of Russia should depend on a fiction which has not stood the test of time, and should be imperilled by her respect for engagements which have not been observed in their integrity.

He announced, therefore, that:

His Imperial Majesty cannot any longer hold himself bound by the stipulations of the Treaty of 18/30 of March, 1856, as far as they restrict his Sovereign Rights in the Black Sea;

That His Imperial Majesty deems himself both entitled and obliged to denounce to His Majesty the Sultan the Special and Additional Convention appended to the said Treaty, which fixes the number and size of the Vessels of War which the two Powers bordering on the Black Sea shall keep in that Sea;

That His Majesty loyally informs of this the Powers who have signed and guaranteed the General Treaty, of which the Convention in question forms an integral part;

That His Majesty restores to the Sultan the full exercise of his rights in this respect, resuming the same for himself.

It was added that His Majesty still adhered to the general principles of the Treaty of Paris, and was "ready to enter into an understanding with the Powers who have signed that transaction, for the purpose either of confirming its general stipulations, or of renewing them, or of replacing them by some equitable arrangement, which may be considered as calculated to secure the tranquillity of the East, and the Balance of Power in Europe."

In replying to the Russian declaration the British Government, through Earl Granville, declared its opposition to any assumption that a State might, on the basis of its own decision that violations had occurred, release itself from the obligations of a treaty. It was stated that:

The despatches of Prince Gortchakoff appear to assume that any one of the Powers who have signed the engagement may allege that occurrences have taken place which, in its opinion, are at variance with the provisions of the Treaty, and, although this view is not shared nor admitted by the co-signatory Powers, may found upon that allegation, not a request to those Governments for the consideration of the case, but an announcement to them that it has emancipated itself, or holds itself emancipated, from any stipulations of the Treaty which it thinks fit to disapprove. Yet it is quite evident that the effect of such doctrine, and of any proceeding which, with or without avowal, is founded upon it, is to bring the entire authority and efficacy of Treaties under the discretionary control of each one of the Powers who may have signed them; the result of which would be the entire destruction of Treaties in their essence. For whereas their whole object is to bind Powers to one another, and for this purpose each one of the parties surrenders a portion of its free agency, by the doctrine and proceeding now in question, one of the parties in its separate and individual capacity brings back the entire subject into its own control, and remains bound only to itself.

The note also declared that the right to release one or more of the parties from all or any of its obligations under a treaty had always been held to belong "only to the Governments who have been parties to the original instrument," and indicated that, had Russia proposed revision of the treaty to the signatory Powers instead of attempting thus to alter it to suit herself, the British Government would have been disposed to give the matter favorable consideration. 3 Hertslet, *Map of Europe by Treaty* (1875), pp. 1898-1900. For statements of a similar nature from other signatories of the Treaty of Paris, see Bruns, *Fontes Juris Gentium*, Ser. B, sec. 1, t. 1, pars. 1, fasc. 2, pp. 759-768.

It was finally agreed that the Powers should meet in London to discuss the question raised by Russia's declaration. On January 17, 1871, all of them, including Russia, subscribed to a protocol by which they recognized "that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement." 3 Hertslet, *op. cit.*, p. 1904. [Compare Article 10 of the Havana Convention of 1928 on Treaties.] And ultimately, despite

the fact that there may be some doubt that the violations cited by Russia were either as serious or as persistent as she alleged them to have been (see Hall, *International Law*, 6th ed., 1909, p. 346 and 3 Hertslet, *op. cit.*, p. 1895, note), the Powers concluded a new treaty modifying the stipulations of the Treaty of Paris relating to the Black Sea. (March 13, 1871.) Article 1 of that treaty declared Articles 11, 13, and 14 of the Treaty of Paris, and the special convention between Russia and Turkey annexed to Article 14, to be "abrogated, and replaced by the following Article," and Article 8 renewed and confirmed "all the stipulations of the Treaty of the 30th March, 1856, as well as of its annexes, which are not annulled or modified by the present Treaty." 3 Hertslet, *op. cit.*, pp. 1920, 1922.

Here again it would seem that, although Russia may have ceased to observe certain of her obligations under the Treaty of Paris after October, 1870, those obligations were not legally terminated until the treaty of March 13, 1871, marked the express agreement of the parties to that termination. See Fiore, *International Law Codified* (Borchard trans., 1918), p. 349. Compare also 2 Hertslet, *op. cit.*, pp. 1256, 1257 n., where the stipulations of the Treaty of Paris in question are marked, not as abrogated at the time of the Russian declaration, but as "abrogated by the General Treaty of 13th March, 1871."

Although, as indicated above, many writers, and not a few diplomats, have asserted that States have a right unilaterally to *terminate* their obligations under a treaty in the type of situation under discussion in this comment, most of the writers have done so with misgivings and have recognized that such a right might all too easily be abused. To avoid such abuse, some of them have tried to qualify the right by saying that it could be exercised only as a last resort, only in case there had been a serious breach or a breach of an essential, as distinguished from a non-essential, provision in the treaty. Such limitations are of no effect, however, if left solely to the decision of the party terminating the treaty, and, not without regret to be sure, the writers have generally recognized that, in the absence of any international tribunal or authority to decide the issue, a State would have to be and could be the judge of its own case where it alleged that another State had violated a treaty with it and proceeded, therefore, to regard the treaty as terminated between it and the alleged offending State.

In the light of what little practice there is, as distinguished from the theoretical statements of writers and the arguments of diplomats, it is submitted that a State does not have the right unilaterally to terminate a treaty as between itself and a party to the treaty which it alone considers to have failed to fulfill its obligations under the treaty. It would seem, certainly, that at most the only conclusion that can be drawn from the two cases discussed above is that a State may provisionally suspend performance of its obligations under a treaty *vis-à-vis* a party which fails to fulfill its obligations thereunder, pending the alteration or termination of the treaty by mutual agree-

ment of the parties thereto. This is very different from a right of unilateral termination.

In any event, the article of this Convention here under discussion does not recognize that a party to a treaty may, acting solely on its own judgment, effectively and finally terminate the treaty as between itself and another party which is alleged to have committed a violation thereof. Of course, if the party which alleges that the treaty has been violated suspends performance of its obligations thereunder *vis-à-vis* the party accused of the breach, and if subsequently that party, and all the other parties, if any, agree to transform such suspended performance into definitive termination, they are free to do so. The parties to a treaty may always agree to terminate it in whole or in part; such a right is expressly recognized in Article 33, paragraph (a), of this Convention. As was pointed out above, this seems to be what actually occurred in the Franco-American and Russian cases. In those cases there was an express agreement of the parties that the treaties were terminated. There is some practice to indicate that, in the case of bipartite treaties at least, such agreement might also be tacit. That is, if State A suspends performance of its obligations under a treaty with State B and announces its intention of regarding the treaty as terminated, and if State B makes no objection and itself proceeds to regard the treaty as terminated, then the treaty may be considered as terminated by tacit agreement of the parties. Thus, when the Russian Government announced that it regarded the Treaty of Brest-Litovsk as abrogated, Germany refrained from protesting against that unilateral declaration and from insisting upon its contractual rights, and indeed proceeded to evacuate the Russian territory which she occupied in accordance with the treaty. Under those circumstances the German *Reichsgericht* considered the treaty as terminated by the implied agreement of the parties. 53 *Journal du Droit International* (1926), p. 465, 469; McNair and Lauterpacht, *Annual Digest of Public International Law Cases*, 1925-1926, Case No. 267; McNair, "*La Terminaison et la Dissolution des Traités*," 22 *Recueil des Cours* (1928), pp. 518-519.

It should also be pointed out that agreement of the parties to regard a treaty as suspended or terminated with respect to any party guilty of violating it may be given in advance in a clause incorporated in the treaty itself. The preamble to the Treaty of August 27, 1928, for the Renunciation of War contains a provision that "any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty." This provision, according to Mr. Hunter Miller, "is still to be regarded, despite its presence in the Preamble, as a substantive part of the Treaty." The effect of the provision is to record agreement by the parties upon the principle that if a State resorts to war in violation of the treaty the other parties are released from their obligations under the treaty to that State. See Miller, *The Peace Pact of Paris* (1928), pp. 115, 218. See also, in this connection, the following provision in Article

14 of the additional articles of the Geneva Convention of 1864 (2 Malloy, *Treaties, etc.*, p. 1911):

In naval wars any strong presumption that either belligerent takes advantages of the benefits of neutrality, with any other view than the interest of the sick and wounded, gives to the other belligerent, until proof to the contrary, the right of suspending the Convention, as regards such belligerent.

Should this presumption become a certainty, notice may be given to such belligerent that the Convention is suspended with regard to him during the whole continuance of the war.

Such provisions in a treaty, as stated above, record in advance the agreement of all the parties—including, therefore, any party which subsequently violates the treaty—to consider the treaty as terminated or suspended as between the States complying with the terms of the treaty and a party failing so to do. If thereafter a party is alleged to have violated the treaty, and if it denies having done so and protests against the application of such a provision to it, the result is simply a dispute between the parties as to the interpretation and application of a treaty, to be settled in some one of the ways proper for the settlement of such disputes.

Where there is no agreement of the parties to a treaty to its alteration, suspension or termination, however, and where the State alleged to have failed to fulfill its obligations under the treaty denies the truth of such allegation, the State making the allegation cannot, under this Convention, bring to an end by its own unilateral action the relationship established by the treaty between it and the State alleged to have committed the breach. On the contrary, it must itself be regarded as violating the rule *pacta sunt servanda*, if, without taking other steps, it simply continues to refuse to carry out in full the obligations imposed upon it by the treaty. Under this article, such a State can be definitively released from the treaty with respect to the offending State only if it submits its case to a competent international tribunal or authority, and seeks and obtains therefrom a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to the offending State. It will be for such tribunal or authority, not the State alleging breach of the treaty acting independently, to decide whether or not the allegation is true, whether or not it has been acted upon within due time, whether or not there are mitigating circumstances such as changes of conditions coming within the rule *rebus sic stantibus* etc., in favor of the State accused of violating the treaty, whether or not the breach is of such a serious nature that termination of the treaty is the only fair and just remedy, etc. The decision of these questions, heretofore left to an interested party acting, perhaps, in the heat of controversy, is, under the rule here propounded, necessarily submitted to a presumably impartial outside body. It is to be supposed that such a body will not lightly give its sanction to the termination of treaties in the absence of positive and

clear proof of serious violation. It is in such a spirit, for example, that we find the arbitrator in the *Tacna-Arica Case* saying:

In order to justify either party in claiming to be discharged from performance, something more must appear than the failure of particular negotiations or the failure to ratify particular protocols. There must be bound an intent to frustrate the carrying out of the provisions of Article 3 with respect to the plebiscite; that is, not simply the refusal of a particular agreement proposed thereunder, because of its terms, but the purpose to prevent any reasonable agreement for a plebiscite. While there should be no hesitation in finding such intent, or bad faith, if established, and in holding the party guilty thereof of the consequences of its action, it is plain that such a purpose should not be lightly imputed. Undoubtedly, the required proof may be supplied by circumstantial evidence, but the *onus probandi* of such a charge should not be lighter where the honor of a nation is involved than in a case where the reputation of a private individual is concerned. A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion. (19 *American Journal of International Law* (1925), pp. 398-399.)

Some of the elements of the rule laid down in this article will now be discussed in detail.

“Any other party to the treaty”

This indicates that, in the case of a multipartite treaty, one of several of the parties, but not necessarily all of them other than the offending party, may seek the declaration indicated. It is entirely conceivable that a breach of a multipartite treaty by a State may be of such nature as to affect directly and more particularly the rights and interests under the treaty of one only of the other parties, and that in consequence it may desire to be relieved of its obligations under the treaty *vis-à-vis* the offending State, while the other parties, for reasons of their own, may be willing to ignore the breach and to continue to be bound by the treaty with respect to the offending State. Under the rule here laid down, it will be possible for the one party referred to, to seek the desired declaration. If, of course, the release of that party from its obligations under the treaty *vis-à-vis* the offending State would operate to the detriment of the other parties, that will be a factor to be considered by the competent tribunal or authority in deciding whether or not the declaration sought shall issue. Furthermore, if the complaining party is released from its obligations under the treaty *vis-à-vis* the offending State, but if the result of its being so released is to put it in the position of itself violating its obligations under the treaty *vis-à-vis* one or more of the other parties, then the latter parties, other remedies failing, could make use of the procedure here provided for as against the State released. In other words, it always must be kept in mind that the declaration here provided for can only be:

“ . . . to the effect that the treaty has ceased to be binding upon it [i.e., the State seeking the declaration] in the sense of calling for further performance with respect to such State” [i.e., the State violating the treaty].

This provision of the article makes it clear that the party seeking and obtaining the declaration is, and can only be, relieved of future performance of its obligations under the treaty with respect to the offending State alone. In the case of a bipartite treaty, of course, the treaty would be, in effect, terminated by the declaration; but in the case of a multipartite treaty, the State seeking the declaration is not in any way to be freed of its obligations under the treaty toward all the parties thereto other than the offending State. The treaty is not destroyed; it continues in full force and effect, and must be carried out in accordance with the rule *pacta sunt servanda* except only as between the State seeking and obtaining the declaration and the offending State.

“ . . . acting within a reasonable time after the failure ”

It is only fair to require that a State should exercise with reasonable promptness the rights provided for in this article in cases where it considers that those rights have accrued to it. If it were allowable to “sleep upon” rights of this nature indefinitely, and to bring them forward after an undue lapse of time, international relations would be deprived of the necessary degree of stability and security. This principle has, in practice, been recognized by the United States. Secretary Olney, in his memorandum of 1896, relative to the Clayton-Bulwer Treaty, declared that “there was a period of ten years, indeed, from 1850 to 1860, when she [Great Britain] undoubtedly did not fully comply with the provisions of the treaty. The complaints of this country were as loud as they were just, and might well have been made the ground for an annulment of the treaty altogether.” He admitted, however, that whatever infraction of the treaty there may have been, “the United States has acquiesced therein too long to claim that the treaty has thereby become null and void. If not altogether estopped to treat the colony [Belize] as a grievance, its only remedy is to give notice that it will regard the future maintenance of the colony as a violation of the treaty and, if its remonstrance is not heeded, to then take such further steps in the matter for the abrogation of the treaty, or otherwise, as it may deem expedient.” And he added:

In no instance have the former failed to deal with the treaty as a binding obligation—in no instance, when occasion justified it, has this Government failed to call upon Great Britain to comply with its provisions—while, during the first ten years of the life of the treaty, when it might have been abrogated, either for violations by Great Britain or with the latter’s consent, the United States steadily insisted upon holding Great Britain to its obligations. Under these circumstances, upon every principle which governs the relations to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigor. (3 Moore, *Digest of International Law*, 1906, pp. 205, 207–208.)

In all probability it will devolve upon the competent international tribunal or authority to decide whether or not the party seeking the declaration has

acted within a reasonable time after the failure of which it complains. This is the type of question which an international tribunal may well decide, and in practice such tribunals have frequently recognized and acted upon the doctrine of prescription. See Ralston, *The Law and Procedure of International Tribunals* (rev. ed., 1926), ch. XIII.

“ . . . a competent international tribunal or authority ”

As the international community is at present organized, the only tribunals or authorities competent to pass upon matters of difference involving States are those upon which the States concerned have, by general or *ad hoc* agreements, conferred such competence. Therefore, the international tribunal or authority here referred to must be one which the State seeking the declaration and the State alleged to have committed a breach of treaty have agreed upon, either by special agreement at the time or by previous general agreement, as being competent to decide the issues involved in this type of case and to hand down the declaration indicated if they are decided in favor of the complaining State.

If State A alleges that State B has failed to fulfill its obligations under a treaty to which they are parties, and for that reason demands to be relieved of its obligations under the treaty with respect to State B—and if State B, on the other hand, denies having committed any breach of the treaty and so disputes the right of State A to be released, it might be cogently argued that the resulting situation is a dispute as to the interpretation of a treaty, or as to the existence of a fact which, if established, would constitute a breach of an international obligation, or perhaps as to the nature or extent of the reparation to be made for the breach of an international obligation. If that argument is sound, it may be that the States parties to the so-called Optional Clause or to certain general arbitration treaties have already conferred upon the Permanent Court of International Justice or some designated arbitral tribunal the competence to decide the issue involved and to pronounce the declaration referred to in this article. That, however, is a question which cannot be decided here.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, a party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty vis-à-vis the State charged with failure.

As just indicated, the tribunal or authority competent to make the declaration indicated must be one which is agreed upon by the State seeking the declaration and the State alleged to have failed to carry out its obligations under the treaty in question. It is apparent, therefore, that it might frequently be within the power of the State alleged to have committed the breach to prevent or delay submission of the matter to an international tribunal or authority simply by neglecting or refusing to agree upon any such

tribunal or authority, or by denying that tribunals or authorities which it already had agreed upon for certain purposes possess jurisdiction to make the sort of declaration referred to in this article. Furthermore, even after the States concerned have agreed upon a competent international tribunal or authority, a considerable time will necessarily elapse before it can render its decision. In consideration of these facts, and in view of the further fact that continued performance of its obligations under a treaty *vis-à-vis* a State charged with breach thereof might prove costly or even involve irreparable damage to the State seeking the declaration, if the decision is ultimately in its favor, it seems only reasonable to permit the latter State to suspend the performance of its own obligations under the treaty *vis-à-vis* the State charged with failure pending agreement upon a competent international tribunal or authority, and pending final decision by such authority. It is to be noted, however, that the complainant State, under this article, simply “*may*” elect to exercise such suspension of performance; it is under no obligation to do so. Furthermore, it is to be noted that such suspension is only *provisional* in character; it is not definitively justified unless the decision of the tribunal or authority is to that effect.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by a competent international tribunal or authority.

This section simply emphasizes the provisional nature of the suspension of performance just referred to above. It stands as a warning to States that they are not lightly to accuse other States of failing to fulfill their treaty obligations and then to proceed not to fulfill their own with respect to such States. In other words, the State which seeks to be relieved of performing its obligations under a treaty *vis-à-vis* another State alleged to have committed a breach of the treaty, unilaterally suspends performance of its own obligations under the treaty *vis-à-vis* such State at its own risk. If the truth of its contentions is established by proof and ultimately sustained by the tribunal or authority agreed upon, the latter will render a declaration that, because of the failure alleged and proved, the treaty has ceased to be binding upon the complainant State in the sense of calling for further performance with respect to the State guilty of the failure. This will operate to justify definitively the erstwhile provisional suspension of performance. If, however, its contentions are not substantiated by proof and are not sustained by the international tribunal or authority, the latter, of course, will deny the declaration sought. And in such case the unilateral suspension of performance of its obligations under the treaty *vis-à-vis* the State which it erroneously alleged to have violated the treaty will result in putting the suspending State itself in the position of a party which wrongfully failed to carry out its treaty obligations in accordance with the rule *pacta sunt servanda*. Therefore, under the rule here proposed, it will behoove States not to undertake

unilaterally to suspend performance of their treaty obligations *vis-à-vis* a State which they allege to be guilty of breach of the treaty unless they are fairly certain that their allegations are sound and susceptible of being proved to the satisfaction of a competent international tribunal or authority. Furthermore, it will behoove them to be ready themselves to agree upon such an international tribunal or authority, for until a decision by such a body sustains their allegations, suspension of performance of their own obligations is never definitively justified and is resorted to at their own risk.

ARTICLE 28. REBUS SIC STANTIBUS

(a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

COMMENT

Paragraph (a) envisages a declaration by a competent international tribunal or authority that a treaty has ceased to be binding, in the sense of calling for further performance, provided: first, that the parties entered into the treaty with reference to the existence of a certain state of facts; second, that the continued existence of this state of facts was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated; and third, that this state of facts has been “essentially” changed. The declaration is to be that the treaty has ceased to be binding “in the sense of calling for further performance”; it is to have no effect, therefore, upon stipulations of the treaty which have been performed prior to the occurrence of the change.

The term “international tribunal or authority” would include such bodies as the Permanent Court of International Justice, arbitral tribunals, the Council of the League of Nations, etc. Such an international tribunal or authority may be “competent” by virtue of the so-called optional clause in the Statute of the Permanent Court of International Justice, a general or special arbitration treaty, or an arbitral clause in a treaty. See the comment on Article 27.

Paragraph (b) allows a party to suspend provisionally performance of its

obligations under the treaty. This right may be exercised, however, only during the period "pending agreement by the parties upon and decision by a competent international tribunal or authority."

According to paragraph (c), only the competent international tribunal or authority referred to in paragraph (a) has the power to decide that a provisional suspension of performance was justified definitively. If the decision is that a provisional suspension of performance was not justified, the party which has provisionally suspended performance of its obligations under the treaty may be held responsible by other parties to the treaty for failure to fulfill its obligations. This possibility will tend to discourage a provisional suspension of performance by a party unless it has substantial reason to expect that the competent international tribunal or authority will render a decision declaring that the treaty is no longer binding and that the provisional suspension was definitively justified.

The provisions of Article 28 relative to procedure and suspension of performance are substantially the same as those found in Articles 27, 29, 31 and 32 of this Convention. For an explanation of the reasons for requiring a decision by an international tribunal or authority before a State may be relieved of its obligations under a treaty and for permitting a right of provisional suspension, see the comment on Article 27.

DOCTRINE

There has been much controversy among writers on international law concerning the doctrine of *rebus sic stantibus*, sometimes referred to as the *clausula rebus sic stantibus*. Almost all writers on international law refer to the doctrine and numerous articles and special treatises on the subject have appeared during the present century. The most comprehensive of these are: Cattand, *La Clause "Rebus sic stantibus" du Droit Privé au Droit International* (1929); Goellner, *La Revision des Traités sous le régime de la Société des Nations* (1925); Idenburg, *Over den Grondgedachte van de Clausula rebus sic stantibus in het Volkenrecht* (1923); Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (1911); Pouritch, *De la Clause "rebus sic stantibus" en Droit International Public* (1918); Radoïkovitch, *La Révision des Traités et la Pacte de la Société des Nations* (1930); Bruno Schmidt, *Über die völkerrechtliche clausula rebus sic stantibus sowie einige verwandte Völkerrechtsnormen* (1907); Schneider, *Die völkerrechtliche clausula rebus sic stantibus und Art. 19 der Völkerbundssatzung* (1931); Werth-Regendanz, *Die Clausula rebus sic stantibus im Völkerrecht, insbesondere in ihrer Anwendung auf den Young Plan* (1931); and Wigniolle, *La Société des Nations et la Révision des Traités* (1932).

The idea common to most concepts of the doctrine is that a treaty becomes legally void in case there occurs a change in the state of facts which existed at the time the parties entered into the treaty. It is generally admitted, however, that not every change in those facts terminates the binding

force of a treaty, but there is a wide difference of opinion among writers on international law as to the proper test for determining precisely what changes shall have that effect. Many writers affirm that a change in the state of facts terminates the binding force of a treaty only when the parties entered into the treaty with reference to this state of facts and envisaged its continuance unchanged as a determining factor which moved them to undertake the obligations stipulated. This is the concept which was commonly held by the early writers on international law and it has been accepted by many writers of the past three centuries, including those of the more recent period. Pufendorf, following Grotius almost textually, says:

The question is often discussed whether promises carry with them a tacit condition, provided things remain in the place where they are. This must in general be denied, for since such a condition is odious, as making a promise void, it is not to be lightly presumed when it has not been added, unless it happen to appear most clearly that the present state of things is included in that single reason which we have mentioned. *De Jure Natural et Gentium Libri Octo*, (*Classics of International Law*, Oldfather trans., p. 817.)

Vattel expressed a similar view on the question:

On a proposé et agité cette question: si les promesses renferment en elles-mêmes cette condition tacite, que les choses demeurent dans l'état où elles sont, où, si le changement survenu dans l'état des choses peut faire une exception à la promesse, et même la rendre nulle? Le principe tiré de la raison d'une promesse doit résoudre la question. S'il est certain et manifeste, que la considération de l'état présent des choses est entrée dans la raison qui a donné lieu à la promesse, que la promesse a été faite en considération, en conséquence de cet état des choses; elle dépend de la conservation des choses dans le même état. Cela est évident, puisque la promesse n'a été faite que sur cette supposition. Lors donc que l'état des choses essentiel à la promesse, et sans lequel elle n'eût certainement pas été faite, vient à changer, la promesse tombe avec son fondement; et dans les cas particuliers, où les choses cessent pour un temps d'être dans l'état qui a opérée la promesse, ou concouru à l'opérer, on doit y faire une exception. (*Le Droit des Gens*, bk. II, ch. XVII, sec. 296.)

Klüber declared that the validity of treaties ends "at the time of the essential change of such and such circumstance whose existence was supposed necessary by the two parties (*clausula rebus sic stantibus*), whether this condition was stipulated expressly or that it results from the very nature of the treaty." *Le Droit des Gens Moderne de l'Europe* (ed. by Ott, 1874), sec. 165. Later German writers on international law who adopted Klüber's view are: Heffter, *Le Droit International de l'Europe* (4th French ed. by Bergson, 1883), sec. 98; Hartmann, *Institutionen des praktischen Völkerrechts in Friedenzeiten mit Rücksicht auf die Verfassung, die Verträge und die Gesetzgebung des Deutschen Reichs* (2d ed., 1878), sec. 56; Holtzendorff, *Handbuch des Völkerrechts* (1885-1889), sec. 46.

Sir Robert Phillimore expresses much the same idea as follows:

When that state of things which was essential to, and the moving cause of the promise or engagement, has undergone a material change, or has ceased, the foundation of the promise or engagement is gone, and their obligation has ceased. This proposition rests upon the principle that the condition of *rebus sic stantibus* is tacitly annexed to every covenant. (2 *Commentaries upon International Law*, 2d ed., 1871, p. 109.)

Westlake says:

Almost all theorists agree that to many treaties the tacit condition *rebus sic stantibus* is attached; they were concluded in and by reason of special circumstances, and when those circumstances disappear, there arises a right to have them rescinded. . . . But the question only arises when there is a difference as to what conditions were implied, or were contemplated, not as existent or possible, but as essential. (1 *International Law*, 1910, pp. 295-296.)

Sir John Fischer Williams observes:

The doctrine that we set out to consider is the doctrine that treaties, for the duration of whose obligations no special period is fixed, are not to be understood as binding on the contracting Powers in the event of some material change in the conditions with reference to which they were concluded, the word "conditions" in this statement including not only material, but also moral, facts. For the purpose of the discussion, the phrase "*rebus sic stantibus*" is a convenient catchword: treaty obligations, when the treaty itself is silent, are subject to the provision that, if the obligations are to remain, the essential "things", inanimate and animate, material, moral and mental, must remain in the condition in which they were when the treaty was concluded. ("The Permanence of Treaties," 22 *American Journal of International Law*, 1928, p. 89.)

Despagnet gives as one cause of the extinction of treaties,

- (b) Quand les circonstances qui ont motivé le traité ont changé et enlèvent à l'ancien accord sa raison d'être. Mais la condition du maintien des traités, *rebus sic stantibus*, doit être comprise de bonne foi, et ne devra pas être étendue à des modifications accidentelles qui ne sont pas de nature à faire supprimer les anciens engagements d'après les intentions communes des parties contractantes. (*Cours de Droit International Public*, 1910, sec. 455.)

Fauchille adopts a similar view, saying: "les traités conclus sans fixation de durée doivent être toujours censés contenir une clause *rebus sic stantibus*, c'est à dire avoir été signés sous la réserve tacite qu'ils cesseront d'être en vigueur quand les circonstances à raison desquelles ils ont été conclus auront cessé d'exister: la fin d'un traité doit inévitablement suivre la disparition des causes qui l'ont occasionné. . . ." 1 *Traité de Droit International Public*, pt. 3 (1926), pp. 383-384.

Among the many other writers who have a similar conception of the doctrine of *rebus sic stantibus* may be mentioned: De Louter, 1 *Le Droit International Public Positif* (1920), pp. 509–511; Hershey, *The Essentials of Public Law and Organization* (1927), p. 453; Wharton, *Commentaries on American Law* (1887), sec. 137a; Wheaton, *Elements of International Law* (Lawrence ed., 1863), sec. 453; and Werth-Regendanz, *Die Clausula Rebus sic Stantibus im Völkerrecht* (1931), p. 75.

Although the doctrine of *rebus sic stantibus* as conceived by the writers mentioned above is based upon the idea of a relation between the binding force of the treaty and a continuance of a state of facts essentially unchanged because the parties intended that the continuance of the state of facts should be a condition of the binding force of the treaty, two variations of this concept may be distinguished. In the one case, a tacit clause *rebus sic stantibus* is presumed to be contained in every treaty. In the second case, no such tacit clause is presumed for all treaties; but if, upon examination, it is clear that a particular treaty was entered into with reference to the existence of a particular state of facts, the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, then the rule of *rebus sic stantibus* applies. The difference between these two concepts is not, in final analysis, very considerable, because when a tacit clause is presumed, it becomes necessary in the case of a particular treaty to determine what facts from among the numerous facts existing at the time the parties entered into the treaty constituted that state of facts whose existence unchanged was intended by the parties to be a condition of the continued binding force of the treaty.

There is a second concept of the doctrine which adopts as a test for determining whether a given change in the state of facts shall render the treaty no longer binding, not the intention of the parties, but a test of a quite different nature. It is that the changes shall be “essential”, “fundamental”, or “vital”. It is obvious that this test is abstract and subjective. It proceeds on the theory that changes in the state of facts may be divided into categories, some being “essential” and some non-essential, some being “fundamental” and some inconsequential. In fact, a writer who adopts this concept of the doctrine of *rebus sic stantibus* usually attempts to catalogue changes in the state of facts into those which are essential and those which are non-essential. A rather large number of writers support this concept of the doctrine. Thus, Oppenheim says:

For it is an almost universally recognized fact that vital changes of circumstances may be of such a kind as to justify a party in demanding to be released from the obligations of an unnotifiable treaty. The vast majority of publicists, as well as the Governments of civilized States, defend the principle *conventio omnis intelligitur rebus sic stantibus*, and they agree, therefore, that all treaties are concluded under the tacit condition of *rebus sic stantibus*. . . . Be that as it may, it is generally agreed that the clause *rebus sic stantibus* may only be resorted to in very

exceptional circumstances, and that certainly not every change of circumstances justifies a State in making use of it.

Oppenheim then lists changes which are, and which are not, in his opinion, "vital" changes. 1 *International Law* (4th ed., 1928), sec. 539. McNair defines the doctrine of *rebus sic stantibus* as follows:

Lorsqu'un traité ne contient aucune disposition fixant sa durée et qu'on peut supposer qu'il a été conclu par les Parties Contractantes à raison de certaines circonstances existant à l'époque de sa conclusion, une modification essentielle de ces circonstances peut avoir pour effet de le dissoudre. ("La terminaison et la dissolution des traités," 22 *Recueil des Cours* (1928), p. 467.)

L. H. Woolsey, after defining the doctrine, says: "Only vital changes would have this effect on account of the possibility of abuse by the contracting parties." He mentions changes which would not warrant termination of a treaty and then concludes:

Changes which are regarded by authorities as fundamental or vital are those which: take away the very foundation of the engagement, that is, its *raison d'être*; threaten or cause the sacrifice of a state's development or its vital requirements for political or economic existence to the execution of the treaty, that is, make performance impracticable except at an unreasonable sacrifice; are inconsistent with the right of self-preservation, or incompatible with the independence of the state; modify essentially the political relations which produced political treaties, as for example treaties of alliance; make a treaty really inapplicable, or actually impossible of fulfillment. ("The Unilateral Termination of Treaties," 20 *American Journal of International Law*, 1926, pp. 349-350.)

A third concept of the doctrine of *rebus sic stantibus* makes the test of whether or not a change in the state of facts causes termination of a treaty, the fact that fulfillment of the treaty after occurrence of a change in the state of facts would be so injurious to one of the parties that such party has a right under the law or right of necessity to terminate the treaty. See Bruno Schmidt, *Über die völkerrechtliche clausula rebus sic stantibus* (1907), pp. 25, 68-82; and Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Stantibus* (1911), pp. 41-44, 116-127.

It may be pointed out that writers on international law occasionally restrict the doctrine of *rebus sic stantibus* by the reservation that it is a rule applicable only to treaties of indefinite or perpetual duration. Article 28 of this Convention does not contain such a restriction, for the reason that there is no connection between the duration of a treaty and the sort of change envisaged by paragraph (a).

Whatever be the concept of the doctrine adopted by a writer on international law, there are serious differences among writers as to the procedure to be followed by a State when it considers that it has the right to invoke the doctrine. Most of the older writers did not deal with the question of pro-

cedure, but merely stated the rule. Some writers apparently hold that a change in the state of facts gives a right to a party to abrogate or denounce the treaty. Heffter, *Droit International de l'Europe* (Geffcken ed., 1883), sec. 98; Despagnet, *Cours de Droit International Public* (1910), sec. 455; 2 Wharton, *Digest of the International Law of the United States* (1887), p. 58; 1 Cobbett, *Leading Cases on International Law* (1922), p. 339; and Pomeroy, *Lectures on International Law in Time of Peace* (1886), sec. 290. Other writers, however, hold that when a party to a treaty believes that it has a right to cease performance of its obligations under a treaty because of a change in the state of facts, such party should not immediately announce its abrogation of the treaty but should inform the other party or parties to the treaty and request them to agree to the termination of the treaty. 1 Oppenheim, *International Law* (4th ed., 1928), pp. 747-751; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 383; G. Seelle, "La Ratification de la Convention du Gothard du 13 octobre 1909," 20 *Revue Générale de Droit International Public* (1913), p. 499; Paternostro, "La Revision des Traités avec le Japon au Point de Vue du Droit International," 23 *Revue de Droit International et de Législation Comparée* (1891), p. 189 ff; 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), pp. 462-464; Cavaglieri, "Regles Générales du Droit de la Paix," 26 *Recueil des Cours* (1929), pp. 536-539; Sir John Fischer Williams, "Treaty Revision and the Future of the League of Nations," 10 *Journal of the Royal Institute of International Affairs* (1931), p. 7; and Garner, "The Doctrine of *Rebus Sic Stantibus* and the Termination of Treaties," 21 *American Journal of International Law* (1927), pp. 515-516. If the other party or parties agree, there is no problem; the treaty has ceased to be binding. If, however, they refuse to agree, some writers on international law assert that the dissatisfied party may then unilaterally terminate the treaty, while others maintain that it must fulfill its obligations under the treaty. The preponderance of opinion among them is that one party to a treaty may not, under the rule of *rebus sic stantibus*, unilaterally declare its obligations thereunder to have ceased to be binding, whether or not a request has previously been made. See, for example, Fauchille, *loc. cit.*; Wigniolle, *La Société des Nations et la Revision des Traités* (1932), p. 60 ff; Anzilotti, *loc. cit.*; Cavaglieri, *loc. cit.*; Sir John Fischer Williams, *loc. cit.* Article 28 is based on this view.

JURISPRUDENCE

Comparatively few cases have arisen before national tribunals in which it has been necessary for them to define and apply the doctrine of *rebus sic stantibus* as a rule of international law.

The case of *Lucerne v. Aargau*, decided by the Swiss Federal Tribunal in 1882, involved the right of the Canton of Lucerne to terminate an agreement concluded with the Canton of Aargau in 1830 by which a public servitude was created over a portion of the territory of the former canton for the benefit of the latter canton. The court stated that treaties concerning the estab-

lishment or recognition of State servitudes cannot be denounced by a party thereto because of modifications in its constitution or legislation, but remain as permanent burdens limiting the territorial sovereignty of the servient State and may be unilaterally annulled only if "ihr Fortbestand mit den Lebensbedingungen des verpflichteten Staats als selbständigen Gemeinwescens oder dessen wesentlichen Zwecken unvereinbar sei, oder wo eine Veränderung solcher Umstände eingetreten ist, welche nach der erkennbaren Absicht der Parteien zur Zeit ihrer Begründung die stillschweigende Bedingung ihres Bestands bildeten." *Arrêts du Tribunal Fédéral Suisse* (1882), *Recueil Officiel*, t. 8, p. 57. As no such reason was found in the instant case, the right of Lucerne to denounce the agreement was denied. The doctrine of *rebus sic stantibus*, according to the Swiss Federal Tribunal, means that a party to a treaty may annul it only in case of a change of those circumstances which, according to the evident intention of the parties at the time of entering into it, formed the tacit requirement of its existence.

The case of *The Canton of Thurgau v. the Canton of St. Gallen*, decided by the same tribunal in 1928, involved the right of St. Gallen to terminate an agreement concluded with Thurgau in 1891, by which a public servitude was created over a portion of the territory of the former for the benefit of the latter. The court referred to the rule laid down in the earlier case of *Lucerne v. Aargau*, and raised the question whether the court might not have gone too far in that case, but it decided the case on the ground that the party interested in terminating the agreement must invoke a change of circumstances within a reasonable period of time after the occurrence of the change of circumstances. This limitation was based on the ground that the action of the servient canton in permitting a treaty relationship to continue for decades after the occurrence of the change showed that the intervening change of circumstances was not present to its mind at the time of the conclusion of the agreement, as the tacit condition of the agreement. Consequently, St. Gallen remained bound by the agreement of 1891. *Arrêts du Tribunal Fédéral Suisse* (1928), *Recueil Officiel*, t. 54, I, p. 188. This case leaves unchanged the doctrine of *rebus sic stantibus* as defined by the court in 1882, and is significant because of the auxiliary rule that a party which invokes the rule must do so within a reasonable time after the occurrence of a change in the state of facts in view of which the agreement was concluded.

The case of *Lepeschkin v. Gosweiler et Cie.*, decided by the same tribunal in 1923, involved the question whether the Hague Convention on Civil Procedure of July 17, 1905, still remained in force as between France and Russia, in view of certain changes that had occurred. The court held that neither France nor Russia had denounced the convention, and that until the political authorities had denounced it the courts were bound to apply it. The following dictum occurs in the course of the opinion:

The fact that, in the particular case, the change in the form of government of Russia has carried a profound alteration of all the internal juridical organization and of the relations of individuals among them-

selves and with the State, the fact that from all this there has resulted a situation contrasting fundamentally with the order prevailing in all the other European States, may have given to the other contracting States the right to withdraw eventually from the agreement, by virtue of the principle of public law known under the name of *clausula rebus sic stantibus*, by reason of the disappearance of the state of things in view of whose existence and continuation the Convention was concluded.

The basis of the doctrine of *rebus sic stantibus* is here, likewise, conceived to be the intention of the parties at the time they entered into the treaty. In this case the court made it clear that a State must invoke the doctrine if it wishes to assert a right under the clause *rebus sic stantibus*; the release does not occur by mere operation of law. The court said:

Although international law doctrine admits in principle the possibility of withdrawal from (*désistement*) a treaty by reason of an essential change in conditions—for instance the disappearance of a state of things whose continuance was the fundamental condition, either express or tacit, of the conclusion of the treaty—although the doctrine admits this possibility, with considerable deviations according to the circumstances, and although it is incontestable that the breaking off or inexecution of a treaty by another State authorizes such a withdrawal, it is certain that in neither case can there be a question of release from the obligations of the treaty *ipso jure*; but the State which wishes to make use of this right must make its will known to the other contracting party in the way recognized by international law. (71 *Journal des Tribunaux et Revue Judiciaire*, p. 582; text (abbreviated) in Hudson, *Cases on International Law*, p. 100.)

In the case of *Bremen v. Prussia*, decided by the German *Reichsgericht* on June 29, 1925, Bremen claimed a revision of a certain agreement made with Prussia in 1904. The agreement provided for the exchange between the parties of certain portions of territory and stipulated that a portion of the territory received by Bremen should be used exclusively for ports and other works serving navigation, and that Bremen should not erect therein any works to facilitate fishing or commerce in fish. Bremen asked for a modification of these restrictions in view of certain changes of circumstances. According to her argument, the principal object of the treaty was to permit her to develop her maritime commerce, but the relations forming the basis of the treaty had been changed in consequence of the Treaty of Versailles which had completely altered the situation by requiring delivery of German ships to the Allied Powers. Bremen now desired to engage in deep sea fishing which was hindered by the provisions of the treaty. She accordingly requested the court to abrogate, limit, or modify, with or without compensation to Prussia, such provisions of the agreement as stood in the way of the carrying on of deep sea fishing. Prussia admitted that treaties may be terminated because of "completely changed conditions." She denied, however, that a treaty could be abrogated or modified by one party without the consent of all parties, in the case of a treaty which "owed its existence to

a performance of obligations by both parties, and which therefore formed a unified whole." After considering the views of several writers on international law, the *Reichsgericht* concluded that "the possibility of treaty annulment on account of changed circumstances, the principle of the *clausula rebus sic stantibus*, is recognized in part in a broad sense in international law." The court refrained from indicating the basis of the rule, however, because in its opinion the claim of Bremen was inadmissible, in view of the content and object of the treaty between Bremen and Prussia. 112 *Entscheidungen des Reichsgerichts in Zivilsachen*, Anhang, pp. 21-32. As the restrictions upon Bremen formed an integral part of the treaty and as Prussia would not have agreed to it without these clauses, they could not be abrogated without her consent, even if Bremen were willing to pay compensation therefor. Particular clauses of a treaty could not be altered, it was added, when this would cause one party to remain subject to the obligations of a treaty while surrendering what this party intended to achieve as the principal object of the treaty.

In the case of *Rothschild and Sons v. Egyptian Government*, the doctrine of *rebus sic stantibus* was invoked for the avoidance of a contract. The Civil Tribunal of Cairo decided on June 15, 1925, that "Attendu que vainement le Gouvernement Egyptien prétend qu'en droit international la clause 'tant que les choses resteront en l'état' est toujours sous-entendue, car il est au contraire de principe que cette clause sous-entendue n'est présumé que pour les contrats ou engagements à durée illimitée et non pour ceux à durée précise, déterminée et limitée comme en l'espèce où la durée de son engagement a été fixée à 60 ans, pour des sommes irreductibles et jusqu'à extinction des emprunts." *Gazette des Tribunaux Mixtes*, août 1925; reprinted in 52 *Journal du Droit International* (1925), p. 1103. The Egyptian Government had refused on July 9, 1924, to pay sums due on the ground that with the termination on December 18, 1914, of the suzerainty of Turkey over Egypt, Egypt was freed from tribute to Turkey and that the sums due to Rothschild and Sons were a part of this tribute. The decision of the case by the Mixed Court of Appeal of Alexandria, on appeal, did not deal with the doctrine of *rebus sic stantibus*. *Journal des Tribunaux Mixtes*, No. 486 du 1^{er} mai 1926; reprinted in 53 *Journal du Droit International* (1926), pp. 754-766.

The case of *Hooper v. United States*, decided by the Court of claims of the United States in 1887, involved the question whether the United States had a right under international law to declare terminated in 1798 the treaties concluded with France in 1778. Mr. Justice Davis, deciding that the abrogation was justified, said *inter alia*:

Abrogation of a treaty may occur by change of circumstances, as: "When a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists. In most of the old treaties were inserted the *clausula rebus sic stantibus*, by which the treaty might be construed as abrogated when material circumstances on which it rested changed. To work this effect it is not necessary that the facts alleged

to have changed should be material conditions. It is enough if they were strong inducements to the party asking abrogation.

"The maxim '*Conventio omnis intelligitur rebus sic stantibus*', is held to apply to all cases in which the reason for a treaty has failed, or there has been such a change of circumstances as to make its performance impracticable except at an unreasonable sacrifice." Wharton's *Com. Am. Law*, §161. (22 Court of Claims, 1887, p. 408.)

The following conclusions may be drawn from the preceding cases. The courts of Switzerland, Germany, Egypt and the United States have recognized that there is such a thing as the doctrine of *rebus sic stantibus*. The doctrine has not been defined in some cases (*Bremen v. Prussia* and *Rothschild and Sons v. Egyptian Government*), but when defined it is always connected with the original intention of the parties to the treaty. Thus, in *Lucerne v. Aargau* is found the phrase "if a change of circumstances has come about when, in accordance with the recognized intentions of the parties, the continuance of these circumstances formed the tacit condition of the existence of the treaties"; in *Lepeschkin v. Gosweiler et Cie*, are found the phrases "by reason of the disappearance of the state of things in view of whose existence and continuation the convention was concluded", and "the disappearance of a state of things whose continuance was the fundamental condition, either express or tacit, of the conclusion of the treaty"; and in *Hooper, Admr. v. United States*, is found the phrase "when a state of things which was the basis of the treaty, and one of its tacit conditions, no longer exists." While a right of unilateral abrogation or annulment is mentioned in some of the decisions, it should be remembered that such a right was recognized only under the presumption that disputed cases should be submitted to a judicial authority for final decision. Furthermore, it is clear from the decisions that the change of conditions was not intended to have the effect of automatically terminating the obligations of the treaty. The party which claims that its treaty obligation is affected by a change of circumstances must invoke the change (*Lepeschkin v. Gosweiler et Cie*) and the claim must be made within a reasonable time after occurrence of the change (*Thurgau v. St. Gallen*). The definition of the doctrine of *rebus sic stantibus* adopted in Article 28 of this Convention is in harmony with the views of those national tribunals which have made decisions in cases in which the doctrine of *rebus sic stantibus* was invoked.

The only case in which the merits of the doctrine have been before the Permanent Court of International Justice for consideration was that between France and Switzerland regarding the Free Zones of Upper Savoy and Gex. In the first phase of the case reference was made on behalf of France to the clause *rebus sic stantibus* in an effort to show that the parties to the Treaty of Versailles had intended that paragraph 2 of Article 435 should terminate the Free Zones régime. France did not, however, at this stage of the dispute, invoke the doctrine as a separate ground for termination of the

obligations of the treaty. *Publications of the P.C.I.J.*, Series C, No. 17-I, Vol. 1, pp. 89, 284, Vol. 2, p. 621. No attempt was made to define the doctrine further than the statement that "there can not be treaties which shall enforce certain rules when the situations have so changed that the reason which caused the rules to be imposed no longer exists." In the second phase of the dispute, France requested the court to establish a régime "taking into account present circumstances," on the ground that she and Switzerland had conferred such jurisdiction upon the court in the special agreement by which the dispute had been submitted to the court, but it was expressly stated in the French case that "the examination of the effect of a change of circumstances according to international law is not involved in the present instance." Series C, No. 19-I, vol. 4, pp. 1640-1641. Finally, in the third phase of the dispute, it was claimed on behalf of France that because of certain changes of circumstances the treaties establishing the Sardinian zone had become void (*caduc*) in accordance with the rule *rebus sic stantibus* and that the court had the authority to recognize that the treaties were void because of the change of circumstances. Series C, No. 58, pp. 109-146, 405-415.

The doctrine is defined in the French case as follows:

Il importe seulement de rappeler qu'il est admis en droit international qu'un changement essentiel dans les circonstances de fait en vue desquelles un traité a été conclu entraîne la caducité de ce traité, lorsque est intervenu à cet effet un acte obligatoire pour les Parties, acte qui peut être soit l'accord des Parties, soit une décision d'un juge international compétent. (*Publications of the P.C.I.J.*, Series C, No. 58, pp. 109-110.)

It is defined later in a similar manner:

Je crois pouvoir me borner à constater que c'est une règle reconnue du droit international que les obligations internationales résultant d'un traité sont rendues caduques par le changement des circonstances, lorsque, du moins, ce changement a un caractère suffisamment important. . . . A cet égard, il suffit, je crois, de constater que la règle que j'annonçais tout à l'heure est reconnue. Il est donc permis de dire qu'il est admis en droit international qu'un changement essentiel dans les circonstances en vue desquelles un traité a été conclu entraîne la caducité des obligations découlant de ce traité, lorsqu'il est intervenu à cet effet—c'est-à-dire pour constater ce changement—un acte faisant droit pour les Parties. (*Ibid.*, pp. 405-406.)

A number of facts were referred to on behalf of France to support the contention that there had been a radical change of circumstances which caused the régime of the Free Zones to deviate completely from the object which had been assigned to them in 1815 and 1816, and which caused the existing state of facts to differ entirely from that which the parties to the treaty had willed in 1815 and 1816. *Publications of the P.C.I.J.*, Series C, No. 58, pp. 113-132. France claimed that when the treaties were made, the free zones were always contiguous to a zone of free exchange in Switzerland, so that

when they were closed to the national market of France they were open to the neighboring Swiss market. This situation was altered radically by the Swiss Federal Customs law of 1849 which had placed high tariffs on goods coming from the free zones. This law produced important changes in the respective situations of the populations interested in the matter, breaking the "equilibrium instituted in 1815-1816" between the zones and the neighboring Swiss territory to the detriment of the former. This was accentuated by other changes. The free zones were unable, because of the Swiss tariff policy, to make a profit from the employment of technical improvements which would permit manufacturing and use of electricity in the zones. The development of railways and the invention of the automobile made it possible for Geneva to find sources of food supply and a market for goods far beyond the territory of the free zones, so that they were less necessary to Geneva than in 1815. With the modern system of import duties and greatly reduced export duties there was no longer need for the zones which had been created partly in order to protect Geneva against French export duties. The conclusion was drawn that:

The equilibrium foreseen in 1815 has been upset; all the profits of the institution have gone to the Canton of Geneva, while all the charges have accumulated on the zones. Geneva becomes integrated in Swiss economy, while the zones rest isolated from the French market by the internal barrier; Geneva communicates freely with Switzerland and the zones, while the zones are enclosed between two customs barriers; Geneva is protected against foreign competition by the federal customs, while the zones are opened without defense to this competition. This is the opposite of the conception which prevailed at the time of the institution of the free zones. (*Ibid.*, p. 132.) (Trans.)

On behalf of Switzerland attention was called to the disagreement among writers on international law relative to the scope of the doctrine of *rebus sic stantibus* (*Publications of the P.C.I.J.*, Series C, No. 58, pp. 474-475); it was denied that either writers or the instances of State practice advanced by France proved a right to a declaration of caducity in case of a change of conditions (*ibid.*, pp. 479-483), and it was asserted that, whatever might be the definition of the doctrine and its standing in international law as regards conventional rights, the doctrine did not apply to treaties establishing *règlements territoriaux* (*ibid.*, pp. 463-464). Furthermore, Switzerland argued that the failure of France to invoke the changes of circumstances which occurred during the nineteenth century prevented France from later invoking them as a ground for terminating the treaties (*ibid.*, p. 487). Finally, Switzerland claimed that the conception of the doctrine of *rebus sic stantibus* as presented by France failed in fact to indicate "la cause d'extinction des traités qu'on appelle la *clausula rebus sic stantibus*" (*ibid.*, pp. 475-476). As to the clause "circonstances en vue desquelles le traité a été conclu" contained in the French definition, Switzerland concluded that this was not meant to refer to all those existing or future factual circumstances in

view of which the parties made the treaty, but only those circumstances which according to the common intention of the parties had some kind of relation to the juridical force of the treaty. That is, the phrase must refer to the circumstances on whose maintenance the parties have tacitly understood the juridical force of the treaty to depend (*ibid.*, p. 485). Applying this interpretation to the case, Switzerland denied that either the texts of the treaties or other evidence proved that the parties to the treaties of 1815–1816 had intended as resolutive conditions of the treaties the changes of circumstances advanced by France (*ibid.*, pp. 493–512).

In the Judgment of June 7, 1932, the Permanent Court of International Justice stated as follows what it understood to be the argument of France based on the doctrine of *rebus sic stantibus*:

The argument in favor of the view that the stipulations establishing the zones have lapsed is that these zones were created in view of and because of the existence of a particular state of facts, that this state of facts has now disappeared owing to Switzerland's own action, and that in consequence the Court, which is charged with the mission of settling the dispute between the Parties, is entitled as between them to declare that the stipulations have lapsed. The fact on which the Agent for the French Government has chiefly relied in support of his argument is that in 1815 the Canton of Geneva was to all intents and purposes a free trade area, that the withdrawal of the French and Sardinian customs lines at that time made the area of Geneva and that of the zones an economic unit, and that the institution of the Swiss Federal Customs régime in 1849 destroyed this economic unit and put an end to the conditions in view of which the zones had been created. (*Ibid.*, p. 156.)

The court found no proof in either the text of the treaties or elsewhere that the zones had been instituted in consideration of the absence of customs duties at Geneva in 1815. The Swiss representative had relied on the absence of customs at Geneva in 1815 in his effort to secure withdrawal of the French customs along the whole frontier from Basle to Geneva, but was unsuccessful. The court seems to have inferred that absence of customs could not have been the determining consideration in 1815, because the free zones were drawn more narrowly than they would have been in case absence of customs had been the determining consideration. Furthermore, since light import duties were levied on imports by Geneva in 1815, absence of customs could not have been a determining factor in the creation of the zones. The court was unwilling to assume that the parties to the treaty had meant in 1815 to allow the free zones under low customs duties, but not under high duties, as that would be too precarious a condition to constitute the basis of the European settlement in 1815. This conclusion was confirmed by additional facts. France had created a free zone, including the Sardinian zone, in 1860, and had maintained it for sixty years. Switzerland had agreed by conventions with France to admit goods from the zones free of duty for a fixed period, but the granting of such a privilege "was never treated as a

condition on which the provisions establishing the free zones must depend for the continuance of their validity." This action on the part of France was considered incomprehensible if France had thought that "the maintenance of the customs régime existing at that time in the Canton of Geneva was a condition precedent to the withdrawal of the French and Sardinian customs lines." While no customs post existed in the Saint-Gingolph zone between 1816 and 1850, there was "no sufficient proof that the Saint Gingolph zone was created in view of this circumstance." The court dismissed other changes referred to on behalf of France, as having no bearing upon the "whole body of circumstances" which the parties had in mind when the zones were created. This whole body of circumstances constituted "circumstances essentially governed by the geographical configuration of the Canton of Geneva and of the surrounding region." (*Ibid.*, pp. 157-158.)

The conclusion of the court was that:

As the French argument fails on the facts, it becomes unnecessary for the Court to consider any of the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the method by which effect can be given to the theory if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816. (*Ibid.*, p. 158.)

The following conclusions may be drawn from the case. The definition of the doctrine given on behalf of France, as refined by Switzerland, was the only definition of the doctrine which the Permanent Court of International Justice was called upon to consider. The court was willing to examine whether the treaties in question were in fact "created in view of and because of the existence of a particular state of facts," and whether this state of facts had disappeared. To this extent the Permanent Court of International Justice may be said to have recognized the doctrine of *rebus sic stantibus*. The court showed a willingness to examine not only the text of the treaties but other alleged evidence in reaching a decision upon the question. The court derived intention from the negotiations preceding the conclusion of the treaties and also from acts performed by France subsequent thereto. But as it did not find the argument on behalf of France sustained by the facts, it did not consider it necessary to examine the questions relative to the doctrine which were advanced in the arguments of France and Switzerland.

Lauterpacht correctly interprets the case when he says: "It is clear that the Court was prepared to recognize the principle (although it refused to say to what extent) that a change of conditions may have an effect on the continuation of treaty obligations. It would not otherwise have considered whether they have in fact changed in a material aspect. Moreover, the rule may legitimately be deduced from the reasoning of the Court that a

change of conditions, however important, will not affect the duration of a treaty if it does not refer to conditions which were present in the minds of the contracting parties and which determined the conclusion of the treaty." *The Development of International Law by the Permanent Court of International Justice* (1934), p. 43.

GENERAL PRINCIPLES OF LAW

Writers on international law have analyzed certain rules of the private law of contracts in force in different countries in order to show that the doctrine of *rebus sic stantibus* is widely accepted, although sometimes under a different name, as a general principle of law to which contract obligations are subject.

Brierly, McNair and Williams have, in this connection, referred to the English doctrine of frustration of contracts developed by the English courts during the past half-century. Mr. Justice Russell defined frustration of contracts as follows in the case of *In re Badische Company, Limited*, 2 Ch. (1921), p. 379:

If the supervening events or circumstances are such that it is impossible to hold that reasonable men could have contemplated that event or those circumstances and yet have entered into the bargain expressed in the document, a term should be implied dissolving the contract upon the happening of the event or circumstances.

Brierly, in commenting upon the case, says:

But in English law the contract is not dissolved by a change of circumstances as such, however vital, but only if an implied term can fairly be read into the contract itself to the effect that it is to be dissolved in the event that has happened. The English doctrine, therefore, attempts to fulfill the intention of the parties, not to defeat it. (*The Law of Nations*, 1928, p. 173.)

McNair states the idea of frustration of contracts similarly. He says:

Whenever the court is of the opinion that at the moment of the conclusion of the contract the parties have subordinated its duration to the continuance of a certain state of facts or to the happening of an expected event (or that they would have done so if their attention had been drawn to the point), there exists a tacit condition which puts an end to the contract in case of the discontinuance of this state of facts or the non-occurrence of the event. (*La Terminaison et Dissolution des Traités*, 22 *Recueil des Cours*, 1928, p. 475.)

In the case of *Hirji Mulji and others v. Cheong Yue S.S. Co. Ltd.*, A. C. (1926), 509, Lord Sumner, speaking for the Privy Council, emphasized the same point, saying:

Rescission (except by mutual consent or by a competent Court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right

to treat the contract as at an end, if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract. . . . It is irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

See, for further discussion of frustration of contracts, Sir John Fischer Williams, "Treaty Revision and the Future of the League of Nations," 10 *Journal of the Royal Institute of International Affairs* (1931), p. 7, and Lauterpacht, *The Function of Law in the International Community* (1933), p. 273.

Analogies have also been drawn between the doctrine of *rebus sic stantibus* and the principle of French law known as the theory of *imprévision*. This principle, which is recognized by the Council of State as applicable to contracts between private persons and the government, but which is not recognized by the Court of Cassation as applicable to private contracts between individuals, gives a right to modification of the terms of a contract in case of an unforeseen change of circumstances which severely burdens one party. The rule was recognized in the case of *Gaz de Bordeaux*, March 30, 1916, by the Council of State, which held that a party has the right to demand a revision of the terms of a contract of concession whenever the equilibrium between the profits which he earns and the cost of manufacture has been upset by an unforeseen change of conditions, such as an increase in the cost of coal or other commodities used in the manufacture of gas. (Sirey, *Recueil*, 1916, III, p. 17.) See also the decisions of the Council of State of June 27, 1919 (*ibid.*, 1920, p. 25) and of March 9, 1928 (45 *Revue du Droit Public et de la Science Politique, en France et à l'Etranger*, 1928, pp. 323-334). The theory of *imprévision* is analyzed in the following works: Berthélemy, *Traité Élémentaire de Droit Administratif* (12th ed., 1920), p. 717; M. Hauriou, *Précis de Droit Administratif et de Droit Public* (12th ed., 1933), p. 1019; Alibert, *L'Imprévision dans les Concessions des Services Publics* (1924); and Jacquemard, *La Théorie de l'Imprévision* (1928).

Bruzin explains the theory as follows:

A contract is made in view of an existing economic situation. It is applicable to this economic situation or to analagous economic situations with all the favorable or unfavorable hazards that they may comport; but when they pass the maximum of foreseeable events we are confronted by extra-contractual circumstances, because the contract was not made in view of these circumstances. The contractual lien may subsist but the contract is not enforceable under the new conditions. In so far as this situation endures, the execution of the

contract can be required only as regards the conditions that were foreseen. (*Essai sur la Notion d'Imprévision et sur son Rôle en Matière Contractuelle*, 1922, p. 219.) (Trans.)

The effect of the change in the state of facts is, not to terminate the obligation, as in the case of the doctrine of *rebus sic stantibus*, but to give a right to a revision of the contract by allowing the party affected adversely an indemnity. The theory of *imprévision* is not recognized by the French Court of Cassation. Decisions of March 10, 1919 (Sirey, *Recueil*, 1920, I, p. 104) and of June 6, 1921 (*ibid.*, 1921, I, p. 193). See 2 Planiol, *Traité Élémentaire du Droit Civil* (10th ed.), sec. 1168 *bis*. Nor do the Belgian courts recognize the theory. See Page, *La Belgique Judiciaire* (1924), p. 367.

The doctrine of *rebus sic stantibus* has been applied to contracts by the courts of several States. It was generally recognized in the German States composing the Holy Roman Empire until the close of the eighteenth century and since the World War it has been revived. See Pfaff, "*Die Clausel Rebus sic stantibus in der Doctrin und der österreichischen Gesetzbuch*," *Festschrift zum siebzigsten Geburtstage Dr. Joseph Ungers* (1898), pp. 221-354; and Staudinger, *Gesamtnachtrag zur 7/8. Auflage des Kommentars zum Bürgerlichen Gesetzbuch* (1922), pp. 89-94. The doctrine has also been recognized to some extent by the courts of Austria, Czechoslovakia, Germany, Yugoslavia and Switzerland. Although there is some variation in the definitions of the doctrine given by different writers, most writers and courts define it as a rule in accordance with which a contract ceases to bind the parties in case there is an essential change in the state of facts in view of which the contract was entered into, if the parties at the time of the conclusion of the contract intended that the existence of this state of facts without essential change should be a condition of its binding force. See Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus sic stantibus* (1911), pp. 70-79.

THE PRACTICE OF STATES

It seems desirable to consider first the instances of State practice in which States have invoked the doctrine expressly and by name, in order to ascertain the extent to which they hold the concept of the doctrine as defined in Article 28.

In 1914 Turkey declared to be terminated the Capitulations under which foreigners enjoyed certain rights in Turkish territory. Several arguments were advanced in support of the right of unilateral abrogation, but the doctrine of *rebus sic stantibus* was not expressly invoked. Austria-Hungary, France, Germany, Great Britain, Italy, the Netherlands, Russia and the United States denied that Turkey could terminate the Capitulations without their consent. 10 Martens, *Nouveau Recueil Général de Traités*, 3d ser., pp. 741-748; *United States Foreign Relations*, 1914, pp. 1092-1093; *ibid.*, 1915, pp. 1302-1306; and *ibid.*, 1916, p. 964. Article 261 of the

Treaty of Sèvres of August 10, 1920, provided for the reestablishment of the Capitulations, but this treaty did not come into force. At the Lausanne Conference on December 2, 1922, the Turkish delegate invoked the doctrine *rebus sic stantibus* as follows:

Treaties whose duration is not fixed imply the clause *rebus sic stantibus*, in virtue of which a change in the circumstances which have given rise to the conclusion of a treaty may bring about its cancellation by one of the contracting parties, if it is not possible to cancel it by mutual agreement. . . . Moreover, the circumstances and the conditions which had brought this régime into being have completely changed. It is unanimously asserted that the Capitulations are absolutely incompatible with the principles of modern public law. . . . The Capitulations have their origin in the principle of "personal law", whereas according to modern legal conception each State, in order to be considered as an independent State, must enjoy within the limits of its frontiers, a complete and full independence. Its laws and institutions must have a completely territorial character. Therefore the Capitulations in our day form, as Pélissier du Rosas rightfully observes, an anomaly and an anachronism. (Great Britain, *Parliamentary Papers*, 1923, *Cmd.* 1814, pp. 478-479.)

Turkey claimed that she had adopted principles of law in conformity with those of European States, and that her system of judicial administration equalled that of European States. It is clear, therefore, that the concept of the doctrine of *rebus sic stantibus* as conceived by the Government of Turkey was one based upon a tacit clause according to which a complete change in the state of facts which gave rise to the treaty is a ground justifying its termination. Turkey apparently admitted the necessity of seeking the assent of the other party to the treaty, but asserted the right to cancel it unilaterally if the other party refused its assent. The other States represented at the Lausanne Conference vigorously denied the last-mentioned contention. *Ibid.*, pp. 467-470.

France recently, during the dispute between herself and Great Britain relative to certain nationality decrees, invoked the doctrine of *rebus sic stantibus* in order to show that the Treaty of December 9, 1856, between Great Britain and Morocco had lapsed. M. de Lapradelle made the following statement on January 12, 1923, in the course of his oral argument on the French claim before the Permanent Court of International Justice.

Messieurs, si en effet c'est là une base pour la critique de nos décrets' on ne peut pas dire que ce soit une base solide, une base qui soit vraiment juridique; et pourquoi? Parce que le traité dont il s'agit est un traité perpétuel et que les traités perpétuels sont toujours soumis à l'extinction, en vertu de la clause *rebus sic stantibus*. Or, le type le plus manifest, le plus accentué du changement de circonstances, c'est la transformation d'un pays de Capitulations en un pays qui, par l'effet d'un régime nouveau—création d'un Etat de civilisation chrétienne ou protectorat—se trouve placé dans des conditions telles que désormais les privilèges d'extra-territorialité perdent toute raison d'être. Du

fait même de la reconnaissance du protectorat français par la Grande-Bretagne, tant en conséquence de son acceptation de l'accord du 4 novembre 1911 qu'en vertu de sa déclaration spéciale du mois de décembre 1914, le Traité anglo-marocain de 1856 se trouve donc frappé d'extinction. (*Publications of the P.C.I.J.*, Series C, No. 2, pp. 187-188.)

The concept of the doctrine is here based upon the assumption of the existence of a tacit clause in every treaty to the effect that it shall lapse when a manifest change in the state of facts causes it to lose its *raison d'être*. It is not clear whether the lapsing was meant to be the result of the intention of the parties at the time of entering into the treaty, or whether because it was objectively apparent that the original state of facts was the reason for entering into the treaty. Sir Ernest Pollock neither affirmed nor denied the statements made by M. de Lapradelle, although he expressed the opinion that the most forceful argument advanced "was that of *rebus exstantibus*, and he (M. de Lapradelle) suggested that conditions were so changed that the Treaty of 1856 must be brushed away as no longer of any importance or validity." He pointed out that, since Article 2 of the Declaration of April 8, 1904, contained the clause "provided that such action shall leave intact the rights which Great Britain, in virtue of Treaties, Conventions and usage, enjoys in Morocco . . .", it would be necessary to determine whether the whole treaty of 1856 "was then and is now brushed away as waste paper, or were there some *rebus exstantibus* in 1904 and no *rebus exstantibus* in 1922?" Series C, No. 2, pp. 208-209.

In its advisory opinion of February 7, 1923, the Permanent Court of International Justice merely stated that the French contention based on the doctrine of *rebus sic stantibus* involved recourse to the principles of international law concerning the validity of treaties—a fact which gave the court jurisdiction in the case—the only question involved. *Publications of the P.C.I.J.*, Series B, No. 4, p. 29. It was not therefore necessary to express an opinion on the merits of the French contention regarding the effect of a change of conditions upon the treaty.

China, in her endeavor to obtain a release from treaties with certain States enjoying rights of extraterritoriality thereunder, employed as one argument in favor of revision of the treaties, the changes alleged to have occurred since they were entered into. The argument based on changed conditions was a minor one, the chief arguments being those concerning the interpretation of articles contained in the treaties relative to revision and the claim of China to termination on the grounds of "equality". See Keeton, "The Revision Clause in Certain Chinese Treaties," 10 *British Year Book of International Law* (1929), pp. 111-136.

In requesting a revision of the treaty between Belgium and China, the Chinese Government stated on April 26, 1926 that:

The aforesaid Treaty, which still regulates the commercial relations between the two countries, was concluded as long as sixty years ago.

During the long period which has elapsed since its conclusion, so many momentous political, social and commercial changes have taken place in both countries, that, taking all circumstances into consideration, it is not only desirable, but also essential to the mutual interest of both Parties concerned, to have the said Treaty revised and replaced by a new one to be mutually agreed upon. As conditions and circumstances in human society are constantly changing, it is manifestly impossible to have any treaty which can indefinitely remain good for all time without modification. International agreements, particularly treaties of commerce and navigation, are, as a matter of international practice, always subject to more or less frequent revision, in accordance with the nature and circumstances of each case, even in the absence of any provision to that effect, so that necessary readjustments may be effected from time to time, to the best advantage of the contracting Parties. (*Publications of the P.C.I.J.*, Series C, No. 16-1, p. 52.)

On May 22, 1926, the Chinese Government informed Belgium that the treaty "automatically ceases to be applicable on October 27, 1926, and a new treaty should be negotiated." Negotiations for a *modus vivendi* having failed, China issued a declaration November 6, 1926, that the treaty had terminated. She asserted on November 16, 1926, that "This declaration is in conformity with the spirit of Article 19 of the Covenant of the League of Nations, which clearly recognizes the fundamental principle of *rebus sic stantibus* governing international treaties which have become inapplicable." It is clear that the Government of China refrained from defining the doctrine of *rebus sic stantibus*, although invoking it by name. The basis of the doctrine, as interpreted by the Chinese Government, in so far as it may be inferred, was that a change in the state of facts would have caused the treaty to become "inapplicable," but the precise sense of even this term is not made clear. It was not therefore apparently based on the intention of the parties.

The Government of Belgium, on the contrary, made quite clear its understanding of the doctrine of *rebus sic stantibus* in a *mémoire* filed on January 3, 1927 with the Permanent Court of International Justice. It stated:

Le Gouvernement belge ne méconnaît pas davantage l'existence du principe suivant lequel les Etats, parties à une convention internationale, ne peuvent se refuser à négocier sa revision lorsque viennent à se modifier les circonstances essentielles en vue desquelles le traité a été conclu. Le Gouvernement chinois est parfaitement fondé à déclarer que le Pacte de la Société des Nations a, dans une certaine mesure, confirmé le principe dans son article 19, en instaurant une procédure qui favorise la révision de traités devenus inapplicables. Mais il résulte de cette disposition que, pour aucun Membre de la Société des Nations, il ne peut être question de dénoncer unilatéralement un traité pour cause de circonstances nouvelles, sans avoir tout au moins tenté d'obtenir la révision du traité par la voie indiquée à l'article 19 du Pacte. Ceci suffit déjà à condamner la dénonciation chinoise. Si telle est la procédure ouverte à tous les Membres de la Société des Nations, c'est

à la Cour permanente de Justice internationale que doit être soumise, en dernier ressort, une contestation qui surgirait relativement à l'application du principe *rebus sic stantibus* entre deux Etats signataires tous deux de la clause facultative de compétence. Ne s'agit-il pas, en effet, suivant la théorie la plus généralement admise, d'une clause tacite contenue dans les conventions internationales conclues sans limitation de durée, et dont l'interprétation est dès lors éminemment de la compétence de la Cour? Il est donc loisible au Gouvernement chinois de tenter devant la Cour permanente de Justice internationale la démonstration que les circonstances qui ont inspirée les clauses du Traité de 1865 relatives à l'exterritorialité ont subi une transformation tellement radicale qu'une abrogation complète s'impose. Aucune dénonciation ne peut, en aucun cas, être permise contre le gré du Gouvernement belge tant que la Cour n'a pas reconnu le bien-fondé de l'application que l'on prétend faire de ce principe. . . . Le Gouvernement belge conclut de cet exposé que la dénonciation unilatérale du Traité sino-belge ne trouve de justification ni dans le Traité ni dans les principes généraux du droit, qu'elle est une pure voie de fait. (*Publications of the P.C.I.J.*, Series C, No. 16-I, pp. 22-23.)

The dispute was finally settled by the negotiation of a new treaty and the case was withdrawn from the Permanent Court of International Justice. Series E, No. 5, pp. 203-204.

The Government of China employed almost identical phrases when referring to changes of circumstances in a note of October 26, 1926, requesting revision of the treaty of July 21, 1896, between China and Japan. 11 *Chinese Social and Political Science Review* (1927), Public Documents, pp. 63-65. On July 19, 1928, it declared a termination of the treaty, to become effective July 20th. The Government of Japan replied on July 31 that China did not have a right under the treaty to terminate it unilaterally. Again, on April 27, 1929, it stated:

But not only is the so-called principle of altered circumstances incapable of being regarded as an established rule of law in international relations, but the admission of such a principle would render almost all treaties liable to repudiation at the pleasure of either of the Contracting Parties, thus shaking the very foundations of international law. Nor is there any precedent where such a principle has ever had actual application. That there exists a specific provision concerning the validity of the Treaty show, not that the possibility of circumstances being altered in the future was not taken into consideration, but that care was taken that no such alteration of circumstances should of itself render the Treaty null and void. (13 *ibid.*, 1929, Public Documents, pp. 59-61.)

Portugal denied that the treaty of December 1, 1887, between herself and China had lapsed on April 28, 1928, as claimed by China, and expressed the opinion that "the changes of political, economical, or commercial conditions, claimed to have occurred in both countries, are not of a nature to entitle China to dissolve the treaty by unilateral withdrawal." 12 *ibid.* (1928), pp. 74-75.

Persia gave notice of denunciation on May 10, 1927, of treaties with a number of foreign States under which these States enjoyed consular jurisdiction in Persia. A right of denunciation on one year's notice was provided in all of them except those with France and Spain. Wheeler-Bennett, *Documents on International Affairs, 1928* (1929), p. 200. "As regards the treaties binding Persia with France and Spain, the duration of which is not specified and which provide for the right of consular jurisdiction, the French Legation, charged also with the protection of Spanish interests in Persia, has been informed that, in the case of treaties of unlimited duration, the right must be recognized for the contracting parties to put an end to them at any moment." Persia, availing herself of this alleged right, gave notice that the treaties would terminate one year later. France and Spain criticized the Persian thesis of the right of denunciation, and Spain maintained that unilateral denunciation could not be justified except by a radical change which would render impossible the execution of the provisions of the treaty, and that a Member of the League of Nations should first invoke Article 19 of the Covenant of the League of Nations. Matine-Daftary, *La Suppression des Capitulations en Perse* (1930), pp. 223-224. That the Persian argument was based fundamentally upon the doctrine of *rebus sic stantibus* would seem to be shown by a report prepared by the Persian Minister of Foreign Affairs for deposit with the *Aeadémie Diplomatique Internationale* in 1929. "*Rapport sur le Statut international de la Perse*," *Aeadémie Diplomatique Internationale, Séances et Travaux* (Séance du 5 Octobre 1929), pp. 48-49. In this report it was contended that "it is a principle universally admitted, conforming to the nature of things, and besides consecrated in international acts, that there cannot be perpetual engagements, binding forever the future generations by limited formulas, and that a perpetual treaty . . . is not valid except with the tacit condition: *rebus sic stantibus*." After indicating the difficulties of application of the doctrine in case the parties do not agree as to whether and when "the change of circumstances permits it (the treaty) to be considered as dissolved," the report concluded that when a so-called perpetual treaty truly conflicts with conditions of new existence with which it is in absolute contradiction, it falls of itself under the pressure of events. This conception of the doctrine of *rebus sic stantibus* is based on a theory of a tacit clause contained in every perpetual treaty, but it is obviously not based upon the idea that a change in the state of facts is of importance only in so far as the treaty was entered into with reference to this state of facts whose continuance unchanged was a determining factor moving the parties to undertake the obligations stipulated. It is based rather upon an idea that in the nature of things a treaty is overridden by historical facts when it conflicts "with conditions of new existence."

The Government of the Union of Soviet Socialist Republics communicated to the Director of the International Intermediary Institute in 1924 a state-

ment of its attitude towards treaties concluded by the Imperial Russian Government. 11 *Bulletin de l'Institut Intermédiaire International* (1925), pp. 154-155. In this communication it was pointed out that the Government of the Soviet Union had informed the British Government on February 2, 1924, that it was prepared "to arrive at an agreement 'on the question of replacing the treaties which have lost their force as a consequence of the events of the war and of after the war,'" and the communication then stated:

It appears from the note of February 8, 1924, that no category of the treaties is put in a position different from the others, except those mentioned in the Decree of October 28, 1917. A general abrogation of all the treaties concluded by Russia under the former régime and under the Provisional Government never took place. However, it hardly follows that all these treaties are susceptible of being reconfirmed. It will be in place to examine this question from the point of view of the clause "*rebus sic stantibus*" for each State and each treaty separately. (Trans.)

The following conclusions seem deducible from the above incidents in which States have invoked the doctrine of *rebus sic stantibus* expressly and by name. Usually the State which invoked it refrained from defining it, so that it is difficult to determine exactly what the State understood as the proper limits of the doctrine or why changes affect the binding obligations of the treaty. This is true of the invocation of the doctrine by China, Persia and Soviet Russia. In those cases in which a State has endeavored to define the doctrine, it is frequently regarded as a tacit clause *rebus sic stantibus*, as in the definitions by Turkey, France, Belgium, Persia, and Soviet Russia. In describing the clause France referred to the changed conditions as causing extraterritorial privileges to lose all their *raison d'être*; Belgium conceived that the clause means "... when the essential circumstances in view of which the treaty was concluded, have been modified," and Turkey conceived it as one "by virtue of which a change in the circumstances which have given rise to the conclusion of a treaty may bring about its cancellation."

There are numerous instances in which States have referred to changed conditions as a ground for termination of their treaty obligations, but in which the doctrine of *rebus sic stantibus* was not expressly mentioned. These instances have been analyzed by writers on international law in order to determine whether or not the rule of *rebus sic stantibus* has been assented to by States. It is obviously of great importance to examine each of these instances for the purpose of obtaining a clear definition of the doctrine.

In 1881 Mr. Blaine, Secretary of State of the United States, requested of Great Britain a revision of the Clayton-Bulwer Treaty of April 19, 1850. "This convention," he said, "was made more than thirty years ago, under exceptional and extraordinary conditions which have long since ceased to exist—conditions which at best were temporary in their nature, and which

can never be reproduced." One motive which induced the United States to enter into the treaty was the expected aid of British capital in the construction of the Isthmian Canal, but this capital was no longer needed because of the "changed condition of this country since 1850." *United States Foreign Relations*, 1881, p. 554. Lord Granville replied that "the principles upon which the whole argument of the despatch is founded are . . . novel in international law," and that development on the Pacific Coast has been foreseen when the treaty was concluded, so that it could not be regarded as an unexpected event. Reference to the intention of the parties was made by Great Britain, on behalf of which it was said: "It is . . . an inadmissible contention that the regular and successful operation of causes so evident at the time, and in their nature so irrepressible, should be held to have completely altered the condition of affairs to the extent of vitiating the foundations of an agreement which cannot be supposed to have been concluded without careful thought and deliberation." *United States Foreign Relations*, 1882, pp. 302-304. In 1882, Mr. Frelinghuysen, Secretary of State, asserted that the treaty was voidable because the treaty related to a particular ship canal to be constructed by a particular company, under a particular treaty concession made in 1849; that the treaty and the concession and the company had all passed away without the building of any canal; and that, consequently, those seven articles were obsolete and without any subject-matter upon which to operate. Great Britain denied that this was a proper interpretation of the provisions of the treaty. *Ibid.*, p. 271 ff.

Article 59 of the Treaty of Berlin of July 13, 1877, provided that "His Majesty the Emperor of Russia declares that his intention is to erect Batum as a free port, essentially commercial." On June 23, 1886, an imperial ukase announced that Batum no longer constituted a free port, and termination of the free port status was justified by alleging that Article 59 did not constitute an agreement of the parties to the Treaty of Berlin but merely registered "a free and spontaneous declaration of His Majesty the Emperor Alexander II. . . ." There was also an extended reference to a complete change of circumstances. On one hand, the maintenance of a tariff cordon imposed heavy charges upon the Russian State and resulted only in neutralizing the commercial advantages which Batum and the transeucasian region might draw from their geographical position. On the other hand, there were no longer in question the advantages of the co-signatories of the Treaty of Berlin, provided by Article 59, because Batum had lost all its value as a depository for the products formerly exchanged by this route between the European States and Persia with the suppression of the transit of the Caucasus. (14 Martens, *Nouveau Recueil Général des Traités*, 2d ser., I, p. 169.) Great Britain protested against this act, claiming that Article 59 was a binding obligation, charging that Russia had violated the Declaration of London of 1871 by terminating the obligation unilaterally, and asserting that she "can not recognize any amount of commercial inconvenience as furnishing a jus-

tification . . . that this portion of the treaty is to be regarded as no longer valid." 48 *Das Staatsarchiv, Sammlung der officiellen Aktenstücke zur Geschichte der Gegenwart*, p. 44. Germany had consented in advance, for political reasons, to assent to termination of the free-port status of Batum. 5 *Die Grosse Politik der Europäischen Kabinette*, Nos. 973-974. Other parties of the treaty did not protest. While it is clear that other States parties to the treaty acquiesced in the termination of the obligation assumed by Russia under Article 59, it is not clear whether acquiescence was given for political reasons, or was given because of assent to the contention of Russia that Article 59 did not constitute an obligation binding upon her, or because of acknowledgment that the change of conditions justified a termination of the obligation. The inference from the Russian statement of the change of conditions is that a treaty obligation ceases to be binding in case the *raison d'être* of the obligation disappears.

Some writers on international law have considered as a case in which the doctrine of *rebus sic stantibus* was invoked, the position taken by Austria-Hungary in 1908 when she withdrew her troops from the Sanjak of Novibazar and declared the annexation of Bosnia-Herzegovina, a territory belonging to Turkey. The circular issued by Austria-Hungary, under date of October 3, 1908, alleged that between 1878 and 1908 "the situation had undergone a radical change; Turkey was then weak in consequence of a bloody war and was powerless to maintain order and tranquility in the Sanjak; during the thirty years that had elapsed she had recovered her strength and was able to maintain peace and order therein; there was therefore no longer any *raison d'être* for the maintenance by Austria-Hungary of military forces in the Sanjak." 109 *Archives Diplomatiques* (1909), pp. 279-280. This portion of the circular was, however, merely an introduction to the announcement that Austria-Hungary believed that changes in Bosnia-Herzegovina created an imperious necessity for Austria-Hungary to annex that territory, and in fact she had previously agreed to withdraw her troops from the Sanjak in order to gain the consent of Russia to her annexation of Bosnia-Herzegovina. 26 *Die Grosse Politik der Europäischen Kabinette*, I, n. 9055. Writers on international law differ widely in their conclusions as to whether this incident afforded proof of or against recognition of the doctrine of *rebus sic stantibus*. See Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Stantibus* (1911), p. 31ff; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 386; Pouritch, *De la Clause "Rebus sic stantibus" en Droit International Public* (1918), sec. 12; 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 460; Werth-Regendanz, *Die Clausula Rebus Sic Stantibus in Völkerrecht* (1931), pp. 41, 61; Cavaglieri, "Règles Générales du Droit de la Paix," 26 *Recueil des Cours* (1929), p. 537.

The Government of Great Britain notified a number of States in 1921 of its intention to terminate its bipartite treaties with them which provided for suppression of the slave trade in certain parts of the world, "in accord-

ance with the general policy of His Majesty's Government to abolish obsolete treaty instruments." It may be that there is here, in the term "obsolete," the idea that an obligation ceases to be binding because the parties entered into the treaty with reference to the existence of the practice of traffic in slaves and that the parties envisaged the continued existence of the traffic as an essential factor moving them to undertake the obligations stipulated, and that since the traffic no longer existed, there was no longer an obligation under the treaties. It may, on the contrary, be merely an elliptical mode of stating that a treaty ceases to bind the parties when the object of the treaty has been completely fulfilled. In any case, Great Britain does not appear to have asserted a right to terminate the treaties unilaterally, but took as the date of termination the dates on which each of the respective States notified Great Britain that they regarded the treaties as inoperative. 116 *British and Foreign State Papers*, pp. 61, 91, 118-119, 196. The treaty between Great Britain and the United States provided for termination by denunciation upon notice of one year, and the United States adopted the date of the notification of Great Britain as the beginning of this period. *Ibid.*, p. 160.

The Government of Norway announced on August 22, 1922, that it felt obliged to denounce the treaty of November 2, 1907, between Norway on the one hand and France, Germany, Great Britain and Russia on the other. Two arguments were advanced to justify denunciation: first, because the treaty conflicted with obligations of Norway under the Covenant of the League of Nations; and second, because "the events of recent years had produced in the domain of foreign politics, changes of such a nature that the international situation was at present quite other than at the moment when the treaty was concluded," and because of these changes "the treaty has in reality lost its principal foundation." 6 *Revue Générale de Droit International Public*, 2d Ser. (1924), pp. 299-301. Great Britain gave her consent on August 22, 1922. 116 *British and Foreign State Papers* (1922), pp. 230-231. France, Germany and Great Britain agreed with Norway by exchanges of notes dated January 8, 1924, "not to avail themselves of the provisions of the Treaty" as from that date. 23 *League of Nations Treaty Series*, No. 576. Russia ignored the argument of changed conditions, except to say that the Treaty of Versailles did not affect the position of Russia in relation to the integrity of Norway. 11 *Bulletin de l'Institut Intermédiaire International* (1925), p. 171, n. 6. On January 8, 1924, Norway gave notice of her denunciation of the treaty, in accordance with the provisions of Article 3, to take effect February 6, 1928.

Russia in 1870 and 1871 invoked among her arguments in favor of termination of certain treaty obligations contained in the Treaty of Paris of 1856, certain changes which were alleged to have occurred since the conclusion of the treaty. She referred to certain "transactions" which had occurred, two of these being alleged violations of the treaty, and the third being the

"introduction of ironclad vessels, unknown and unforeseen at the conclusion of the Treaty of 1856," which were believed to increase "the danger for Russia in the event of war, by adding considerably to the already patent inequality of the respective naval forces." Circular of Prince Gortchakoff of October 31, 1870, 18 *Nouveau Recueil Général de Traités*, pp. 269-273. Several of the other parties to the treaty protested against the unilateral termination of its provisions by Russia and a conference was assembled at London in 1871 to consider revision. The parties made on January 17, 1871, a declaration that they "reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut pas se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale." 18 Martens *Nouveau Recueil Général de Traités*, pp. 273-302. At the conference Russia referred to changes in the "equilibrium of situations and of forces in Europe" during the preceding fifteen years, and stressed "combien la situation actuelle en Europe est loin de celle qui existait à l'époque du Congrès de Paris." The change chiefly stressed was that in 1856 Russia was at war with France, Great Britain, Sardinia and Turkey, whereas at present she maintained relations of peace and good understanding with those States. 61 *British and Foreign State Papers*, pp. 1195-1202. The argument of Russia was not based clearly upon any distinguishable concept of the doctrine of *rebus sic stantibus*, because she did not attempt to show why the specific changes mentioned should have produced an effect upon the binding force of the provisions of the treaty which provided for neutralization of the Black Sea.

The following conclusions may be drawn from the cases of State practice wherein a State has invoked certain changes of circumstances as a ground for termination, though not mentioning the doctrine of *rebus sic stantibus* by name. The basis of the argument that the change in the state of facts existing at the time of the conclusion of the treaty causes termination of the obligations is in several cases connected with the interpretation of the intention of the parties, as in the case of Austria-Hungary in 1869, in the case of the United States, speaking through Secretaries Blaine and Frelinghuysen, in 1881 and 1882, in the case of Russia in 1886 in the matter of Batum, and in the first part of the argument of Austria-Hungary in 1908 relative to the Sanjak of Novibazar.

In some of these instances the right of termination was asserted because fulfillment of the treaty after the change in the state of facts was alleged to have been more burdensome than under the state of facts existing when the treaty was entered into. This idea was expressed by Russia in the Batum incident, in claiming that the free-port status neutralized commercial advantages which might otherwise have been obtained, and in the Black Sea incident, in claiming that iron-clad vessels increased the danger of Russia in time of war by increasing the inequality of naval forces between Russia and other States.

In some of them the right of termination was claimed because a change in the state of facts was alleged to have taken away the *raison d'être* of the treaty, or its principal foundation, or caused the treaty to be obsolete, in the sense of putting an end to a state of facts on which operation of the treaty necessarily depended. Such ideas were expressed by the United States, speaking through Secretaries Blaine and Ferlinghuysen, by Russia in the case of Batum, by Austria-Hungary in the case of the Sanjak of Novibazar, by Great Britain in regarding certain conventions on slavery as "obsolete," and by Norway in referring to a treaty as having lost its "principal foundation." The idea that the *raison d'être* of a treaty had disappeared seems to be implicit in the argument of Russia that a change from a relation of war to one of peace and good understanding eliminated the reason for neutralization of the Black Sea.

APPLICATION OF THE DOCTRINE OF "REBUS SIC STANTIBUS"

Controversy among writers on international law regarding the doctrine of *rebus sic stantibus* arises primarily on the question of how the rule is to be applied in concrete cases. In practice, likewise, the chief point of contention between the parties to a treaty when one party has claimed that the obligations of the treaty should be terminated because of a change in the state of facts, has been whether the party making the claim should be the final judge, or whether the party opposing the claim should be the final judge, or whether an international authority should be the judge.

The principle is well established that one party to a treaty does not have the right to terminate its treaty obligations unilaterally merely upon the ground that it believes that the doctrine of *rebus sic stantibus* is applicable to the treaty. This principle is clearly stated in the Declaration of London of 1871 (*supra*). Austria reaffirmed the principle in connection with the Black Sea incident and when Turkey abrogated the Capitulations in 1914, on the one hand, but implicitly denied it in the case of the annexation of Bosnia-Herzegovina and in the case of the Concordat with the Holy See, on the other hand. Belgium expressly affirmed the principle in the case of the denunciation by China of the treaty relative to extraterritoriality. In the only instance which involved her, China asserted the right to terminate treaties of extraterritoriality unilaterally, but primarily on the ground of "inequality" rather than on the ground of changed conditions. France affirmed the principle in connection with the Black Sea incident, at the time of the annexation of Bosnia-Herzegovina, and in 1914 and in 1922 when Turkey sought release from the Capitulations. When invoking the doctrine of *rebus sic stantibus* herself in the Free Zones controversy, France expressly repudiated the idea of unilateral termination. Germany has never asserted the right to terminate a treaty on the ground of changed conditions, and in most of the instances in which she failed to condemn unilateral termination of treaties it was because she desired for political reasons not to deal with the

questions on the basis of international law. Great Britain has never asserted the right to terminate a treaty unilaterally and has denied it whenever it has been asserted, as in the Black Sea incident, the Batum incident, the annexation of Bosnia-Herzegovina, the case of the Clayton-Bulwer Treaty, the termination of the Turkish Capitulations, and the termination of extraterritoriality in China. Italy has never asserted such a right and she denied it in the Black Sea incident, the annexation of Bosnia-Herzegovina, the termination of Turkish Capitulations, and the termination of extraterritoriality in China. Persia has asserted the right to terminate a perpetual treaty unilaterally at any time. Russia affirmed the right to terminate a treaty provision unilaterally in the Black Sea incident, but later joined in the Declaration of London, and denied a right to terminate treaty obligations unilaterally in the case of the annexation of Bosnia-Herzegovina and termination of Capitulations in Persia and of extraterritoriality in China. The United States has denied the right in the case of the Turkish Capitulations and of extraterritoriality in China. While the United States asserted the right in the case of the Clayton-Bulwer Treaty, she did not attempt to exercise the alleged right.

In many cases, when one party seeks termination of a treaty obligation basing its claim on a change of conditions, the other party or parties will acquiesce in termination of the obligations. It is not always clear whether the other parties acquiesced because they agreed with the claim based on a change of conditions, or because they agreed with some other claim made by the State demanding termination of the obligations, or because they were willing to acquiesce in termination for some other reason quite independent of the legal arguments involved in the question. The Swiss agent expressed the following opinions on the matter in the Free Zones controversy:

First, however, it is clear that to direct the party who invokes the *clausula* to reach an understanding with the other, is not to answer the question which in law is raised regarding the merits. It is quite evident that if the two interested States come to an agreement all is well. If they come to an agreement, everything is settled . . . whether or not there is a doctrine or principle called the *clausula rebus sic stantibus*. The parties may always come to an agreement on the abolition of a convention, and if they come to an agreement, the convention is extinguished by the very fact and the sole fact of this agreement; the question of the *mutatio rerum* in itself no longer exists. (*Publications of the P.C.I.J.*, Series C, No. 58, p. 476.)

Under paragraph (a) of Article 33 of this convention, "a treaty may be terminated by agreement of the parties."

It is in the case in which one party claims and the other party denies that the doctrine of *rebus sic stantibus* is applicable and in which the other party is unwilling to terminate the treaty by agreement that the difficulty of application of the doctrine becomes acute. To permit unilateral termination either immediately, or after requesting the other party to agree that the

doctrine is applicable, puts the final decision into the hands of the party making the claim. International practice, as has been shown, denies this solution. However, to require a party to await the consent of the other party when the first party is convinced of the applicability of the doctrine of *rebus sic stantibus*, may be to deny in fact the realization of the right in case the second party refuses to admit the applicability of the doctrine. The solution is to require both parties to submit to a competent international authority the decision of the issue. This is the rule laid down in Article 28.

ARTICLE 29. ERROR

(a) A treaty entered into upon an assumption as to the existence of a state of facts, the assumed existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority not to be binding on the parties, when it is discovered that the state of facts did not exist at the time the treaty was entered into.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

COMMENT

Nearly all writers on international law who have discussed the essential conditions of a valid treaty lay down the proposition that a treaty entered into with reference to an assumed state of facts which is subsequently found to have no existence, is either void or voidable at the will of a party, because in such a case the treaty does not express the real will of the parties. As the French phrase runs: "l'erreur est considérée comme un vice du consentement." See, among others, 1 G. F. de Martens, *Précis du Droit des Gens* (2d ed., Vergé, 1864), sec. 51; 1 F. de Martens, *Traité de Droit International* (Léo trans., 1883), sec. 108; Heffter, *Le Droit International* (ed. by Geffcken, 1883), sec. 85; 2 Rivier, *Droit des Gens* (1896), sec. 140; Despagnet, *Cours de Droit International Public* (1905), p. 540; 1 de Louter, *Droit International Public Positif* (1920), p. 477; Hall, *International Law* (8th ed.), p. 382; Nippold, *Der völkerrechtliche Vertrag* (1894), p. 176; 1 Oppenheim, *International Law* (4th ed., 1928), sec. 500; Weinschel, *Willensmängel bei völkerrechtlichen Verträgen*, 15 *Zeitschrift für Völkerrecht* (1929-30), p. 446 ff; 2 Carnazza-Amari, *Traité de Droit International Public* (1882), p. 444; Strupp, *Eléments du Droit International Public* (1927), p. 176; Verdross, "Droit International de la Paix," 30 *Recueil des Cours* (1929), p. 428; Bernard, *Lectures on Diplomacy* (1868), p. 173; and Tomšič, *La Reconstruction du Droit International en Matière des Traités* (1931), p. 48 ff, where other authors are cited. Pradier-Fodéré (2

Traité de Droit International, 1885, sec. 1076), while agreeing with other writers that error is ground for the annulment of a treaty, thinks the matter is of no practical importance since the possibility of error in the conclusion of treaties today is too remote to justify the space which writers have given to it. See, in the same sense, Cavaglieri "*Règles Générales du Droit de la Paix*," 26 *Recueil des Cours* (1929), p. 510, and Despagnet, *Cours de Droit International Public* (1905), p. 540.

But instances of treaties entered into with reference to assumed facts which turned out to have no existence have not been lacking in the past and they are certainly not impossible in the future. This being so it would seem that there is place for a rule in this Convention dealing with the subject, even though the occasions for applying it in the future may be rare. Most of the errors that have occurred in the past in the negotiation of treaties have resulted from the use of incorrect or incomplete maps upon which the negotiators relied. With the more extensive geographical and topographical knowledge of today, errors of this kind are likely to be rare in the future but they are conceivable because there are still certain areas of the world concerning the geography and topography of which our knowledge is far from complete. Moreover, errors other than those relating to facts of geography are possible in the negotiation of treaties, such, for example, as those resulting from the use of incorrect documents, erroneous translations, wrong assumptions as to the existence of economic conditions, etc.

A case of treaties based on geographical error was afforded by the treaty of August 5, 1772, between Russia and Austria for the first partition of Poland, and the treaty of cession of September 18, 1773, between Poland and Austria, both of which provided that the new frontier of Poland should follow a petty stream called the Podhorze river which was later found to have no existence. Tomšić, *op. cit.*, p. 60, n. 1. Another instance was furnished by Article 2 of the treaty of September 3, 1783, between Great Britain and the United States, which referred to the "Northwest Angle of Nova Scotia" as being formed by a line "drawn due north from the source of the St. Croix River to the highlands . . . which divide those rivers that empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean." On Mitchell's map which was used by the negotiators no such range of highlands was shown but the negotiators apparently assumed, incorrectly, that it existed and the treaty provision was based on that assumption. 1 Moore, *History and Digest of International Arbitrations* (1898), p. 65 ff. The dispute was finally settled by the conclusion of a treaty signed on August 9, 1842. 1 Malloy, *Treaties, etc.*, p. 650. A dispute also arose under the same article of the same treaty as to the identity of the St. Croix River. While Mitchell's map correctly represented the existence of a river which the negotiators called the St. Croix, it did not designate its true course or position nor was there any river in the region commonly known by that name. 2 Miller, *Treaties and Other International Acts of the United States of America* (1931) pp. 96 and 97. The

dispute was settled by arbitration in 1798. 1-2 Moore, *International Adjudications* (1929-1930). Text of the award, 2 *ibid.*, p. 373. Reference may also be made to Article 3 of the treaty of February 22, 1819, between the United States and Spain, which described the boundary line between the two countries west of the Mississippi River as following in part the Rio Roxo westward to the 100th degree of longitude as laid down in Melish's map published at Philadelphia in 1818. In fact, however, this map located the 100th meridian far east of the place where the true meridian was *United States v. Texas*, 162 U. S. 37-42. What appear to have been other cases of geographical errors are referred to by Hyde in an article entitled "Maps as Evidence in International Boundary Disputes," 27 *American Journal of International Law* (1933), p. 311.

A recent case of error not involving a fact of geography was that which arose out of an incorrect translation of a word in the convention of October 12, 1929, signed at Warsaw, *Pour l'Unification de Certaines Règles Relatives au Transport Aérien International*, Article 15, sec. 1 of which read: "Les articles 12, 13 et 14 ne portent aucun préjudice ni aux rapports de l'expéditeur et du destinataire entre eux, ni aux rapports des tiers dont les droits proviennent, soit du transporteur, soit du destinataire." In the course of the seventh session of the *Comité International Technique d'Experts Juridiques Aériens* at Stockholm in July, 1932, the Secretary-General called attention to an error of translation in the above section, in that the word "transporteur" in the last line should have been "expéditeur". The error was manifest and was admitted on all sides to be a material one. The attention of the Government of Poland having been called to the error by a note of the British Minister of Foreign Affairs, the Polish Government informed the Government of France thereof and suggested that the error be corrected. The Secretary-General of the *Comité d'Experts* proposed that the governments which had adhered to the convention notify the Government of Poland that they would accept the correction, which would then be entered on the original instrument on deposit in the Polish archives. The Government of Czechoslovakia, on the other hand, proposed that the correction be made by means of a protocol to be signed at the Third Conference on Private Air Law. The procedure suggested by the Secretary-General was followed by the Polish Government. The question of procedure was again discussed at the Third Conference on Private Air Law at Rome in May, 1933. A summary of the discussion at Stockholm and the text of the minutes of the discussion at Rome are printed in 2 *Revue Générale de Droit Aérien* (1933), pp. 815-821. It may be remarked that the correction had already been made in the text registered with the Secretariat of the League of Nations on February 13, 1933 (137 *League of Nations Treaty Series*, p. 11). The corrected text is also published in the *British Treaty Series*, No. 11 (1933), *Cmd.* 4284, but the uncorrected text was published in the French *Journal Officiel* of December 27, 1932. Errors of this kind involving as they do merely incorrect translations of

words in the draft of a treaty, although they may be serious and involve important juridical consequences, are easily corrected, but errors of geography or topography in the provisions of boundary treaties are usually more difficult to correct even though only two parties may be involved.

As to what constitutes error in the sense of a *vice du consentement* in the making of treaties, writers on international law are not entirely in agreement. Some distinguish between the effect of essential and unessential error and hold that, if the error is not a material one involving important juridical consequences so that had the facts been known to the negotiators or ratifying authorities their action would probably have been no different, or if as a consequence of the error no substantial inequality of rights or obligations results, there is no reason for regarding the treaty as null and void or voidable. But some authors (*e.g.*, Rivier, 2 *Droit des Gens*, 1896, p. 55), think there is no place for such a distinction, although it is admissible in private law. When it is a question of treaties, says Rivier, any error must be regarded as essential and every treaty *entaché* by error is null. But this opinion is not shared by the majority of writers. Some, *e.g.*, Heffter, Fiore, Phillimore, Anzilotti, and Weinschel, maintain that an error in order to render a treaty invalid must not only be an essential one but must have been excusable, that is, one which was the result of absolute ignorance or misunderstanding of circumstances or facts which could not have been known to those who negotiated or ratified the treaty. Error resulting from misunderstanding by negotiators of their instructions would not, therefore, have any effect on the validity of the treaty. On the other hand, if the treaty was based upon material error and created obligations for a party which it clearly would not have assumed if the real facts had been known to it before ratification, such party is not bound by the treaty. Thus, if a treaty for the cession or exchange of territory, for the navigation of a river or for the grant of a concession, was concluded as a result of geographical error, the effect of which would leave the entire or preponderating portion of the burden of performance upon one of the parties, when the intention was to establish a reciprocity of advantages or equality of obligations, the error may be regarded as a ground of nullity. The same would be true of treaties generally, granting favors or concessions in return for equivalent or like concessions, when as a result of error it turned out in practice that only one of the parties was a beneficiary.

Writers on international law are in general agreement that errors of law do not have the same juridical effect as is produced by errors of fact, and that international law does not recognize that States may take advantage of their ignorance of the law to free themselves from treaty obligations resulting from such ignorance. Tomšič, *La Reconstruction du Droit International en Matière des Traités* (1931), p. 97, and 2 Pradier-Fodéré, *Traité de Droit International* (1885), p. 743. This appears to be the rule of municipal law in regard to private contracts. Williston, *On Contracts* (1903-04), secs. 1548 and 1582, and the American decisions there cited.

In the case of boundary treaties, geographical errors should not be regarded as a cause of invalidity if the parties at the time of the conclusion of the treaty are in agreement as to the fundamental rules according to which the boundary is to be traced, and disputes arise after the treaty has been concluded, merely because those charged with tracing boundary lines interpret and apply those rules differently. Lapradelle, *La Frontière* (1928), p. 129 ff. See the arbitral award in the dispute between Great Britain and Portugal under the treaty of June 11, 1891, relative to the delimitation of their zones of influence in Eastern and Central Africa. La Fontaine, *Pasicrisie internationale* (1902), p. 485 ff. See also the analogous case of the delimitation of the frontiers of Brazil and French Guiana, *ibid.*, p. 563 ff. See also the somewhat similar dispute growing out of the Treaty of Utrecht of April 11, 1713, in which the Government of the Swiss Confederation acted as arbitrator. The question related to the identity of the river "Japoc or Vincent Pincon" referred to in Article 8 of this treaty. The Swiss Government held that there being agreement between the parties at the time of the conclusion of the treaty as to the identity of the Japoc and Vincent Pincon, it could not be maintained ten years later when a dispute arose, that the names referred to in Article 8 represented different rivers and that consequently the article was based on a geographical error. La Fontaine, *op. cit.*, p. 568 and Tomšič, *op. cit.*, p. 61.

It may be stated in this connection that no cases involving directly the question of the effect of error on the validity of treaties appear to have come before international tribunals for decision. In the *Eastern Greenland Case* (*Publications of the P.C.I.J.*, Series A/B, No. 53, p. 92), Judge Anzilotti was apparently willing to consider

whether the declaration of the Norwegian Minister for Foreign Affairs was vitiated, owing to a mistake on a material point, i.e. because it was made in ignorance of the fact that the extension of Danish sovereignty would involve a corresponding extension of the monopoly and of the régime of exclusion.

But, in his opinion, "there was no mistake at all." He then laid down the proposition that only excusable errors afford a ground for the nullity of treaties. As to this he said:

But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a government could be ignorant of the legitimate consequences following upon an extension of sovereignty.

In the case of Croft (*Great Britain v. Portugal*), submitted to arbitration in 1856 (2 Lapradelle et Politis, *Recueil des Arbitrages Internationaux*, 1905, p. 1), the question involved was the effect of an acknowledgement of error

made by Portugal acting under strong pressure from Great Britain. The tribunal held the acknowledgment to be of no effect since it was made in a purely municipal document and was never admitted in any international correspondence. This distinction was criticized by the editors of the *Recueil* who observed:

D'autre part, même formulé dans un acte international, l'aveu ne doit, à notre sens, produire d'effet qu'à la condition d'être l'expression consciente et libre de la volonté du débiteur: s'il est entaché d'erreur ou de violence, il doit pouvoir être rétracté. Cette proposition semble, à première vue, contredite par la doctrine généralement reçue que les vices du consentement ne sont pas, dans le droit des gens, des causes de nullité des traités. Mais, formée par réaction contre la tendance naturelle aux légistes du moyen-âge d'étendre aux traités les règles romaines des contrats, maintenue par le légitime désir d'assurer la stabilité des pactes internationaux, justifiée pratiquement par le défaut de juge entre les Etats, cette doctrine paraît aujourd'hui, dans sa généralité, injuste et démodée: on estime qu'il est certaines règles d'honnêteté et de probité dont l'observation s'impose même aux gouvernements; et que la pratique de plus en plus fréquente de l'arbitrage doit amener, sur ce point comme sur beaucoup d'autres, la révision des anciennes idées. (Pp. 35-36.)

Certain principles and rules of the private law relative to mistake in the formation of contracts would seem to be applicable to cases of error in the making of treaties. Thus, the American Law Institute Restatement of the Law of Contract (sec. 502) declares that "where parties . . . are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if enforcement would be materially more onerous to him than it would have been had the fact been as the parties believed it to be." Cf. in the same sense Williston, *On Contracts* (1926), secs. 1544 and 1548, and 13 *Corpus Juris*, sec. 265. Article 29 of this Convention can be interpreted in this sense except that it does not recognize the right of a party to denounce the treaty unilaterally.

But where the mistake is made by one of the parties only, that is not necessarily a ground of nullity (unless the mistake was induced by fraud or misrepresentation by the other party), nor is it such a ground if mistakes are made by both parties and they relate to different matters. Restatement, sec. 503. Nor is mistake a ground of nullity when the person relying upon it has been negligent in expressing himself and has thus caused the error. Anson, *Principles of the Law of Contract* (4th American ed. by Corbin, 1924, sec. 180).

Article 29 of this Convention does not undertake to define "error" in the making of treaties or indicate its constituent elements. It lays down the simple proposition that when a treaty has been entered into upon an assumption of a state of facts and that assumption was envisaged by the parties as a determining factor which induced them to enter into the treaty, the treaty may be declared by a competent international tribunal or authority

not to be binding on the parties when it is discovered that the state of facts referred to did not exist at the time the treaty was entered into. Let us suppose the following cases:

(1) Two States, each assumed to have within its territory a navigable river which rises in the territory of the other. The two States enter into a treaty by which each accords to the other the right of navigating the river through its territory. The right was intended to be reciprocal, and a determining factor which moved the parties to enter in the treaty was the assumption that both rivers were navigable each within the territory of both States and could therefore be used for this purpose by each State within the territory of the other. Later it is discovered that one of the rivers is not and was not at the time of the conclusion of the treaty, navigable within the territory of the State in which it has its source, so that it is impossible for that State to avail itself of the right stipulated for in the treaty.

(2) Two States enter into a treaty by which one concedes to the other the right to engage in its coasting trade in return for the right of the latter State to participate in the oyster fisheries within the territorial waters of the former. A determining factor which induced both States to enter into the treaty was the assumed existence of the oyster fisheries, but subsequently it was discovered that they had become extinct before the conclusion of the treaty.

(3) States A and B conclude a treaty for the settlement of a boundary dispute, the treaty being entered into on the assumed existence of a range of mountains running parallel to and at a distance of ten miles from the coast of State B. On the basis of this assumption State A recognizes State B's title to the territory between the sea and the mountain range. Subsequently it is discovered that no such range of mountains existed, or, if so, it was situated twenty-five miles instead of ten, from the sea coast.

In all such cases the non-existence of the assumed state of facts affords a ground upon which the treaty may be declared by an international tribunal or authority to be without obligatory force. Article 29, however, lays down certain conditions or qualifications which limit the effect of error much more strictly than is generally done by writers on international law. In the first place, the existence of the state of facts assumed by the parties must have been a determining factor which moved the parties to undertake the obligations stipulated in the treaty. But it is not necessary that it should be the sole factor; it is sufficient if it was one of the factors, in case there were several considerations which influenced the parties in entering into the treaty. It must, however, be a "determining" factor, that is one which was an essential consideration that motivated the parties in concluding the treaty and without which they would not have entered into it. This qualification would exclude all errors as to the assumed existence of facts except those of a material or fundamental character. Thus, an error as to the source of a river or its course or an error of translation or an error in respect to latitude

or longitude would not under Article 29 afford ground for denying the binding force of a treaty unless the error was of such a nature that had the real facts been known at the time the treaty was concluded it would not have been entered into.

Finally, the state of facts the assumed existence of which was a determining factor which led the parties to enter into the treaty must not have existed at the time the treaty was entered into. If it existed at that time but did not exist at a later date the treaty could not be declared not binding for that reason. Thus, if a treaty was entered into on the assumption that a certain river was navigable and that assumption was one of the considerations which led the parties to enter into the treaty, its binding force could not be subsequently challenged on the ground that the river had ceased to be navigable, if it was navigable at the time of the conclusion of the treaty.

As stated earlier in the comment, writers on international law have generally laid it down that the discovery of error has the effect of rendering a treaty either void *ab initio* or voidable at the will of any party. This principle, if admitted, would give any party the right of unilateral denunciation and make it the final judge in any case in which such party should allege the existence of error. The recognition of such a right would undermine the fundamental rule of *pacta sunt servanda* and would put it within the power of a State to relieve itself of its treaty obligations, by simply alleging that those obligations had been assumed as a result of error, and thereupon declaring the treaty to be no longer binding. It is believed that a rule which recognizes such a right as belonging to a party to a treaty would not only be contrary to the elementary principle of law that no one should be a judge in his own case but it would open the door to abuse by making it possible for a State, by its own action, to repudiate a treaty on the ground of alleged error. This Convention, therefore, rejects this solution. Under Article 29 no party acting unilaterally can, on the ground of alleged error, declare a treaty to be not binding on it. Such a decision can only be made by an international tribunal or other authority upon which both or all parties have by agreement conferred competence to decide the question whether error of the kind envisaged by Article 29 has occurred. Questions of this kind are particularly adapted to decision by international arbitration or judicial tribunals, and as pointed out above, the cases involving error which have arisen in practice have been settled either by arbitration or agreement between the parties themselves through negotiation. In no such case did any party assert the right to decide unilaterally the question for itself, and if such a claim had ever been put forward it would have been vigorously denied by the other party or parties to the treaty. In view of the great advance made in recent years in the practice of pacific settlement of international disputes and the general willingness of States to submit controversies arising out of the interpretation of treaties, to arbitration or judicial settlement, the rule here proposed for the decision of disputes resulting from alleged error in the

making of treaties seems to be a reasonable one—one which is in accord with the best juridical sentiment and in large degree with recent practice.

But while Article 29 does not recognize the right of a party unilaterally to free itself from its obligations under a treaty because of error, it does permit provisional suspension by a party of its obligations pending the reaching of an agreement between it and the other party for the submission of the question of the error to an international tribunal or authority and pending its decision thereon. The rule here laid down regarding the right of provisional suspension and the effect thereof, is the same as that of Articles 27 (violation of treaty obligations) and 28 (*rebus sic stantibus*). As to the justification for the rule and the conditions under which it may be availed of, see the comment on Article 27.

It will be noted that under Article 29 the treaty may not be declared void but only “not binding” on the parties. In this respect the rule is different from that of the articles dealing with fraud (Art. 31) and duress (Art. 32) under which the treaty may be declared “void.” The discovery of error as to facts the existence of which was assumed by the parties when they entered into the treaty is not necessarily a reason for pronouncing the treaty void *ab initio*; it would seem to be sufficient to hold it to be no longer binding from the date of the discovery of the error. In the case, however, of a treaty to which one State has been induced to become a party as a result of the fraudulent conduct of another State, the situation is different and the treaty ought to be regarded as void. See, as to this, the comment on Article 31.

ARTICLE 30. SEPARABLE PROVISIONS

Articles 27, 28, and 29 of this Convention may be applied to a separate provision of a treaty only if such provision is clearly independent of other provisions in the treaty.

COMMENT

Articles 27, 28 and 29 of this Convention allow a party to a treaty under certain circumstances to seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it, and pending an agreement between it and the other party or parties upon such tribunal or authority and the pronouncement of its decision, the party seeking the declaration may provisionally suspend performance of its obligations under the treaty *vis-à-vis* the other party or parties. The present article allows a party to seek a declaration that a particular provision of the treaty, that is, a single article, section, clause or paragraph, has ceased to be binding upon it and, pending an agreement upon the selection of the tribunal or authority and the rendering of its decision, the party seeking the declaration may provisionally suspend performance of its obligations under that particular provision. In other words, the party seeking the declaration is not obliged to ask that the entire treaty shall be declared to be no longer

binding upon it in order to be relieved from the duty of performing its obligations under a particular provision which the other party has failed to observe, or which in consequence of certain changed conditions, or in consequence of error discovered, has, in its opinion, ceased to be binding upon it. It may ask merely that that provision alone be declared to be no longer binding upon it, while the other provisions of the treaty are left to stand unaffected. In that case the tribunal or authority may pronounce such provision to be no longer binding, leaving the other provisions intact and binding on the party which has been relieved of its duty of performance under the particular provision declared to be no longer binding.

In such a case, however, Article 30 conditions the right of provisional suspension by the complaining party, as well as the power of the tribunal or authority to declare a particular stipulation no longer binding, upon the existence of an important fact, namely, that the particular stipulation is one which is "clearly independent of other provisions in the treaty"; that is, it must be one which, by reason of its nature and purpose or origin, can be taken out of the treaty of which it is a part without upsetting the balance of rights and obligations established by the other provisions in the treaty. If the elimination of the particular provision from the treaty would affect the rights and obligations of the parties under other provisions of the treaty or remove one of the considerations which induced one party or parties to accept those provisions, it would not be just to permit another party to seek and obtain a declaration that the particular provision in question is no longer binding upon it and in the meantime to suspend provisionally performance of its obligations under that provision. Under these circumstances the treaty must be regarded as an indivisible unit; the provision in question cannot be separated from the rest of the instrument and regarded as if it alone were a treaty.

Not infrequently there are, however, provisions in treaties which are independent of or not integrally related to other provisions, so that their termination would not have the effect of disturbing the balance of rights or obligations of the parties under other provisions or of removing one of the considerations which induced one or more of the parties to enter into the treaty. To such provisions Articles 27, 28, and 29 of this Convention can be applied.

The rule of Article 30 is based on the now generally recognized principle known as the separability of treaty provisions. It may be observed, however, that this principle was not generally regarded with favor by the early writers on international law. Thus, Grotius considered that each article of a treaty had "the force of a condition" the nonfulfillment of which rendered the whole treaty void. The "individual items of one and the same agreement," he said "seem to be related in respect to the two sides after the manner of a condition, as if it had been stated in this way: 'I will do thus and so if the other does what he has promised.'" For the reason, he added, that

the violation of one article rendered the entire treaty null, it was sometimes expressly provided in a treaty that in case one article was violated the others should remain in force. Such a provision was sometimes inserted in treaties, he said, in order to prevent one party from freeing itself of its obligations under the treaty as a whole, by violating upon slight provocation a single provision of it. *De Jure Belli ac Pacis*, lib. III, ch. XIX, sec. 14 (*Classics of International Law*, Kelsey trans., p. 800). See also lib. II, ch. XV, sec. 15 (*ibid.*, p. 405).

Vattel cited the opinion of Grotius with approval. He said:

But the question is asked whether the violation of a single article can effect the dissolution of the entire treaty. Some writers make a distinction here between articles which are connected together, (*connexi*), and those which are separate and distinct in character, (*deversi*), and they maintain that if one of the latter be violated the treaty continues in force with respect to the rest. But the contrary opinion of Grotius seems to me clearly based upon the nature of treaties of peace and the spirit in which they are concluded. That great writer says that "all the articles of a single treaty are included each in the others, each being a condition on which the rest are accepted, as if the parties formally agreed, 'I will do this thing, provided you on your side do that'." And he adds with good reason that "when the parties desire that the agreement shall not be thereby annulled, they add the express clause that, even though one of the articles of the treaty should happen to be violated the others shall nevertheless continue in force." Such an agreement can undoubtedly be made. The parties may even agree that the violation of an article shall not nullify those which offset it, and are, as it were, an equivalent for it. But if the treaty of peace does not contain that express clause, the violation of a single article annuls the whole treaty, as we have proved above, when speaking of treaties in general. (*Droit des Gens*, liv. IV, ch. IV, sec. 47, *Classics of International Law*, Fenwick trans., p. 359.)

Again he said:

Certain authors wish to extend what we have just said to those articles of a treaty which have no natural connection with the article that has been violated, and they say that those separate articles should be regarded as so many distinct treaties concluded all at one time. Hence they maintain that if one of the allied States violates a single article of the treaty the other State is not thereupon justified in annulling the entire treaty, but that it can either refuse in turn to perform what it promised in view of the article violated or force the offending State to carry out its promises, if that can be done, and if not, to make good the loss; and they maintain that with this end in view the injured State may threaten to revoke the whole treaty, a threat which may be lawfully put into effect if it be disregarded. Such is unquestionably the conduct which prudence, moderation, the love of peace, and charity will ordinarily prescribe to Nations. Who is there who would deny it to be so, and madly assert that sovereigns may, upon the least subject of complaint, immediately have recourse to arms, or may at least break every treaty of friendship and alliance? But the question here is one of law and not of the proper action to be taken to obtain justice, and I

hold that the principle upon which the above decision is based is absolutely untenable. The separate articles of the same treaty can not be regarded as so many distinct and independent treaties. Although it may be that no direct connection can be seen between the articles, they are all bound together by this common relation, that each of the contracting parties agreed to certain articles less beneficial in view of others more so. I should never, perhaps, have agreed to this article had my ally not granted me another which has no relation of subject-matter to the first. All the articles taken as a whole have, consequently, the same force and character as a single mutual promise, unless certain articles are formally excepted. (Liv. II, ch. XIII, sec. 202, *ibid.*, p. 177.)

In view of the indivisible character of a treaty and the effect of a violation of one article upon the whole treaty, Vattel thought the practice to which Grotius referred of sometimes incorporating in treaties a provision to the effect that the violation of a single article should not be considered as annulling the entire treaty was a wise precaution for preventing one party from avoiding its obligations under the treaty by violating for a trivial reason a single provision thereof. It was evidently, however, the opinion of both Grotius and Vattel that in the absence of such a stipulation all the provisions of a treaty were to be regarded as interdependent and inseparable, the acceptance of each being conditioned upon the acceptance of the others. One could not therefore be terminated without carrying with it the termination of the others.

Wolff was among the authors to whom Vattel referred as making a distinction between those articles of a treaty which may have no "natural connection" with an article which has been violated, and those which do have such a connection, violation in the latter case rendering the entire treaty void, violation in the former case rendering only the violated article void. *Jus Gentium* (1740), secs. 432, 1022, and 1023. G. F. de Martens also adopted this distinction and the conclusion based upon it. He also distinguished between the principal and accessory articles. All the former, whether they are connected with one another or not as regards their content, are in a *liaison générale* by reason of the fact that the execution of each of them is conditioned upon the execution of the others. They are therefore inseparable and the termination of one carries with it the termination of the others. And if the principal articles are terminated the accessory articles go with them. But the termination of an accessory article does not necessarily involve the termination of the principal articles. *Précis du Droit des Gens Moderne de l'Europe* (2nd ed., Vergé, 1864), sec. 59.

Rivier in his discussion of the effect of non-execution by a party of a treaty provision, affirms that for this purpose the treaty must be regarded as an indivisible whole. As to this, he says:

Si l'une quelconque des clauses, même celle qui semble la moins importante, est violée, il n'y a plus de sûreté quant aux autres. On

peut dire que chaque clause forme comme une condition de toutes les clauses. Il n'y a pas lieu de distinguer entre articles principaux et accessoires, connexes et non connexes. Ces distinctions n'ont rien à faire ici, ou il s'agit de sécurité, de confiance. Tous les articles ont, à ce point de vue, la même valeur. Ils constituent un ensemble indivisible. (2 *Principes du Droit des Gens*, 1896, p. 135; see also p. 459.)

Phillipson appears to be of the same opinion (*Termination of War and Treaties of Peace*, 1916, p. 206), and so does Halleck (2 *International Law* (4th ed., by Baker, 1908), p. 347). Fauchille, however, recognizes the principle of separability of clauses. There are treaties, he admits, the non-execution of a single provision of which renders voidable the entire treaty, because their provisions are more or less dependent upon one another; but there are others, as he points out, which contain provisions which are independent of and unrelated to the other provisions and the non-execution of one does not necessarily render the whole treaty void or voidable. The effect, therefore, of the violation of one provision upon the other provisions depends upon the character or content of the particular treaty. 1 *Traité de Droit International Public*, pt. 3 (1926), p. 389. See, in the same sense, Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 457, and McNair, Note in 1 Oppenheim, *International Law* (4th ed., 1928), p. 756.

The Institute of International Law in its *règlement* on the effect of war on treaties recognizes the rule of separability. Article 3 of the *règlement* reads as follows:

Pour l'application de la règle établie dans l'article 2 [which declares that the outbreak of war between the parties puts an end to certain specified kinds of treaties], il doit être tenu compte du contenu du traité. Si, dans le même acte, il se rencontre des clauses de nature diverse, on ne considérera comme annulées que celles qui rentrent dans les catégories énumérées en l'article 2. Toutefois le traité tombe pour le tout quand il présente le caractère d'une acte indivisible. (25 *Annuaire de l'Institut de Droit International*, 1912, p. 648.)

The question of the separability of treaty provisions is rarely discussed by present day writers on international law, and as a result there is little doctrine based upon the character of modern treaties. Most of the older writers who expressed opinions on the question had in mind only bipartite treaties. Generally speaking, bipartite treaties are homogeneous in character and deal with a single subject, although there are, of course, exceptions. Consequently, their provisions are more likely to be interdependent or so closely related that the termination of one provision carries with it the termination of the others. It is different, however, with many multipartite treaties of today which sometimes contain several hundred articles dealing with a variety of miscellaneous subjects, the provisions relative to which are independent of one another, each being capable of standing alone without being affected by the termination of others. In the case of such a treaty, one

provision may be terminated without necessarily disturbing the balance of rights and obligations established by the other provisions of the treaty and without destroying one of the considerations which may have induced some of the parties to accept the treaty. It does not follow therefore that because, generally speaking, a bipartite treaty should be regarded as an indivisible whole, this is true in the same degree of multipartite treaties of the kind referred to above.

Furthermore, it may be remarked that some writers who defend the principle of the indivisibility of treaties base their views in large part on the analogy of contracts at private law. It is true that a contract is generally less susceptible of division than a treaty, and especially a multipartite treaty, because, as stated above, it usually deals with a single subject and aims at the accomplishment of a specific object. But divisible contracts are by no means unknown. See the Restatement of the Law of Contracts by the American Law Institute, sec. 266, p. 385, where it is said that a contract is divisible (a) where by its terms performance of each party is divided into two or more acts, and (b) the number of parts due from each party is the same, and (c) the performance of each part by one party is the agreed exchange for a corresponding part by the other party. See also Williston, *On Contracts* (1921), sec. 861, p. 1647, who says the essential feature of a divisible contract is that "a portion of the price is by the terms of the agreement set off against a portion of the performance and made payable for that portion, so that when part of the performance has been rendered, a debt for that part immediately arises." See also his further observations in sections 862 and 863.

The principle of separability is well recognized in the interpretation of statutes. Thus the Supreme Court of the United States will not hold an entire statute unconstitutional because a single provision is unconstitutional if it is possible to separate the invalid provision from the other provisions without impairing their efficiency for accomplishment of the purpose intended by the legislature. 1 Willoughby, *The Constitutional Law of the United States* (1st ed., 1910), p. 18, citing *Howard v. the Illinois Central Railroad Co.* (1908), 207 U. S. 463. See also 40 *Harvard Law Review* (1926-27), p. 626, and Cooley, *Constitutional Limitations* (7th ed.), p. 247. But the Supreme Court has held that, in the absence of a provision in the statute to the effect that, in case one part of it is held invalid, the other parts shall remain in force, it is to be presumed that the legislature intended the statute to be treated as a whole. *Williams v. Standard Oil Co.* (1929), 278, U. S. 235. See also *Riccio v. Hoboken*, 69 N. J. Law (1903), 104.

There are, of course, multipartite treaties which must be regarded as an indivisible whole, in the sense that their provisions cannot be separated so that some of them may be terminated, while the others may remain in force, without producing an inequality in respect to the position of the parties as regards their rights and obligations under the treaty. Of such treaties in

general, Malkin ("Reservations to Multilateral Conventions," 7 *British Year Book of International Law*, 1926, p. 142) observes:

Multilateral conventions are after all only a form of contract in which the consideration for the acceptance of the contract by any one party is its acceptance by the others. In all conventions of this nature there are probably provisions which do not appeal much to certain signatories but which they are prepared to accept as a return for securing the acceptance of other provisions, to which they attach importance, by the other parties to the convention. If, however, any party is entitled, without the consent of the other signatories, to pick out of the convention any provisions to which it objects and exclude them by means of a reservation from the obligations which it accepts, it is obvious, not only that the object of the convention might be largely defeated, but that the consideration indicated above is impaired or even destroyed; the other signatories are not in fact getting what they bargained for.

What is here said regarding the effect of taking out of such a treaty by means of a reservation a particular provision, would apply equally to its abrogation or elimination by other methods. It is impossible to lay down any general rule by which the treaties which fall within this class can be determined, further than that which is implied in Article 30, namely, that the treaty must be one in which the particular provision in question is clearly not independent of other provisions of the treaty. The answer must depend in each case upon the nature, content and purpose of the treaty, and possibly upon the circumstances under which the particular provision originated and was accepted by the parties. Treaties for the limitation or reduction of military armaments, treaties for mutual assistance against aggression, treaties of alliance and guarantee are likely to be of such a character that their provisions cannot be separated one from another, and some of them terminated, while the others are left in force. The same thing may be said of treaties generally in which the obligations of the parties differ, it being impossible to relieve one party of its obligations without upsetting the balance of rights and obligations for the others.

Treaties occasionally provide expressly by their own terms that they shall be regarded as an indivisible whole. Such, for example, was the Declaration of the Naval Conference of London, of February 26, 1909, Article 65 of which declared that the declaration should be treated as a whole, no signatory being allowed to ratify certain articles while rejecting others. This restriction was adopted because the agreement reached regarding the various matters with which the declaration deals was the result of compromise and concession, some States agreeing to accept certain articles in return for the acceptance by other States of other articles. Manifestly, it would have been unfair to have permitted a State to accept those provisions which were in the nature of concessions to its point of view by other States, and to reject those provisions which represented concessions which it had made to other

States. In short, the balance of considerations which induced the signatories to accept the various provisions of the declaration would have been upset; for the purpose of ratification, therefore, its provisions were to be considered as inseparable. Bentwich, *The Declaration of London* (1911), p. 156-157; Cohen, *The Declaration of London* (1911), p. 124-125; and M. Renault's Report for the Drafting Committee, Scott, *The Declaration of London of February 26, 1909* (1909), p. 132.

At the Peace Conference at the close of the World War, when Belgium demanded not only the termination of the provisions of the settlement of 1839 regarding her neutralization but also those relative to the navigation of the river Scheldt and the demilitarization of Antwerp, she argued that her consent to neutralization was part of the price which she paid for her acceptance of the other arrangements. The two sets of provisions could not, therefore, be separated, and both alike should be terminated. None of the other parties, however, accepted this thesis. 4 Miller, *Diary at the Peace Conference*, p. 426; Tobin, *Termination of Multipartite Treaties* (1933), p. 263; Tobin, "Is Belgium Still Neutralized?" 26 *American Journal of International Law* (1932), p. 532.

The Treaty on Limitation of Naval Armament of February 6, 1922 (2 Hudson, *International Legislation*, 1931, p. 798), the Treaty of Mutual Guarantee signed at Locarno, October 16, 1925 (3 *ibid.*, p. 1690), and the Treaty for the Renunciation of War, signed at Paris, August 27, 1928 (4 *ibid.*, p. 2522), it is submitted, are among examples of treaties whose provisions cannot be separated so that some of them could be equitably terminated while the others are left in force.

On the other hand, there are numerous treaties whose provisions are not all interdependent and therefore inseparable in the sense of Article 30. Examples of bipartite treaties of this kind are by no means lacking. Thus, a treaty of commerce may contain provisions dealing with such diverse matters as duties on imports, trading privileges of merchants, rights of navigation, the protection of citizens, the right of aliens to own land, exemption from military service, the rights of consular and diplomatic representation, right of the citizens of each State party to the treaty to withdraw from the other State in case of war, freedom of religious worship, extradition of fugitives from justice, the right of so called extra-territorial jurisdiction, privateering, the taking of prizes into ports, the enumeration of articles which may be regarded as contraband in the event of war, etc. In former years treaties of commerce containing such a multiplicity and variety of unrelated provisions were not uncommon and some of them are still in force. It is not easy to see any necessary interdependence of all their provisions, or why some of their provisions could not be suspended or terminated without putting the parties on a footing of inequality as regards the remaining provisions. Even certain provisions of treaties which are entirely homogeneous, in the sense that they deal with a single subject, are sometimes of such

a nature that they can hardly be said to be dependent upon other provisions, and therefore inseparable. Take, for example, the clauses (sometimes numbering as many as thirty or more) of a modern extradition treaty, enumerating the offences for which a fugitive may be surrendered. There would seem to be no reason why a clause which mentions arson as one of these offences is in any sense dependent on a clause which lists the kidnapping of minors.

In the case of many modern multipartite treaties, the interdependence of the numerous provisions which they contain is even less evident. The Treaty of Versailles of June 28, 1919, for example, is divided into fifteen parts, containing 440 articles dealing with such unrelated matters as the League of Nations, the status of Belgium and Luxemburg, the boundaries of various States, the colonies of Germany, military, naval and air armaments, financial and economic matters, reparations, status of treaties between Germany and the Allied and Associated Powers, debts, property rights, contracts, air navigation, navigation of rivers, labor, etc. While it might be difficult to determine to what extent the acceptance of certain provisions of the treaty by some of the parties was influenced by the acceptance of other provisions by other parties, it would be impossible to conclude that such a treaty was intended to be an indivisible whole. In fact, as will be pointed out later, various of its provisions have been modified or terminated while the others remain in force.

The same is true, though perhaps in less degree, of such treaties as the international Sanitary Convention of 1928 (3 Hudson, *International Legislation*, 1931, p. 1903), an instrument of 172 articles having the characteristics of a code; the convention of July 27, 1929, on the treatment of prisoners of war, in 97 articles (27 *American Journal of International Law*, 1933, Supp., p. 56); the convention of Nov. 25, 1927, on radiotelegraphy, which, with the regulations annexed to it, fills 65 pages in the third volume of Hudson's *International Legislation* (p. 2197 ff); the service regulations of October 29, 1925 annexed to the Telegraph Convention of July 10/22, 1875 (*ibid.*, p. 1695 ff), which fill 60 pages in the same collection; the universal postal convention of June 28, 1929, containing 81 articles in addition to a series of elaborate regulations in 93 articles (4 *ibid.*, pp. 2869 and 2917); and the Convention on Private International Law adopted at Havana, February 20, 1928 (the "Bustamante Code") in 436 articles (*ibid.*, p. 2279). Many other examples might be cited of elaborate multipartite treaties containing numerous provisions of which it would be impossible to say that they are so closely related and interdependent that the rule of separability would be inapplicable to them.

In practice, the principle of separability has often been applied. Various provisions of the treaties of peace following the World War have been terminated or revised while the others remain in force; *e.g.*, the provision of the Treaty of Versailles relative to the occupation of the Rhineland, and the

reparations provisions of the treaties of St. Germain, Trianon and Neuilly. During the World War various belligerents suspended the operation of those provisions of treaties to which they were parties, the execution of which they considered to be incompatible with the existence of a State of war, while they continued to observe other provisions, the performance of which did not interfere with the prosecution of the war. Thus the execution of provisions of treaties of commerce and communications relative to trade between the parties and of other treaties which involved direct relations between enemy governments was in some cases suspended, while those dealing with property rights continued to be observed. Tobin, *The Termination of Multipartite Treaties* (1933), pp. 81 ff, 106, 159, and 252.

Treaties themselves sometimes expressly provide that certain of their articles may be revised without the revision affecting the force of the other articles. Thus the Treaty of Neuilly provided that its first 26 articles (the Covenant of the League of Nations) might be modified separately by action of those States which were members of the League. The provisions relating to the treatment of minorities might be modified by the Council of the League (Art. 57). Likewise the Council might terminate the economic clauses (Art. 160). Part XI dealing with the régime for international railways and the freedom of transport might be revised separately by the Council (Art. 247). The other peace treaties contained similar provisions, all being based on the principle that the provisions open to revision or termination were independent of the others, and therefore could be altered or terminated without affecting those which remained.

Various multipartite treaties other than those dealing with peace recognize the principle of separability. Thus, the protocol annexed to the Convention on the Transport of Goods by Rail, signed at Berne, October 23, 1924 (Art. 2), allows exceptions to be made by any party to the enforcement of certain provisions of the convention for a period not exceeding four years, in view of the liability of the currency of certain States to sudden fluctuations. 2 Hudson, *International Legislation* (1931), p. 1466. Article 289 of the Treaty of Versailles which made it the duty of each of the Allied and Associated Powers to notify Germany of the bipartite treaties or conventions which it wished to revive with her, provided that the notification should "mention any provisions of the said conventions or treaties which, not being in accordance with the terms of the present treaty, shall not be considered as revived." Such provisions would therefore be terminated, whereas the others would be revived and continued in force. The Treaty of St. Germain (Art. 241), the Treaty of Trianon (Art. 224), and the Treaty of Neuilly (Art. 168) contained corresponding provisions.

The courts, when dealing with the effect of war on treaties, have sometimes applied the rule of separability. Thus, the Supreme Court of the United States in *Karnuth v. the United States* (1929), 279 U. S. 231, held that Article 3 of the Jay Treaty of 1794 between Great Britain and the United States

had been terminated by the outbreak of war between the parties in 1812, whereas Article 9 of the same treaty had not been terminated. The court emphasized the different nature and purpose of the two articles. Article 9 dealt with vested and permanent rights—rights “which by their very nature, are fixed and continuing, regardless of war or peace,” whereas Article 3 conferred a privilege upon the respective nationals of the two parties to cross and recross the boundary line between the United States and Canada. It was evidently the opinion of the court that the two articles were independent of and unrelated to each other, and that the termination of one of them did not necessarily carry with it the termination of the other.

The Permanent Court of International Justice has also recognized that certain articles or parts of a treaty may be quite independent of others, either because of their arrangement or because of the different subject-matter with which they deal. Hudson, *The Permanent Court of International Justice* (1934), p. 558. Thus, in the *Free Zones Case* the court considered Article 435 of the Treaty of Versailles, relating to the free zones of Upper Savoy and Gex, as being independent of other articles of the treaty both because of its origin and because of its position in the treaty. It was therefore capable of being regarded as a “complete whole.” *Publications of the P.C.I.J.*, Series A/B, No. 46, p. 140. Again, while holding that the Treaty of Versailles “must be read as a whole,” the court has considered Part XIII of the treaty dealing with the subject of Labor as being independent of the rest of the treaty. Series B, No. 2, pp. 23, 25; and Series B, No. 13, p. 18. In its judgment in the case of the *Wimbledon*, the court declared that the provisions of section VI of Part XII of the Treaty of Versailles, dealing with the Kiel Canal, were “self contained” and that “if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous sections of Part XII, they would lose their *raison d'être*.” Series A, No. 1, p. 24.

ARTICLE 31. FRAUD

(a) A State which has been induced to enter into a treaty with another State by the fraud of the latter State, may seek from a competent international tribunal or authority a declaration that the treaty is void.

(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

COMMENT

The employment of fraud by the representatives of a State for the purpose of inducing those of another State to enter into a treaty, and its legal effect

upon the validity of a treaty entered into as a result thereof, are matters which are discussed in most of the treatises on international law. A few writers, however, *e.g.*, Pradier-Fodéré, 2 *Droit International Public* (1885), sec. 1076; Cavaglieri, "*Règles Générales du Droit de la Paix*" 26 *Recueil des Cours* (1926), p. 510; and Despagnet, *Cours de Droit International* (1905), p. 540, dismiss the subject with the statement that in view of the precautions taken today in the negotiation of treaties the possibility of the successful employment of fraud is so slight that the matter is not of sufficient importance to justify consideration. In practice no instances of the actual employment of fraud in the negotiation of treaties are known, and there appear to be no decisions either of national or international tribunals involving the question. Nevertheless, it is altogether conceivable that fraud might be successfully employed by a treaty negotiator, as it has often been employed in the making of contracts at private law. Cf. 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 299. The fact, therefore, that there are no known instances in which the validity of a treaty has ever been contested on the ground that one of the parties was induced to enter into it as a result of the fraudulent conduct of the representatives of another party, is no reason for denying the desirability of a rule governing such cases if and when they should arise in the future.

Article 31 does not attempt to define the term "fraud" or indicate in any way the essential elements which give an act a fraudulent character. Under this article that task is left to the international tribunal or authority before which the party alleging the employment of fraud must bring the question in order to obtain a declaration of nullity. There is, however, a general agreement among jurists as to the essential characteristics of fraudulent conduct. It may be said that its distinguishing characteristic is that the act was done with a wilful intent to deceive another.

Certain of the rules of municipal law as to what constitutes fraud in the making of contracts would seem to be, in the main, applicable in the case of treaties induced as a result of fraud. One of these rules is that while wilful misrepresentation, that is, statements made with the knowledge that they are false, and made for the purpose of deceiving another and of inducing him to enter into a contract, always constitutes fraud, innocent misrepresentation, that is, a misstatement of facts not known to be false is not. The former is always sufficient reason for the avoidance of a contract; the latter may vitiate a contract when the misrepresentation is material or important but it never constitutes ground for an action *ex delicto*. In fact it is really error and not fraud. Mere expressions of opinion, or a misrepresentation as to the law, as distinguished from the facts, are not sufficient ground for invalidating a contract. 3 Williston, *On Contracts* (1922), secs. 1495 and 1500; Anson, *Principles of the Law of Contract*, (4th American ed. by Corbin, 1924), secs. 176, 195-199; and American Law Institute's *Restatement of the Law of Contracts*, Williston reporter (1933), ch. 15.

An example of fraud in the conclusion of a treaty would be the wilful employment by one party, during the course of the negotiation of the treaty, of a forged or otherwise falsified map or document on the assumed correctness of which the other party relied in good faith and because of which he was induced to agree to the treaty. It is not sufficient to say that it is the duty of each party to verify the accuracy of all maps, documents and papers used in the negotiations and on the basis of which the treaty is concluded, and that if either fails to do so and allows himself to be made the victim of a fraud which he could have avoided by investigation, he should take the consequences. This is not saying, however, that a negotiator is relieved of the duty of exercising reasonable care to insure against misrepresentation. It is only saying that if after exercising the reasonable degree of precaution which may be rightfully expected of him, he is wilfully deceived, he should not be made to suffer for his failure to discover the fraud. The fact that he has been induced to accept the treaty by means of acts which under all legal systems are regarded as unlawful and a cause of the nullity of contractual obligations based upon them, is sufficient in itself to afford a ground upon which the validity of the treaty may be contested. This is the rule of municipal law governing the validity of private contracts and there would seem to be no reason why it should not be equally applicable to international engagements of a contractual character. It may be mentioned in this connection that the arbitrator (Huber) in the *Palmas Island Case* acted on the principle that when a State submits documents in support of its claim before an arbitration tribunal the arbitrator is entitled to assume that they are *bona fide* and not fraudulent. Text of the award in 22 *American Journal of International Law* (1928), p. 867. The same principle appears to have been acted on by the Guatemala-Honduras Special Boundary Tribunal in its award of January 23, 1933.

The mere concealment or non-disclosure by one party of information possessed by it relative to the subject or object of the negotiation, which, if it were known to the other party, might cause it to reject the treaty or accept it only with modifications, ought not to vitiate the agreement, because such an act can hardly be said to be tainted with fraud. There is no duty on the part of one negotiator to furnish the other with information in his possession and which the former may have acquired through investigation at his own expense, relative to the subject-matter of the negotiation. Thus, the action of Secretary of State Webster, during the negotiation of the northeastern boundary treaty of August 9, 1842, in not bringing to the attention of Lord Ashburton a map discovered in the archives of Paris by Jared Sparks in his private capacity, which map was supposed to be favorable to the British contention relative to the location of the boundary line, although criticized in England, was not a case of fraud or deceit. Lord Ashburton himself, and the "older diplomatists" to whom he put the question, did not so regard it. The archives in which Sparks discovered the map

were equally open to the British negotiator, and in fact at the time, there existed a true copy of it in the British foreign office. 5 Moore, *Digest of International Law* (1906), p. 719; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 3, n. 7, and Foster, *Century of American Diplomacy* (1902), p. 285.

Nearly all writers on international law who have discussed the subject conclude that the effect of recourse to fraud by the representatives of a State with a view to inducing another State to enter into a treaty, either renders the treaty voidable or void. There is no agreement as to which of the two effects are produced. See among others Gentili, *De Jure Belli Libri Tres*, lib. III, ch. 14, (*Classics of International Law*, Rolfe trans., 1933), p. 361; 1 Anzilotti, *Cours de Droit International* (Gidel trans. 1929), p. 343; Hall, *International Law* (8th ed., 1924), p. 382; 1 Westlake, *International Law* (1910), p. 290; Tomšič, *La Reconstruction du Droit International en Matière des Traités* (1931), p. 52; Cavaglieri, "Règles Générales du Droit de la Paix," 26 *Recueil des Cours* (1929), p. 510; and Strupp, *Eléments du Droit International Public* (1927), p. 176. In either case, whether the treaty be regarded as void *ab initio* or only voidable at the will of a party, the party alleging fraud, would in the absence of a common tribunal, be its own judge as to the facts. Compare 2 Rivier, *Droit des Gens* (1896), p. 55. The objection to a rule which recognizes the right of a party to a treaty to be the final judge of its validity is obvious. It is believed that among the writers on international law who have discussed the subject, Fiore is one of the few who have correctly stated the effect of fraud employed for the purpose of inducing a State to enter into a treaty. He declares that fraud "may be deemed a ground for the nullity of treaties." *International Law Codified* (Borchard trans., 1918), Art. 759. He does not suggest the right of unilateral denunciation by the complaining party.

Article 31 of this Convention is based on the principle which apparently Fiore approved, namely, that a treaty is not void because of the employment of fraud in its negotiation, until a judgment has been rendered by a competent international tribunal or authority holding it to be void. To allow the complaining party itself to pronounce a judgment of nullity would conceivably render the rule of *pacta sunt servanda* illusory, since a party which desired to free itself of a treaty obligation would only need to allege that it had been induced to assume the obligation as a result of fraud employed by the other party, and thereupon to pronounce the treaty void. The charge of fraud against another State is a serious one and the State which makes it ought to be willing to submit the question of the truth of its allegation to a disinterested international tribunal in the choice of which it will have an equal share with the other party. Considering the remarkable development in recent years of the law and practice concerning the pacific settlement of international disputes (see Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931); also the comment on Article 31 of the

Harvard Research Convention on Diplomatic Privileges and Immunities, 26 *American Journal of International Law* (1932), Supp., p. 139), it is believed that the rule laid down in Article 31 that a treaty can be pronounced void for reason of fraud only by such a tribunal or authority, is in line with the law and practice in its present state of progressive development. The same principle is the basis of Articles 27, 28, 29 and 32 of this Convention, the principal difference being that in the case of Articles 27 (violation of treaty obligations), 28 (*rebus sic stantibus*), and 29 (error), the treaty can only be declared "not binding" or "no longer binding," whereas in the case of fraud (and also duress, Art. 32) it may be declared "void". This distinction is based on the difference in the character of the two kinds of acts which produce their effects upon the status of the treaty. The discovery of error, for example, as to the existence of a state of facts on the basis of which a treaty was entered into is not necessarily a sufficient reason for declaring a treaty null and void, whereas the employment of fraud must always, by reason of its unlawful character, be regarded as an act which constitutes sufficient ground for having a treaty induced by it declared to be void *ab initio*.

Where the treaty is declared void it is to be assumed that it never had any valid existence. The State which obtained the declaration of nullity is not only relieved of the duty of further performance *vis-à-vis* the State which had recourse to fraud but also as regards all the other parties.

This article, like Articles 27, 28 and 29 which precede it, recognizes the right of provisional suspension of performance by a party alleging fraud, but such suspension does not become definitively justifiable until a decision sustaining the allegation has been rendered by the international tribunal or authority envisaged by the article. The reason for allowing this right in the case of a treaty the entering into which was induced by fraud is the same in principle as that for which it is allowed in the case of violation by a party of its treaty obligations—a change of conditions with reference to which a treaty was entered into and the existence of error as to a state of facts which was envisaged by the parties as a determining factor which moved them to enter into the treaty. The procedure here laid down for determining the nullity of a treaty induced by fraud and the provision relative to provisional suspension of performance are the same as those in the preceding articles referred to. It does not seem necessary to repeat here the discussion of them. See especially the comment on Article 27.

ARTICLE 32. DURESS

(a) As the term is used in this Convention, duress involves the employment of coercion directed against the persons signing a treaty on behalf of a State or against the persons engaged in ratifying or acceding to a treaty on behalf of a State; provided that, if the coercion has been directed against a person signing a treaty on behalf of a State and if with knowledge of this fact the treaty signed has later been ratified by that State without coercion,

the treaty is not to be considered as having been entered into by that State in consequence of duress.

COMMENT

Writers on international law appear to be unanimous in the opinion that, with the possible exception of treaties of peace which are often imposed by a victorious belligerent upon a State which has been defeated in war, freedom of consent by the parties is an essential condition of the validity of a treaty. Grotius maintained that the law of nature required the observance of the principle of equality in the making of treaties, that there ought to be freedom of choice by the parties, and that their consent should not be induced by fear. *De Jure Belli ac Pacis*, lib. II, ch. XII, sec. 10 (*Classics of International Law*, Kelsey trans., p. 348). To this principle he recognized one exception, which he said had been "introduced with the consent of nations", namely, that where a war has been publicly declared and waged on both sides "all promises made in the course of the war, or for the purpose of terminating it, are valid to the extent that they cannot be made void by reason of a fear unjustly inspired, except with the consent of the party to whom the promise has been made." *Ibid.*, lib. II, ch. XVII, sec. 19, and lib. III, ch. XIX, sec. 11 (Kelsey trans., pp. 435 and 798).

Vattel likewise recognized that treaties of peace constituted an exception to the general rule of freedom of consent. As to this he said:

A sovereign can not dispense himself from observing a treaty of peace by alleging that it was extorted from him by fear or by constraint. In the first place, if this plea were admitted, it would make it impossible for any reliance to be put upon treaties of peace; for there are few such treaties against which that plea could not be brought as a cover for bad faith. To authorize such an evasion would amount to an attack upon the common safety and welfare of Nations; the principle would be condemned as abhorrent by the same reasons which make the faithful observance of treaties a universally sacred duty (Book II, §220). Besides, the plea would be almost always disgraceful and absurd. It hardly ever happens at the present day that a Nation waits until it is reduced to the last extremity before making peace; it may have been defeated in several battles, but it can still defend itself; and it is not without resources so long as it has men and arms. If a Nation finds it prudent to procure, by a disadvantageous treaty, a necessary peace; if it delivers itself from imminent danger, or from complete destruction, by making great sacrifices, whatever it thus saves is an advantage which it owes to the treaty of peace; it freely chooses a loss that is present and certain, but limited in extent, in preference to a disaster, not yet arrived, but very probable, and terrible in character. (*Droit des Gens*, liv. IV, ch. IV, sec. 37, *Classics of International Law*, Fenwick trans., p. 356.)

Nevertheless Vattel admitted that it was possible to conceive of treaties of peace so unjust and oppressive that the plea of constraint would be justified. As to this he said:

If ever the plea of constraint may be admitted, it is against an agreement which does not merit the name of a treaty of peace, against a forced submission to terms which are equally contrary to justice and to all the duties of humanity. If an ambitious and unjust conqueror subdues a Nation, and forces it to accept hard, disgraceful, and unendurable terms of peace, necessity may constrain the Nation to submit to them. But this show of peace is not real peace; it is oppression, which the Nation endures so long as it lacks the means to free itself; it is a yoke which men of spirit will throw off upon the first favorable opportunity. (*Ibid.*, sec. 37, p. 356.)

Among more recent writers, see 1 G. F. de Martens, *Précis du Droit des Gens* (2d ed., Vergé, 1864, sec. 50), who restricted the rule of freedom of consent to the freedom of the negotiator against the employment of constraint against his person for the purpose of coercing him into signing a treaty when otherwise he would not do so; Despagnet, *Cours de Droit International Public* (1905), p. 541; 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 298; Cavaglieri, "Règles Générales du Droit de la Paix," 26 *Recueil des Cours* (1929), p. 511; Tomšič, *La Reconstruction du Droit International en Matière des Traités* (1931), p. 40 ff, where the opinions of various writers are summarized; and Fiore, *International Law Codified* (Borchard trans., 1918), Art. 758, who limits the rule to the employment of "true physical violence" against a plenipotentiary or head of the state so as to deprive him of all power of deliberation and of freedom of judgment. See also 2 Pradier-Fodéré, *Traité de Droit International Public* (1885), sec. 1076; 1 F. de Martens, *Traité de Droit International* (Léo trans., 1883), sec. 108; Bluntschli, *Droit International Codifié* (Lardy trans., 1881), sec. 409, who limits the application of the rule to cases where "violence or menaces, serious and immediate" are employed against the treaty-making representatives of a State; 2 Phillimore, *Commentaries upon International Law* (3d ed., 1882), p. 75; Woolsey, *International Law* (6th ed., 1899), sec. 104, who limits the rule to "unjust duress or violence practiced on the sovereign or the treaty-making agent"; Phillipson, *Termination of War and Treaties of Peace* (1916), p. 163, who apparently limits the rule to the use of physical violence, and only violence which is "serious enough to influence a reasonable man—*metus qui in homine constantissimo cadit*"; and 1 Westlake, *International Law* (1910), p. 290, who holds that the rule of freedom of consent "means only freedom against force and intimidation practiced on the contracting agent of the State," but not that which "is practiced on the will of the State itself." See also Strupp, *Eléments du Droit International Public* (1927), p. 176; 1 De Louter, *Droit International Public Positif* (1920), p. 478; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 4; 1 Oppenheim, *International Law* (4th ed., 1928), p. 711, who emphasizes that freedom of consent as an essential element of a binding treaty means only the freedom of the representatives of the contracting States, and does not apply to treaties concluded under circumstances of urgent distress such as defeat in

war or the menace of a strong State against a weak one; Hall, *International Law* (6th ed., 1909), p. 319, who like most other writers limits the rule to the use of force against the persons of the treaty-making representatives of the State and who points out that the use of force against another State is recognized by international law as a permitted means for redressing wrongs; Grosch, *Der Zwang im Völkerrecht* (1912), p. 92 ff, who maintains that a treaty obtained through the use of force against another State as such is valid, because it must be assumed that the force so used was employed in the exercise of a lawful right and for the purpose of enforcing international law, but that coercion used against the persons of the treaty-making representatives of a State renders the treaty invalid, because as in the law of private contracts, it is assumed that an essential condition of a contract, namely, freedom of consent, is lacking in such a case.

No purpose would be served by a further citation of the opinions of writers. This summary of them is sufficient to indicate that there is a general agreement that freedom of consent as an essential condition of a binding treaty has reference to the freedom of the individuals who participate in the making of treaties from physical or mental coercion applied directly against them for the purpose of compelling them under fear of injury to accept a treaty, when they would not do so in the absence of such compulsion. It is in this narrow or restricted sense that the term "duress" is used in this Convention.

The kind of coercion envisaged by Article 32 may or may not involve the use of violence. It may be actual or threatened; it may be physical or mental, although some writers limit it to the use of physical compulsion. A threat of arrest or imprisonment, or of personal violence or threatened deposition in the case of the head of a State or of threatened dissolution and dispersion in the case of an assembly whose consent is necessary to the validity of a treaty, may be quite effective in inducing the persons against whom the threats are made to sign, ratify or approve a treaty when otherwise they would not do so.

Measures of coercion must of course be distinguished from argument, entreaties, advice and persuasion. The latter are unobjectionable as means of inducing a negotiator to sign a treaty, unless they are carried to such an extreme as to amount to the coercion of his will. Duress must also be distinguished from undue influence, in that the former implies that fear is the motive which coerces the will, whereas that element is lacking in the latter. Cf. 3 Williston, *On Contracts* (1922), sec. ch. 43, and Anson, *Principles of the Law of Contract* (Corbin ed., 1924), sec. 230.

The rule that the employment of duress against the person of a treaty-making representative of a State vitiates the principle of freedom of consent, is but an application to international engagements of a well-recognized rule of the municipal law of private contracts. See 2 Phillimore, *Commentaries upon International Law* (3d ed. 1882), p. 75; Anson, *op. cit.*, sec. 228;

and 3 Williston, *op. cit.*, secs. 1603 and 1608 ff. Williston points out that the modern trend of jurisprudence is to regard as void any transaction which the party seeking to avoid was not bound to enter into, if the party was coerced by fear of a wrongful act by the other party to the contract or transaction; the fact to be determined in each case is whether or not the party seeking to avoid his obligations under the contract really had a choice and exercised his will freely and without constraint.

The term "duress" as used in this Convention does not include the employment of force or coercion by one State against another State for the purpose of compelling the acceptance of a treaty. The treaty-making representatives of the latter State may as a result of its defeat in war or the use of force against it, or as a result of other circumstances such as a condition of bankruptcy or financial distress, find themselves under the necessity of giving their consent to a treaty when they would not otherwise do so. Such indirect compulsion is not, however, "duress" as the term is used in this Convention.

It is true, that in recent years there has been an increasing disposition among writers on international law to challenge the traditional view as to the right of one State to use force against another State and to impose upon the latter a treaty embodying such terms as the former State may see fit to demand. Such writers distinguish between the legitimate and the illegitimate use of force, or between its justifiable and unjustifiable use, between treaties of peace imposed by a belligerent at the close of a war which was declared and waged in defense of a cause sanctioned by international law, and one imposed by a belligerent who has made war in violation of international law or of its treaty obligations. It is the view of these writers that treaties imposed under the former circumstances are valid and binding, whereas the latter are not, or at least may be so declared by a competent tribunal or authority. They admit that the use of force or the threat of force against a State may, in particular cases, be justifiable, and therefore that a treaty obtained as a result thereof is binding, unless the terms of the treaty are in violation of international law. On the other hand, it is contended that pressure in the form of a war or threatened war would not be justifiable if the war were one, for example, which was forbidden by the Covenant of the League of Nations or the Briand-Kellogg Pact, and a treaty extorted as a result of such action would not be binding on the party from which it was extorted.

This view is defended by F. de Visseher in an elaborate article entitled "*Des Traités Imposés par la Violence*," in 12 *Revue de Droit International et de Législation Comparée*, 3rd ser. (1931), p. 513 ff; and by Raventos y Noguera, "*La Violencia como Causa de Nulidad de los Contratos internacionales*," 4 *Revue de Droit International de Sciences Diplomatiques, Politiques et Sociales* (1926), p. 20 ff, who points out that the Covenant of the League of Nations, the Locarno Pacts and the Briand-Kellogg Pact all limit the right of the parties to make war, and therefore if war be defined as the employment of force

recognized by law for the solution of international disputes, a treaty imposed upon a defeated State as a result of a war made in violation of these pacts would be null and void. Cf. also Lauterpacht (*Private Law Sources and Analogies of International Law*, 1927, p. 162), who remarks that the acquiescence of writers in the old rule that the use of force against a State does not vitiate a treaty extorted by such means, is not whole-hearted, is more apparent than real and is usually accompanied by qualifications and reservations. He adds that a large body of publicists now recognize the binding force of treaties concluded as a result of the use of force only when the force has been employed in the name of the law and in accordance with it.

While admitting that in the present state of international law it cannot be asserted that no treaty which one party has been coerced into is entitled to the protection of the law, Brierly says that "it is within our powers when we are stating what the law is, to clear our minds of cant; and if we do so, we shall surely say that no shred of sanctity attaches to a treaty into which one party has been coerced, nor is good faith in the least engaged in its observance." "Some Considerations on the Obsolescence of Treaties," 11 *Transactions of the Grotius Society* (1926), pp. 18-19. See, in the same sense, the remarks of Nippold, *Der völkerrechtliche Vertrag* (1894), p. 172; and Laghi, *Teoria dei Trattati Internazionale* (1882), p. 144 ff, who rejects the distinction between coercion exercised against the State as such and that exercised against its treaty-making representatives, and who asserts that the traditional view that the former does not vitiate the rule of freedom of consent expresses a rule which is too general and absolute. See also 2 Hyde, *International Law* (1922), p. 9, who referring to the "accepted doctrine" that the validity of a treaty is not impaired by the fact that it was imposed upon an unsuccessful belligerent by his victorious adversary, asserts that it may be doubted whether the right of the successful belligerent in this respect is unlimited; and he points out that since the outbreak of the World War, international society has been increasingly reluctant to admit the right "of a conqueror to force the session of territory from an enemy alien race without the consent of the inhabitants." He adds that the United States at this time vigorously denies such a right, and that should a treaty be employed to accomplish "what the law of nations might in this regard ultimately denounce", it would to that extent be illegal or voidable at the option of the State compelled to make the transfer.

The views just quoted and the pronouncements referred to undoubtedly represent a new attitude in regard to the validity of treaties imposed by force, and perhaps it can only be said that the law on this point is in a state of transition (See Fenwick, *International Law*, 2d ed., 1934, p. 337). It cannot be said, however, that the conception of duress has been extended to embrace the use of force against a State as such, even though the force is unjustifiably used by the State resorting to it and in violation of its treaty engagements.

It has been argued that force cannot be used against a State for the pur-

pose of compelling the acceptance of a treaty without its being necessarily directed against the persons or organs in whom or in which the treaty-making power is vested. So argues H. Weinschel in an article entitled "*Willensmängel bei völkerrechtlichen Verträgen*", 15 *Zeitschrift für Völkerrecht* (1929-30), p. 446 ff. Thus, if one State addresses an ultimatum to another State demanding the conclusion of a treaty embodying the terms of a settlement which it insists upon, and accompanies the ultimatum with a threat of bombardment or occupation of territory, the demand in the last analysis is of necessity addressed to those persons or organs which are charged with the conclusion of treaties and which alone are competent to comply with the terms of the ultimatum. It is therefore argued that, indirectly at least, they are subjected to duress. This is not, however, the duress which is envisaged by this Convention, and it is not that which writers on international law generally have in mind when they declare treaties obtained as a result of duress to be invalid or voidable.

Treaties of peace imposed upon defeated belligerents at the close of war are often regarded as an exception to the general rule which makes freedom of consent a condition of the validity of a treaty. Strictly speaking it cannot be said that coercion in such cases is employed for the purpose of compelling a negotiator to sign the treaty or the head of a State to ratify it or a legislative assembly to approve it. The usual procedure is for the victorious belligerent to state the terms on which it is willing to conclude peace with the enemy or to present the latter's plenipotentiaries at the peace conference with the draft of a treaty embodying the terms which it insists upon. The plenipotentiaries of the defeated State are told that the acceptance of the terms is a condition of the cessation of the war. They are given to understand also that if the terms are not accepted hostilities will be renewed or continued, if an armistice has been proclaimed. In that case there is no employment of force or threatened use of force, physical or mental, against the persons of the plenipotentiaries to compel them to sign the treaty. They are free to choose between acceptance of the treaty or the renewal or continuance of the war with whatever consequences that may entail. There is no duress in the legal sense of the term, since the negotiator is free to refuse to sign the treaty and accept instead the other alternative.

If, however, a plenipotentiary should be threatened with physical violence or imprisonment in case he should refuse to sign a treaty of peace, or if the head of the State were similarly threatened if he should refuse to ratify it, it would be a case of duress as the term is used in Article 32. Such coercion is never legitimate even when employed for the purpose of inducing the acceptance of a treaty of peace or any other treaty, although it may be a treaty which the State resorting to duress is clearly justified in demanding of the other State.

Paragraph (a) lays down the rule that if coercion has been directed against a person signing a treaty on behalf of a State and if with knowledge on the

part of the ratifying authority of this fact the treaty is later freely ratified, it shall not be considered as having been entered into in consequence of coercion. This would seem to be a reasonable view of the matter. Cf. Strupp, *Eléments du Droit International Public* (1927), p. 176; and Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (1924), p. 21, who affirms that a treaty which has been signed in consequence of the use of force against the person who signs it but is subsequently ratified by the head of the State against whom force was not used, is a valid treaty. Although the coercion directed against the agent of the State to induce him to sign the treaty was illegal, the *vice du consentement* with which the treaty was tainted is cured by the subsequent ratification of the treaty. Since a State is under no obligation to ratify a treaty which has been signed on its behalf, the ratifying authority is entirely free to refuse to ratify a treaty the signature of which has been extorted from a plenipotentiary by the use of duress against him. If with full knowledge of the fact that the treaty has been signed in consequence of duress the competent authority or organ ratifies it freely and voluntarily, the conclusion must be that it did not consider the employment of duress to obtain the signature as invalidating the treaty, or, if so, it was willing to overlook the illegality of the methods employed and to ratify the treaty in spite of it. For the reason that most treaties today are subject to ratification by another person or organ than that which negotiates and signs them, an opportunity is thus afforded by which a treaty the signing of which has been extorted under duress may be held up and prevented from coming into force.

Under paragraph (a) the employment of coercion against the person or persons charged with ratifying or acceding to a treaty is duress equally with coercion employed against a negotiator to induce him to sign a treaty. There is no place for a distinction here between different persons whose consent is necessary in the process of concluding a treaty. If the employment of duress against a person for the purpose of obtaining his signature to a treaty should be condemned as illegal, there is a greater reason still why its employment against the ratifying authority should be considered as illegal because its action often represents the final step in the procedure by which a treaty is brought into force and becomes binding on the parties and if its consent has been obtained through the use of duress, there will be no further opportunity for preventing the treaty from taking effect, unless the treaty should provide for an exchange of the instruments of ratification.

Instances of the use of duress against negotiators and against kings while held in captivity have not been entirely lacking. See 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), pp. 298-299; Woolsey, *International Law* (6th ed.), sec. 104; Tomšič, *Reconstruction du Droit International* (1931), p. 39; and Klüber, *Droit des Gens* (1831), sec. 142. A case of the kind often cited was the treaty for the renunciation of his crown extorted in 1807 by Napoleon I of France from Ferdinand VII of Spain at Bayonne, whither he had been decoyed by Napoleon. When the proposal for Ferdinand's ab-

dication was made and rejected, Napoleon threatened to try him for treason unless he abdicated within twelve hours. Under the influence of this threat he signed the treaty. The invalidity of the treaty has been affirmed by all writers who have discussed it. It was repudiated by the Spanish nation and fell into desuetude after the battle of Leipzig.

Whether a treaty extorted from the head of a State while held as a prisoner by his enemy, the acceptance of which is made a condition of his release, is binding upon him, is a matter of controversy among the writers on international law. Despagnet (*Cours de Droit International*, 1905, p. 542) regards such a treaty as binding, and he reproaches Francis I of France for having without justification repudiated the Treaty of Madrid of 1526 with the Emperor Charles V, to which he had given his consent as a result of "force and constraint" solely, as he claimed, in order to obtain his release from captivity. Cf. Fauchille, *op. cit.*, p. 299. See also Tomšič, *op. cit.*, p. 39, who points out that the signing of the treaty of 1526 by the King of France was the result of circumstances rather than the result of the use of physical force or threats against the King's person. Reference may be made in this connection to "the pretended treaty of the 16th of March 1810" between France and Holland which was at the time under the domination of the Emperor Napoleon Bonaparte. This treaty was imposed upon Holland by the Emperor, and was presented to Louis Napoleon, King of Holland, for ratification at a time when he was virtually a prisoner of the Emperor at Paris. Having no choice but to yield he gave his assent to the treaty. 1 Moore, *Digest of International Law* (1906), p. 253. Phillipson (*Termination of War and Treaties of Peace*, 1916, p. 161), who discusses in detail the case of a treaty extorted from a king held in captivity, thinks the answer to the question depends on whether a treaty concluded under such circumstances is subsequently ratified by the nation. Nippold (*Der völkerrechtliche Vertrag*, 1894, p. 173) thinks the answer depends on whether or not the sovereign prisoner is still considered as the representative of the State from the date of his captivity. In the same sense see Tomšič, *op. cit.*, p. 39. Grotius maintained that a king who derived his sovereignty from the people could not while a prisoner conclude a valid treaty, because it is impossible to believe that when the people confer sovereignty on him they intend that he may exercise it under circumstances when he is no longer free. *De Jure Belli ac Pacis*, lib. II, ch. XX, sec. 3 (*Classics of International Law*, Kelsey trans., p. 805). Vattel likewise denied that a treaty entered into by a prince while held in captivity was binding on the nation unless it "was ratified by the nation itself, or by those who are invested with the public authority during the captivity of the sovereign, or, lastly, by the sovereign himself after his release." This was so because a prince held in captivity is not free to exercise authority over the nation or to govern it in the interests of the public welfare. He is in the position of a minor or an insane person and during this period of disability only those who by the law of the State are designated as regents are qualified

to conclude treaties. *Droit des Gens*, liv. IV, ch. II, sec. 13 (*Classics of International Law*, Fenwick trans., p. 348). The question has little practical importance today, because kings rarely have the power to conclude treaties without the counter-signature of a minister and the assent of the legislature or one chamber thereof.

Instances in which coercion was resorted to or alleged to have been employed against the ratifying authorities or other organs whose assent to the conclusion of treaties was necessary, have likewise not been lacking. An instance often cited was the surrounding of the Diet of Poland in 1773 at the time of the first partition of that country, by armed Russian soldiers for the purpose of coercing it into the acceptance of the treaty of partition. Various members of the Diet were also imprisoned and their property confiscated. As to the facts, see Tomšič, *op. cit.*, p. 53; Despagnet, *op. cit.*, p. 542; 1 de Louter, *op. cit.*, p. 478, and 1 Fauchille, *op. cit.*, pt. 3, p. 298. A more recent instance of the kind, sometimes cited, was the coercion alleged to have been employed by the Japanese plenipotentiaries with the aid of soldiers against the Emperor of Korea and his ministers, to obtain their assent to the treaty of November 17, 1905, for the establishment of a Japanese protectorate over that country. As to the details, see 1 de Louter, *op. cit.*, p. 479; Tomšič, *op. cit.*, p. 57; and Rey, "*La Situation Internationale de la Corée*," 13 *Revue Générale de Droit International Public* (1906), p. 55.

The charge that pressure was employed by the occupying military forces of the United States against the national assembly of Haiti in 1915 to obtain its assent to a treaty proposed by the American Government, appears to have been officially admitted but defended as justifiable. See the statement prepared by the Navy Department, *Hearings before the Select Committee on Haiti and San Domingo*, U. S. Senate, 67th Cong., 1st and 2nd sess., Sen. Res. 112. See also the following from the report of the Senate Committee appointed to inquire into the occupation and administration of Haiti and San Domingo (U. S. Senate Report No. 794, 67th Cong., 2nd Sess., p. 7):

The American representatives in the opinion of your committee influenced the majority of the assembly in the choice of a President. Later they exercised pressure to induce the ratification by Haiti of the convention in September 1915, precisely as the United States had exercised pressure to induce the incorporation of the Platt Amendment in the Cuban Constitution and thus to assure the tranquillity and prosperity of Cuba. . . .

Adverting to the charge that coercion was used against the Haitian assembly in order to obtain its assent to the treaty, Mr. Charles E. Hughes remarks:

It may be said that the reference to the making of a treaty with Haiti in such conditions as those which existed in 1915, is ironical; that it was an agreement imposed by our will and represented our wishes. If this be so, these wishes, as the treaty discloses and the event has proved, were in the interest of the Haitian people. (*Our Relations to the Nations of the Western Hemisphere*, 1928, p. 79.)

Hershey (*The Essentials of International Public Law and Organization*, rev. ed., 1927, p. 170) thus characterized the circumstances under which the assent of Haiti was obtained:

If the matter were tested in an international court, there might be grave doubts as to the legal validity of this treaty. Serious personal pressure appears to have been brought to bear upon the President, the Cabinet, and other officials of Haiti to secure its ratification. They were threatened by Secretary Daniels with loss of back payment of salaries and were told that in case the treaty failed of ratification, the United States Government would remain in control of Haiti until the desired end should be accomplished.

See also a pamphlet on the *Seizure of Haiti* issued by the Foreign Policy Association (1922), signed by Bausman and others; and Stuart, *Latin America and the United States* (1922), p. 275. The pressure used by the United States to obtain Cuba's assent to the so-called Platt Amendment and its incorporation in the Constitution of that country and in the treaty of May 22, 1903, took the form of notice to the Government of Cuba that the occupying military forces of the island would not be withdrawn until this demand was complied with. Upon compliance therewith, the United States withdrew the last of its military forces on February 4, 1904. *U. S. Foreign Relations*, 1904, pp. 239, 243. The pressure thus employed against Cuba, however, would not come within the scope of "duress" as the term is used in this Convention, since it was not directed against the persons who signed or ratified the treaty in behalf of Cuba.

The employment of pressure by Japan against China to obtain the latter's assent to the treaties and notes of May, 1915, embodying the so-called twenty-one demands, has also been referred to as an example of the use of coercion against the State as such rather than against the treaty-making authorities. The ultimatum of May 7 was addressed to the President and Government of China, and it was their assent that was sought. The ultimatum required that the treaty demands be complied with in 48 hours, and in the meantime military forces were put into conspicuous display. Hornbeck, *Contemporary Politics in the Far East* (1916), pp. 320 and 325. In these circumstances, the Chinese Government decided to comply with the ultimatum "in view of the military threats of Japan." Reinsch, *An American Diplomat in China* (1922), pp. 131 and 147. See also Willoughby, *Foreign Rights and Interests in China* (1920), p. 7. The Chinese Government issued a protest against the treaties which China "had been compelled to sign," but did not at that time indicate an intention to contest their validity. At the Peace Conference at Paris in 1919, the Chinese delegation announced that China reserved the right to raise at a subsequent date the whole question of their validity, because they had been concluded "under coercion of a Japanese ultimatum threatening war." Wood, *The Shantung Question* (1922), p. 124. At the Washington disarmament conference in 1922 the question was again

raised by China, and it was urged that the treaties be reconsidered and cancelled, but again there was no assertion of an intention to denounce them because of their invalidity resulting from the use of coercion. Young, *The International Legal Status of the Kwantung Leased Territory* (1931), p. 160, and Willoughby, *China at the Conference* (1922), p. 249 ff. Mr. Young's conclusion is that, considering all the circumstances, the threatened use of force by Japan against China as a State was not a sufficient cause for invalidating the treaties, although he admits that "physical coercion or intimidation of the negotiators themselves" would have been a sufficient cause for invalidating them had it been resorted to. Professor Quigley in an examination of the question comes substantially to the same conclusion. 6 *Minnesota Law Review* (1921-22), p. 380 ff. See also Price, *The Russo-Japanese Treaties of 1907-1916* (1933), p. 81, who states that the document embodying such of the twenty-one demands as were finally accepted "was admittedly obtained under duress," but who adds that the duress was "legitimate" under international law.

Hershey expressed the opinion that the Bucharest and Brest-Litovsk treaties of 1918 were extorted by Germany from Russia and Roumania as a result of duress directed against the representatives of the latter Powers. 12 *American Journal of International Law* (1918), p. 819. One of the arguments invoked by the Irish Free State to justify its repudiation of Article 4 of the treaty with Great Britain of December 6, 1921, was that it had been accepted under the threat of a renewal of the "war." Jennings, "*Le Traité Anglo-Irlandais de 1921 et son Interprétation*," 13 *Revue de Droit International et de Législation Comparée*, 3rd ser. (1932), p. 495. Among the reasons for which Bolivia invoked the application of Article 19 of the Covenant of the League of Nations in support of her demand for a revision of the treaty of peace between Bolivia and Chile of October 20, 1904, was that the treaty was imposed on Bolivia by force. Peru relied on the same argument to support her demand for a revision of the treaty of October 20, 1883, with Chile. League of Nations, *Records of the First Assembly, Plenary*, p. 595 ff; Radoïkovitch, *La Révision des Traités et de Pacté de la Société des Nations* (1930), p. 314. But these were not cases in which coercion was exercised against the persons of the negotiating or ratifying authorities. Any force or pressure therefore which may have been employed in these cases would not be duress as the term is used in this Convention.

(b) A State which has entered into a treaty in consequence of duress, may seek from a competent international tribunal or authority a declaration that the treaty is void.

(c) Pending agreement by the parties upon, and decision by, a competent international tribunal or authority, a party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

(d) A provisional suspension of performance by the party seeking such a

declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

COMMENT

These paragraphs provide a procedure by which a State which has been constrained to become a party to a treaty through the employment of duress against the persons who signed, ratified or acceded to the treaty, may have it declared void by a competent international tribunal or authority. The same provision is contained in Article 31 (fraud). Both differ, however, from the rule laid down in Article 27 (violation of treaty obligations), which provides that the treaty may be declared "to have ceased to be binding upon it, in the sense of calling for further performance with respect to such State." The juridical consequences are not the same in the two cases. Where the treaty is declared void it is to be assumed that it never had any valid existence. The State, therefore, which obtains a declaration that the treaty is void is not only relieved from the duty of further performance *vis-à-vis* the State which had recourse to duress but also *vis-à-vis* all the other parties. It is also excused from any failure of performance prior to the declaration of invalidity. And a declaration that the treaty is void necessarily means that it is void not only as between the State against which duress was employed and all the other parties but also as between the other parties *inter se*.

Paragraphs (b) and (c) also allow the State against whose treaty-making representatives duress has been thus employed to suspend provisionally the performance of its obligations under the treaty, pending an agreement between it and the party which had recourse to the use of duress, upon the selection of the tribunal or authority and the rendering of its decision. The procedure here provided by which such a treaty may be declared void and the right of provisional suspension accorded to the State whose representatives were subjected to duress are exactly the same as those provided in Articles 27 (violation of treaty obligations), 28 (*rebus sic stantibus*), 29 (error) and 31 (fraud). What was said in the comment on those articles in justification of the procedure there provided by which a treaty may be declared by a competent international tribunal or other authority to be void or no longer binding, and what is there said in support of the right of provisional suspension, may be said with even greater justification of the same rule here laid down in the case of the use of duress. This is so because it is hardly conceivable that the employment of duress against the treaty-making representatives of a State, as the term is used in this Convention, can ever be justified, whereas there may be extenuating circumstances which might afford some excuse at least for the failure of a State to perform its obligations under a treaty.

It may, however, be emphasized here that, as in the cases envisaged by Articles 27, 28, 29 and 31, the right of unilateral termination by a State is not recognized but only the right of provisional suspension, and that such sus-

pension does not become definitively justified until a decision has been rendered by a competent international tribunal or authority holding that the treaty has ceased to be binding. A good many of the writers on international law who are cited in the earlier part of this comment lay down the rule that a treaty which has been obtained by one State as a result of duress employed against the treaty-making representatives of another State, is either void *ab initio* or is voidable at the option of the party which was the victim of the use of duress. But it does not seem that such a conclusion can be justified either in the light of the practice or upon grounds of reason or expediency. To say that a treaty extorted under duress is void *de plein droit* can only mean, in the absence of an international tribunal competent to declare it void, that the party against which it was employed can treat it as such. To recognize its right to be its own judge in such a case would open the way by which a State could free itself of its treaty obligations by simply alleging that its treaty-making representatives had been constrained against their will to sign, ratify or accede to the treaty.

ARTICLE 33. TERMINATION OF TREATIES

(a) A treaty may be terminated by agreement of the parties.

(b) A bipartite treaty is terminated when one of the parties thereto becomes extinct.

(c) Subject to any provision concerning its renewal or continuance contained in the treaty or agreed upon by the parties, a treaty concluded for a fixed period of time is terminated by the expiration of that period.

COMMENT

It will be seen that this article enumerates only three ways or causes by or as a result of which a treaty is or may be terminated. Among the causes often enumerated by writers on international law or listed in the draft codes but which are not included in Article 33 are the following:

1. Denunciation by one party, in the case of bipartite treaties.
2. Renunciation by one party of its rights under a bipartite treaty when the renouncing party owes no obligations to the other party.
3. Impossibility of execution.
4. The execution of the stipulations of the treaty.

As to the first of these, denunciation, that procedure is dealt with by Article 34. As to termination by renunciation, it is often said by writers, and it is so declared in the Havana Convention on Treaties (Art. 14), that a bipartite treaty which creates rights or benefits only for one party without imposing obligations on it for the benefit of the other party—that is a bipartite, unilateral or non-synallagmatic treaty—may be terminated by the express renunciation by the beneficiary party of its rights thereunder. It hardly seems justifiable, however, to regard this procedure as one by which

treaties may be terminated. In any case, it would not be correct to say that the renunciation by one party of its rights under such a treaty would have the effect of terminating the treaty. The consent of the other party would still be necessary to its termination and it is conceivable that the other party might be unwilling to give its consent. In these circumstances it would be arbitrary to lay down a rule to the effect that the renunciation by a party of its rights under a bipartite treaty has the effect of automatically terminating the treaty. For this reason it is not listed in this Convention as one of the ways by which treaties are terminated.

For somewhat the same reason impossibility of execution is not mentioned in Article 33 as one of the conditions which results in the termination of a treaty. It does not follow that because execution of a treaty becomes impossible, the treaty is, in consequence, terminated. It might happen that the reasons for the inability of a State to perform its obligations are only temporary, in which case the duty of performance might be suspended during the period of its incapacity, but the treaty would not be terminated. As suggested above, the most that can be said in such cases is that the obligation of performance is suspended during the period when performance is impossible. The treaty remains in existence, and the duty of performance revives as soon as the obstacle to its execution is removed. If the obstacle is never removed the suspension of the operation of the treaty will continue indefinitely, but in view of the impossibility of accurately foretelling future events, it would be arbitrary to lay down the rule that the happening of an event which renders execution of a treaty impossible, it may be only for a brief period, results in the termination of the treaty.

Finally, it is frequently asserted by writers on international law that a treaty is terminated when its stipulations have been executed or the resolutive condition envisaged by the treaty has been realized. Thus, Anzilotti (1 *Cours de Droit International*, Gidel trans., 1929, p. 440) remarks that, once the obligations of a treaty have been executed, "one can no longer speak of the existence of the treaty as a juridical act; it remains without doubt as a historical fact, but that is another thing." Anzilotti adds that the objections made by some recent authors to the current doctrine which classifies execution of the stipulations of a treaty as one of the modes by which treaties are terminated are therefore not well-founded. Among the authors whom he doubtless had in mind may be mentioned Oppenheim, who asserts that the execution of treaties "does not terminate their binding force." "A treaty," Oppenheim adds, "whose obligation has been performed is as valid as before, although it is then of historical interest merely." 1 *International Law* (4th ed., 1928), p. 744. In legal theory, it is submitted that Oppenheim's view is correct. A treaty is not terminated by the execution of its stipulations; there may be no further obligations to perform under the treaty, but the treaty continues to exist nevertheless. In so far as a treaty creates or transfers rights *in rem*, it sets up a permanent state of affairs (See Westlake's dis-

cussion of "dispositive" treaties, 1 *International Law*, 1910, p. 60 ff), and it necessarily continues in force even though its specific obligations have been performed.

(a) A treaty may be terminated by agreement of the parties.

COMMENT

Turning now to a consideration in turn of the three methods mentioned in Article 32 by which, or the causes through which, treaties may be terminated, it may be observed that the normal and most common of them is mutual agreement of the parties. The power of the parties to terminate a treaty by agreement whenever they wish to do so would seem to be incontestable. This power could not be denied without denying the right of States to enter into treaties, a right which is affirmed by Article 3 of this Convention. There are, however, some writers who maintain that where third States derive rights from a treaty, their consent is necessary before it can be terminated. See, for example, 1 Fauchille, *Traité de Droit International Public*, pt. 3 (1926), p. 380, and 3 Calvo, *Droit International Théorique et Pratique* (1896), sec. 1662. But this view is not generally supported and it must be rejected as having no legal basis. See the comment on Article 18 (Treaties and Third States).

Ordinarily, an agreement for the termination of a treaty takes the form of the conclusion of a new treaty which is intended to supersede and replace the one terminated, although this is not invariably the case. The parties may, if they wish, abrogate a treaty without replacing it with a new one. See some examples mentioned by Pradier-Fodéré, 2 *Traité de Droit International Public* (1885), sec. 1210. Particular provisions of a treaty may be terminated by the conclusion of a new treaty, while the other provisions are left in force. The termination of a treaty may result directly from an agreement which expressly declares that the treaty is terminated at once or shall be terminated on a specified date thereafter, or indirectly or by implication, as where a new treaty is concluded whose stipulations are inconsistent with those of the earlier one, but which is silent as to whether the parties intended to terminate the earlier treaty or not.

When it is said that a treaty may be terminated by an agreement of the parties, it means that the agreement must have the consent of both or all the parties, otherwise it would not be "an agreement of the parties". Whether the consent of the other party or parties must be express is a debatable question. It is conceivable that the consent of a State might be tacit or result from implication, if it is clear that the giving of its consent was intended. That mutual consent to the termination of a treaty may be implied from the attitude of the parties, has recently been affirmed by the German *Reichsgericht*. Decision of May 23, 1925, in the case of the Treaty of Brest-Litovsk, 36 *Zeitschrift für internationales Recht* (1926), p. 408; French trans-

lation in 53 *Journal du Droit International* (1926), p. 465; and a résumé in McNair and Lauterpaeht, *Annual Digest of Public International Law Cases*, 1925-1926, Case No. 267. The facts in this case were that on November 5, 1918, the German Government having severed diplomatic relations with the Government of Russia, the latter government a few weeks later issued a radio manifesto "to all" declaring that it regarded the treaty as abrogated. The German Government having refrained from protesting against the unilateral termination of the treaty by Russia and from insisting upon its rights under the treaty, the court held that its silence was tantamount to acquiescence in the Russian declaration and therefore the treaty must be regarded as impliedly abrogated. That this was the common intention of the parties was subsequently confirmed by the fact that no reference was made to the Brest-Litovsk Treaty in the Treaty of Rapallo, concluded between the two countries on April 16, 1922, which regularized the juridical situation between them. It is not improbable that this latter circumstance may have determined the decision reached.

In the case of bipartite treaties, the meaning of the rule that a treaty may be terminated by "the agreement of the parties" is clear. It means that both parties must consent to the agreement, *i.e.*, the consent must be mutual. In the case of multipartite treaties the situation is more complicated. Article 22, paragraph (b) of this Convention lays down the rule that two or more parties to a treaty to which other states are parties may, under certain conditions, make a later treaty which will supersede the earlier treaty so far as their relations *inter se* are concerned. As between themselves the earlier treaty is therefore terminated, assuming that supersession involves termination, but it is not terminated as between any of them and the other parties nor between any of the latter parties themselves. In theory at least, the rule is the same for multipartite and bipartite treaties alike; that is, the treaty cannot be terminated for all the parties except by an agreement to which the consent of all of them is given. In short, unanimous consent is necessary. See as to this the comment on Article 22, paragraph (a). In practice this rule has not always been observed, especially in the case of multipartite treaties of general European settlement. It has sometimes happened that an alteration in the position of a European State from a small to a great Power or *vice versa*, or other changes of conditions, have destroyed or reduced its interest in the matter, or, in the opinion of the other parties, have removed the necessity for obtaining its consent. Thus several of the treaties or parts thereof comprising the Vienna settlement of 1815 were subsequently modified or superseded without the express consent of certain of the parties thereto. In some instances, as for example, where their interests were slight, they were apparently not even consulted. The question as to the necessity of unanimous consent of the parties to the termination of a treaty arose at the Peace Conference of 1919 in connection with the revision or termination of certain important pre-war treaties of settlement to which

Russia and the Netherlands were parties but neither of which was represented at the Conference. "For the most part the problem was at least temporarily solved by ignoring Russia and making arrangements for securing the subsequent consent of Holland." Tobin, "Is Belgium still Neutralized," 26 *American Journal of International Law* (1932) p. 514, and his *Termination of Multipartite Treaties* (1933), ch. IV, especially p. 223 ff. See also 5 Miller, *My Diary at the Conference of Paris* (1924), p. 33. Apparently the consent of neither has ever been given, at least not formally.

(b) A bipartite treaty is terminated when one of the parties thereto becomes extinct.

COMMENT

A State might conceivably become "extinct" as a result of physical causes, *e.g.*, its submergence in the sea, although no cases of the kind have ever occurred in fact. Again, a State may become juridically "extinct," as many in fact have, through annexation to another State as a result of conquest or cession, or through fusion or merger with other States, or through division or dismemberment and the erection of a new State or States in its place. See Klüber, *Droit des Gens* (1831), sec. 23; 1 Pradier-Fodéré, *Traité de Droit International Public* (1885), sec. 147. It is the doctrine of most writers on international law that when, as a result of such acts, a State loses its juridical personality and ceases to exist as a State, all bipartite treaties to which it was a party at the time, are terminated *ipso facto*, since they cannot, from the nature of the case, survive the legal death which the State has sustained. As to treaties in the sense of this Convention, this consequence necessarily results from Article 1, paragraph (a), which defines a treaty as an instrument to which two or more States are parties. In the case of a bipartite treaty, if one of the parties disappears, the instrument would therefore cease to be a treaty. As Cavaglieri observes, the execution of the treaties of a State conditioned upon its power to exercise sovereignty within its territory, and this power is lost when the State is extinguished through annexation to or absorption by another State. *La dottrina della successione di stato a stato e il suo valore giuridico* (1910), quoted in 13 *Revue de Droit International et de Législation Comparée*, 2d ser. (1911), p. 331. See also his article: "Effets des Changements de Souveraineté Territoriale," 15 *ibid.*, 3d ser. (1934), p. 223.

A few writers, however, hold otherwise. Thus Bluntschli, *International Law Codified* (Lardy trans., 1881), Art. 50, while admitting that annexation operates to extinguish the juridical existence of the State annexed, argues nevertheless that this does not necessarily involve an extinction of its rights and obligations *vis-à-vis* other States under treaties which it had with them at the time of annexation, because its territory, resources, and population continue to exist unaffected by the transfer of sovereignty thereover to another State; the annexing State therefore succeeds to its treaty rights and

obligations, at least in so far as they are not incompatible with the new order of things resulting from the annexation. But whether some other State, *e.g.*, the annexing State or the new State which takes its place succeeds to the rights and/or obligations of the treaty thus terminated is a question of state succession—a subject with which this Convention does not deal. See the comment on Article 26. The article here under consideration merely declares that the bipartite treaties of an extinguished State are terminated as a result of its extinguishment; it lays down no rule as to whether the rights or obligations created by the treaties pass to some other State or not.

Practice has for the most part been in accord with the view that the bipartite treaties of a State are terminated by its juridical extinction. Examples which may be mentioned were the Union of Geneva in 1798 with France, the annexation of the Duchy of Genoa to Piedmont in 1815, of Algiers to France in 1831, of Texas to the United States in 1845, of Lombardy to Sardinia in 1859, the incorporation of Hanover, Nassau and Frankfort into the Kingdom of Prussia in 1866, the incorporation of the Duchies of Modena, Parma, Tuscany and the Kingdom of the Two Sicilies into the Kingdom of Italy in 1860, the annexation of the Papal States to Italy in 1870, the annexation of the South African republics to Great Britain in 1901, of Korea to Japan in 1910, of Hawaii to the United States in 1896, and of Madagascar to France in the same year. In all these cases the annexing or absorbing State took the position that the existing bipartite treaties between the annexed State and other Powers ceased to exist as a result of the annexation or incorporation, and the obligations of the treaties did not therefore pass by succession to the annexing State. In some cases, it is true, there were protests on the part of third States which had treaties with the annexed State. Thus the governments of France and Great Britain, both of which States had treaties with the republic of Texas, contested the position of the United States that the annexation of Texas resulted in the extinguishment of existing treaties between Texas and other Powers, but the matter was not pressed. Both the United States and Great Britain made similar representations in 1896 to France, which likewise took the position that the incorporation of Madagascar as a colony of France involved the extinguishment of existing treaties between that country and other Powers. Japan, likewise, protested against the action of the United States in declaring that the annexation of Hawaii put an end to the treaties between it and other countries. See Kiatibian, *Conséquences Juridiques des Transformations Territoriales des Etats sur les Traités* (1892), pp. 30 ff and 82 ff; McNair, "*La Terminaison et la Dissolution des Traités*," 22 *Recueil des Cours* (1928), p. 486 ff; 5 Moore, *Digest of International Law* (1906), p. 344 ff; and Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 426 ff.

It may be remarked that the position of the United States (and perhaps of other States also) in regard to the effect of annexation or absorption upon the treaties of annexed States has not always been entirely consistent. Oc-

casionaly its position has varied, depending on whether it was the annexing State or whether it was a third State having treaties with the annexed State. Thus, it declined to admit that its treaty of October 1, 1855, with the Two Sicilies was terminated by their annexation to Sardinia in 1860 or by the subsequent establishment of the Kingdom of Italy. Likewise, it denied that its treaty of November 26, 1838, with Sardinia was terminated by the establishment of the Kingdom of Italy, and it adopted a similar position in 1876 and 1908 in regard to the effect of the establishment of Turkish sovereignty over Tripoli in 1835 and thereafter, upon the American treaty of June 4, 1805, with Tripoli. See Secretary Fish's note of September 18, 1876, to the Turkish Minister, in which, after admitting that "as a general rule, when one country is absorbed in another the treaties of perhaps the more inconsiderable of the two are often regarded as annulled," he added, that "it is believed that the absorption of a state is not always attended by an admitted annulment of its treaties." The annexation of Texas, he said, having been accomplished by the legislation of the parties, it "necessarily cancelled the treaties between Texas and foreign powers, so far at least as those treaties were inconsistent with the Constitution of the United States, which requires customs duties to be uniform throughout the Union." The same, he said, was true of the effect of the conquest of Algiers by France, but it was not true of the act by which the Porte acquired the ascendancy which it afterwards claimed in Tripoli, that contest being "of a comparatively obscure character, and, as was believed, had been but faintly and imperfectly recorded in the annals of the time." Moore, 5 *Digest of International Law* (1906), pp. 345-346. Nevertheless, when the United States was itself the annexing State, as in the case of Hawaii, Secretary of State Sherman vigorously maintained the principle that annexation puts an end to all treaties between the annexed State and other Powers, and he cited in support of his position the cases of the annexation of Hanover to Prussia, of Texas to the United States, and of Madagascar to France. *Ibid.*, p. 349, and Hyde, "The Termination of Treaties of a State in Consequence of its Absorption by Another—the Position of the United States," 26 *American Journal of International Law* (1932), p. 133 ff.

The American Government appears to have admitted finally that the treaty of June 4, 1805, with Tripoli did not survive the annexation of Tripoli to Italy in 1912. Hyde, article cited, p. 135. The Italian Government itself took the position that, "in consequence of the recognition by the foreign powers" of Italian sovereignty over Tripoli, the special régime of foreigners therein established in virtue of treaties or capitulations had ended "in conformity with universally accepted principles of international law." *U. S. Foreign Relations*, 1913, p. 608, and Hyde, article cited, pp. 135-136.

Whatever may have been the original position of governments in all these cases of total annexation, one fact stands out; namely, that in practically every case the final outcome was the acceptance, expressly or by acquies-

cence, of the principle that where the effect of the annexation was to extinguish the international juridical personality of the annexed State, the bipartite treaties with other Powers to which it was a party at the time of annexation, were terminated.

While, for the reasons mentioned above, a bipartite treaty is terminated by the extinction of one of the parties, it may be otherwise with multipartite treaties. It might easily happen that one State which is a party along with a large number of other States becomes "extinct". In that case the treaty is necessarily terminated so far as that State is concerned, but not for the other parties. For them it continues in force unaffected by the disappearance of the extinct party—unless of course the treaty provides by its own terms that it shall be terminated whenever one of the parties ceases to be such in consequence of its extinction. It is conceivable that the disappearance of one of the parties, especially if it is one upon which a large share of the burden of execution rests, may have the effect of upsetting the balance of rights and obligations of the remaining parties. In that case the latter parties may withdraw through the exercise of the right of denunciation if the treaty so allows. See Article 34 and the comment thereon.

(c) Subject to any provision concerning its renewal or continuance contained in the treaty or agreed upon by the parties, a treaty concluded for a fixed period of time is terminated by the expiration of that period.

COMMENT

Treaties often expressly provide that they shall remain in force for an indefinite period, although in such cases the right of denunciation is often provided for. Occasionally treaties are silent as to the duration of the period for which they were concluded, in which case they must be considered to be of indefinite duration. On the other hand, treaties today frequently contain a clause which limits their period of duration to a fixed number of years—one, two, three, five, ten, twenty and occasionally more. Thus the treaty between Belgium and Luxemburg for the establishment of an Economic Union between the two countries, signed at Brussels July 25, 1921 (Article 29), was concluded for a period of fifty years, and in case neither party gives notice one year before the expiration of that period of its intention to terminate the treaty, it is to be continued in force for a further period of ten years. 9 *League of Nations Treaty Series*, p. 241. The practice of thus limiting the period of duration of treaties has increased in recent years. The present tendency is shown by the fact that of seventeen instruments designated as treaties registered with the Secretariat of the League of Nations in a recent year (1932), three were concluded for an indefinite period but with the right of denunciation, two for a period of twenty years, four for ten years, six for five years, one for three years and one contained no provision in regard to the period of its duration. Of twenty instruments

designated as "treaties" which were registered with the Secretariat of the League in 1928, six were silent as to the period for which they were concluded, three were concluded for a period of one year, two for two years, one for three years, four for five years and four for twenty years.

That a treaty automatically terminates with the expiration of the period for which it was concluded, unless the parties prior to the date of its expiration mutually agree that it shall be renewed or continued, apparently has never been denied by any one. As to whether such an agreement for renewal or continuance must be express or whether it may result tacitly from the conduct of the parties, opinions differ. Vattel expressed the opinion that the consent required might be either express or tacit. But he added that:

The tacit renewal of treaties is not to be easily presumed, for agreements of such importance well deserve to receive the express consent of the parties. Hence the presumption of the tacit renewal of a treaty can only be based upon acts of such a character that they would not have been performed except in virtue of the treaty. But even in this case the question presents difficulties; for, according to circumstances and to the nature of the acts performed, nothing more may be proved than a mere continuation or extension of the treaty, which is something quite different from a renewal, especially as regards the term.

Droit des Gens, liv. II, ch. XIII, sec. 199 (*Classics of International Law*, Fenwick trans.), p. 176. Hall declares that consent for the renewal of a treaty may be tacit as well as express, provided the consent is "signified in such a manner as to show the intention of the parties unmistakably." *International Law* (6th ed., 1909), p. 352. See also Heffter, *Droit International de l'Europe* (Geffcken ed., 1883), sec. 99. Fiore in his draft lays down the rule that if, after the expiration of the period fixed for the duration of the treaty, the parties continue reciprocally to observe their obligations under the treaty "it should be considered as tacitly renewed, when the reciprocal observance of the treaty is proved in a formal, explicit and unequivocal manner, and is such as to establish clearly the reciprocal intention of maintaining the treaty in force after the expiration of the contractual period." *International Law Codified* (Borchard trans., 1918), Art. 842. The practicability of this rule, however, may be doubted, and it is believed that in practice such a rule would lead to uncertainty and controversy. The degree of proof of the fact of observance by the parties which Fiore insists upon would in a case of dispute probably be difficult to establish. It is believed that the safer rule would be to recognize that treaties concluded for a fixed period of years automatically terminate at the expiration of that period, unless the parties expressly agree to renew it or prolong the period of its duration. Obviously, no notice by one party to the other of its intention to terminate the treaty is necessary when its period of duration is fixed, unless of course the treaty itself otherwise provides.

When the period of duration is fixed at a specified number of years, as is

usually the case, that period should be calculated from the date on which the treaty comes into force. In fact, treaties concluded for a definite period usually provide expressly that this period shall be reckoned from the date of their coming into force. Since treaties do not always fix the date when they shall come into force, disputes may arise as to when the period for which they were concluded expires. Article 10 of this Convention lays down a rule when such treaties shall come into force and, as stated above, their period of duration should be computed from that date.

It will be noted that the rule laid down in paragraph (c) that a treaty concluded for a fixed period of time is terminated by the expiration of that period, is subject to any provisions which the treaty may contain concerning its renewal or continuance. In that case of course the treaty provision is controlling. Not infrequently treaties concluded for a definite period of years provide for their tacit renewal or continuance after the expiration of such period, by a stipulation to the effect that, in case no notice is given before a certain date prior to the expiration of that period by either party, of its intention to terminate the treaty on the date of expiration, it shall continue in force for another and like period of years or for a shorter period or for an indefinite period. Examples of bipartite treaties of this kind are the so-called liquor smuggling conventions of the United States, which were concluded for one year from the date of the exchange of ratifications and which provided that if no notice were given on either side three months before the expiration of the said period, of a desire to propose modifications thereto, the treaty should remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right of either party to propose modifications of the treaty and subject also to the provision that if the proposed modifications were not agreed upon before the expiration of the one year period, the treaty should "lapse". A common provision in bipartite treaties is the following: "The present treaty shall remain in force for five years, dating from the day of the exchange of ratifications, and thereafter until terminated by twelve months written notice given by either High Contracting Party to the other." The treaty of commerce of June 27, 1914, between the United States and Ethiopia provides that:

This treaty shall continue in force for a period of four years after the date of its ratification by the Government of the United States. If neither of the contracting parties, one year before the expiration of that period, notifies officially its determination to terminate the treaty, it shall remain in force for a further period of ten years; and so on thereafter unless notice is given officially by one of the contracting Powers, one year before the expiration of said period, of its intention to terminate said treaty. (3 *Treaties etc. between the United States and Other Powers*, p. 2579.)

The treaty of February 7, 1911, between Great Britain and the United States for the protection and preservation of fur seals contained the following provision:

The foregoing Articles of this treaty shall continue in force during the period of fifteen (15) years from the day on which they go into effect and thereafter until terminated by twelve (12) months' written notice given by either the United States or Great Britain to the other, which notice may be given at the expiration of fourteen years or at any time afterwards. (3 *Treaties etc. between the United States and Foreign Powers*, p. 2632.)

Examples of multipartite instruments containing similar provisions were the conventions on private international law signed at The Hague on June 12, 1902 (95 *British and Foreign State Papers*, pp. 411, 416 and 421) and July 17, 1905 (99 *ibid.*, p. 990, and 116 *ibid.*, p. 666), and the Washington Treaty of 1922 for the Limitation of Naval Armament (2 Hudson, *International Legislation*, 1931, p. 798). The General Act of September 26, 1928, for the Pacific Settlement of International Disputes (Art. 45) provides that:

The present General Act shall be concluded for a period of five years, dating from its entry into force.

It shall remain in force for further successive periods of five years in the case of Contracting Parties which do not denounce it at least six months before the expiration of the current period. (4 Hudson, *International Legislation*, 1931, p. 2544.)

Since only the silence of the parties rather than their positive action is necessary to the renewal of the treaty in such cases, it is not easy to see how a controversy might be precipitated by such silence. If, however, a party desired to terminate the treaty, a dispute might arise as to whether the notice given was sufficient and proper or whether it was given within the period required. Occasionally the treaty requires that the notice must be given by writing. In the absence of a specific provision, it would seem that proper and sufficient notice would be that customarily given through the diplomatic channel.

(d) The termination of a treaty puts an end to all executory obligations stipulated in the treaty; it does not affect the validity of rights acquired in consequence of the performance of obligations stipulated in the treaty.

COMMENT

The expression "executory obligations" as used in this paragraph means obligations under a treaty which would still remain to be performed at or after the time of the termination of the treaty, if such termination had not intervened. It may happen that all the obligations have been executed by both or all the parties before the treaty is terminated; in that case nothing remains to be done by any of the parties, and there are no executory obligations. It may happen, however, that some or even all of the obligations on one or both sides still remain to be executed at the time of the termination of the treaty; in that case the duty to execute the parts which remain unexecuted ceases with the termination of the treaty. Finally, the treaty may be one the

obligations of which are continuous, the duty of performance never ceasing as long as the treaty is in force and occasion for performance arises; in this case, the obligation of further performance ends with their termination.

The second part of paragraph (d) emphasizes the fact that termination of a treaty operates to end its binding force only prospectively or in the sense of calling for further performance; it in no wise affects the treaty in so far as its stipulations have already been performed. In other words, after a treaty has been terminated, and because of that fact, there can be no undoing of what was already done in carrying out the provisions of the treaty while it was in force, and no disturbing of rights vested as a result of such performance. Thus if, as part of the performance of a particular treaty, State A cedes an island to State B, and if subsequently the treaty is terminated, State A cannot, as the result of such termination, question the effectiveness of the cession. Again, suppose that a particular treaty requires State A to permit the vessels of State B and its nationals to use a certain canal without payment of fees. If the treaty is terminated after a period, State A of course is free after that time to collect fees of State B or its nationals if they use the canal; it cannot, however, as the result of termination of the treaty, collect such fees retroactively for the period during which the treaty was in force. See 5 Moore, *Digest of International Law* (1906), sec. 780; 2 Hyde, *International Law* (1922), sec. 549; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 446; Borchard, "Effect of War upon Treaties and Private Rights under Treaties," 38 *Yale Law Journal* (1928-1929), p. 520. See also the decision of the Supreme Court of the United States in *Chirac v. Chirac* (1817), 2 Wheaton 259, 277, where Chief Justice Marshall declared that rights which have become vested under a treaty continue after the treaty has expired. See also the decision of the same Court in *Society for the Propagation of the Gospel, etc. v. New Haven* (1823), 8 Wheaton, 464, where it was said that "the termination of a treaty cannot divest rights of property already vested under it." The court added:

If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that rights of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.

See, in the same sense, the observations of the German *Reichsgericht* in the case of *S.H.H. v. L. Ch. in Paris* (1914), 85 *Entscheidungen des Reichsgericht in Zivilsachen*, p. 374, English translation (in part) Hudson, *Cases on International Law* (1929), p. 968, and the decision of the *Oberlandesgericht* of Hamburg (1917), *Deutsche Juristen Zeitung*, 1917, p. 307, and (in French) 13 *Revue de Droit International Privé* (1917), p. 584.

The Permanent Court of International Justice in its interpretation of treaties has emphasized "the principle of respect for vested rights, a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law." *Case concerning Certain German Interests in Polish Upper Silesia* (the Merits), *Publications of the P.C.I.J.*, Series A, No. 7, pp. 22 and 42. See also the comment on the jurisprudence of the court, by Beckett, under the heading "*Principe du Respect des Droits Acquis dans le Droit International*," 39 *Recueil des Cours* (1932), p. 174.

ARTICLE 34. DENUNCIATION

A treaty may be denounced by a party only when such denunciation is provided for in the treaty or consented to by all other parties. A denunciation must be in accordance with the conditions set by the provisions in the treaty or by the other parties.

COMMENT

The term "denunciation" as used in this article refers to an act by which a State which is a party to a treaty may withdraw from the treaty and cease to be a party thereto. It must not be confused with the "termination" of a treaty by agreement of the parties. The article recognizes two situations or circumstances in which a party may denounce a treaty: (1) the treaty itself must provide for the right of denunciation; or (2), in the absence of such a provision in the treaty, all the other parties must give their consent to the denunciation. Such consent, it would seem, might be tacit as well as express. Thus, if one party should denounce the treaty and none of the others expressed an objection to its action, their silence could reasonably be interpreted as consent. As to the doctrine of consent resulting from silence, see 1 Anzilotti, *Cours de Droit International* (Gidel trans., 1929), p. 344, and Cavaglieri, "*Règles Générales du Droit de la Paix*," 26 *Recueil des Cours* (1929), pp. 512-514. Occasionally where a treaty itself contains no provision for its denunciation, the right of denunciation is reserved by the signatory governments in the *procès-verbal* of the deposit of ratifications. See, e.g., the *procès-verbal* of the deposit of ratifications of the International Sanitary Convention signed at Paris December 3, 1903, par. V. 2 Malloy, *Treaties, etc.*, p. 2129.

Article 34 does not recognize a right of denunciation unless the consent of all the parties is given thereto. Unless such consent were necessary a State could withdraw from a treaty and free itself of its obligations thereunder whenever it chose to do so. In that case the rule of *pacta sunt servanda* (Article 20) would have little or no meaning. It is believed that the rule laid down by Article 34 enunciates a generally accepted principle of international law.

There are, to be sure, reputable writers on international law who maintain that there are exceptional cases in which a State may, in the absence of a

provision conferring the right of denunciation or without obtaining the consent of the other parties, denounce unilaterally a treaty. This can be done, they maintain, when, for example, the treaty was entered into on the basis of a state of facts the continuance of which was envisaged by the party which assumed obligations thereunder as a consideration which induced it to enter into the treaty, and when such state of facts has undergone a material change. See Liszt, *Le Droit International* (Gidel trans., 1928), p. 186. Cf., in the same sense, Despagnet, *Cours de Droit International Public* (1905), p. 549, who recognizes other reasons still which would justify a State in denouncing a treaty in the absence of a provision in the treaty itself authorizing denunciation. To the same effect, see Bluntschli, *Droit International Codifié* (Lardy trans., 1881), Articles 454-458, who not only recognizes the right of denunciation when one of the parties defaults on its obligation of performance or when the order of things which was the basis of the treaty has changed, but also when the provisions of the treaty have become incompatible with "the general rights of humanity and with recognized international law" or with "the necessary development of the Constitution or private law of a State". Hall (*International Law*, 6th ed., 1909, p. 341) holds that a treaty may be denounced in the absence of an express reservation of the right of denunciation when "the nature of its contents is such that it is evidently not intended to set up a permanent state of things". Cf. also McNair, "*La Terminaison et Dissolution des Traités*," 22 *Recueil des Cours* (1928), p. 532, who observes: "Pour notre part, nous croyons qu'on peut admettre qu'il y a des traités qui peuvent être dénoncés à volonté et que le seul critère qui permette de déterminer si un traité peut ou non être dénoncé dans les conditions décrites ci-dessus réside dans l'intention des parties." See also 1 Oppenheim, *International Law* (4th ed., 1928), p. 746, who declares that such treaties as those which "are either not expressly concluded forever, or are apparently not intended to set up an everlasting condition of things", although "they do not expressly stipulate for the possibility of withdrawal, can nevertheless be dissolved after notice by one of the contracting parties."

The Havana Convention on Treaties of February 20, 1928 (Art. 14), lays it down, that a treaty "ceases to be effective" by "total or partial denunciation, if agreed upon." Article 17, however, adds that "treaties whose denunciation may have been agreed upon and those establishing rules of international law, can be denounced only in the manner provided thereby," and that "in the absence of such a stipulation, a treaty may be denounced by any contracting State . . . provided it has complied with all the obligations conventioned therein."

It is believed, however, that the rule proposed by Fiore (*International Law Codified*, Borchard trans., 1917, Art. 830) is a sounder one. It reads as follows: "Unilateral denunciation may be effectual in annulling a treaty only when the right is recognized in the treaty and it is carried out in the terms and cases provided therein and in the forms established by common

law." Except for the lack of a provision to the effect that denunciation is allowable, in the absence of a stipulation in the treaty authorizing it, when all the other parties consent thereto, Fiore's rule is essentially the same as that laid down in the article here under discussion.

In practice, States have sometimes asserted a right of unilateral denunciation in exceptional cases when the treaty did not authorize it. The claims of Soviet Russia, China and Turkey may be referred to in this connection. See the comment on Article 28 of this Convention (*rebus sic stantibus*). But such claims have usually been denied by the other parties, although they have sometimes yielded and given their consent to the modification or termination of the treaty.

In 1909 the Social Democratic party in the Bavarian parliament demanded the termination of an extradition treaty with Russia on the ground that it had become notorious that Russia was a State to whom fugitives from Germany should not be surrendered for trial and punishment. The Bavarian Prime Minister, in replying to the interpellation, asserted that in the absence of a treaty provision allowing denunciation it was not permissible under international law for a State to denounce and terminate a treaty, except possibly when it was justifiable as a measure of national necessity or where there had occurred a complete change of circumstances since the conclusion of the treaty. 4 *Zeitschrift für Völkerrecht* (1909-1910), p. 293.

In 1909 a controversy arose between France and the United States over the claim on the part of the United States to denounce three commercial agreements concluded with France on May 28, 1898, August 20, 1902, and January 28, 1908 (1 Malloy, *Treaties, etc.*, pp. 542, 543 and 547), none of which contained any provision for their denunciation. They were what are commonly called in the United States "executive agreements", and therefore not subject to ratification by the President by and with the advice and consent of the Senate. They were entered into by the President in pursuance of authority conferred by Section 32 of the tariff act of July 24, 1897. By Section 4 of the tariff act of August 5, 1909, the President was authorized and required to give notice within ten days to all foreign countries with which the United States had commercial agreements, of the intention of the United States to terminate such agreements. When the French Government was notified of the intention of the President to denounce the three above-mentioned agreements, it called the attention of the American Government to the fact that they contained no provision for their denunciation. In a note of August 10, 1909, to the Secretary of State the French Chargé at Washington said: "M. Jusserand represented to the Federal Government that as our conventions did not contain any dissolving clause they were of a permanent nature, and that in order to break them at any time an understanding at least was necessary." *U. S. Foreign Relations*, 1909, p. 250. The French Government does not appear to have pressed the matter of the right of the United States to denounce the agreements, but rather com-

plained of the differential treatment as between France and other countries in respect to the date when the denunciation was to take effect.

Although the agreements were not "treaties" in the sense in which the term is used in the Constitution of the United States, they were treaties in the international sense, and as such they were binding on the United States. Since their period of duration was not fixed and since they contained no provision for denunciation by either party, neither party had a right to denounce them without the consent of the other. Apparently the French Government after having denied the right of the United States to denounce them, acquiesced in their denunciation, so that it may be said that they were in effect denounced by the United States with the tacit consent of France.

The rule that one of the parties to a bipartite treaty cannot denounce it and thereby terminate its existence unless the treaty itself so provides, or, in the absence of such a provision, unless the other party consents to the denunciation, has rarely been challenged. See Tobin, *Termination of Multipartite Treaties* (1933), p. 194. In the case, however, of those multipartite treaties which contain no provision for their denunciation, the rule is not so generally accepted, mainly because the consequences of the withdrawal of one of the parties are less serious than they are in the case of bipartite treaties. Denunciation by one party of a bipartite treaty necessarily results in the termination of the treaty, whereas in the case of multipartite treaties its only effect is to release the denouncing party, leaving the treaty in force as between the other parties. In the case of some multipartite treaties, however, the withdrawal of a particular State will have the effect of disturbing the equilibrium of rights and obligations as between the other parties. Moreover, if one State may denounce the treaty and withdraw, others may do likewise with the result that the general purpose of the treaty will be frustrated.

The right of the parties to an important multipartite treaty having something of a "constitutional" character, to denounce the treaty and terminate their obligations under it without the consent of the other parties, was the subject of discussion at the Geneva Conference of September, 1926, of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice. This conference had been called to consider the reservations of the United States Senate to the protocol of signature of December 16, 1920, of the Statute of the Court. The discussion was precipitated by the 4th reservation of the Senate which gave the United States a right to withdraw at any time its adherence to the protocol. The Statute of the Court contained no provision which recognized the right of the signatories to denounce it and withdraw from it; although some of the delegates were in favor of conceding this right to the United States. It having been suggested that if this right were accorded to the United States it would have to be accorded equally to the other parties, it was argued on the one hand that the right of a State to withdraw from a multipartite treaty whenever it

wished to do so was an elementary principle of international law and could not be denied. On the other hand, it was argued that this was not necessarily true in the case of certain great multipartite instruments such as the Statute of the Permanent Court of International Justice, to which all members of the League of Nations were parties and which in a sense formed a part of the constitutional law of a great world organization.

The discussion showed perhaps a preponderance of sentiment in favor of the view that such instruments were in a sense on a higher plane than ordinary multipartite conventions, and that consequently it could not be recognized that particular parties were entirely free to denounce them at their will and without the consent of the other parties. M. Castberg in supporting this view pointed out that such a right would be dangerous and would tend to make the privileges conferred by conventions of this nature practically valueless. The protocol of the court was, with its accompanying statute, he argued, a convention of such character that it could not be denounced by a signatory, whether that State was a member of the League or not. *Minutes of the Conference of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice held at Geneva from September 1st to 23rd, 1926*, 1926. V. 26, especially the remarks of MM. Rolin, Markovitch, Erich, Buero, Osusky, Pilloti, and Castberg, pp. 13-18. See also Hudson, *The Permanent Court of International Justice* (1934), pp. 120-121.

On the whole, it would seem that the safer solution is to recognize no distinction between bipartite and multipartite treaties in this respect, or between different kinds of multipartite treaties, and to lay down the same rule for all treaties; namely, that no State which has bound itself by a treaty may denounce it and withdraw without the consent of the other party or parties, given either in advance in the treaty itself or later in the form of a special agreement. It is also the principle affirmed by the Protocol of London of January 17, 1871, following Russia's attempt to denounce the treaty of 1856 relative to the status of the Black Sea, which states that "it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty nor modify the stipulations thereof, unless with the consent of the contracting parties by means of an amicable arrangement." 61 *British and Foreign State Papers*, p. 1195.

An increasing number of treaties today, both bipartite and multipartite, contain stipulations which provide for denunciation. Of the first 76 bipartite and multipartite treaties and other international instruments registered with the Secretariat of the League of Nations, 30 contained provisions for their denunciation whereas 46 did not. An examination of the treaties registered in later years shows approximately the same proportion.

Provision for denunciation is based on the idea that, in view of the rapidly changing conditions under which treaties must be applied, States would be more willing to become parties to them, and especially those concluded for a long period of time, if they are allowed the right of denunciation

whenever in their opinion a change of conditions renders performance of the obligations detrimental to the national interests. In short, the privilege of denunciation serves as an antidote to the possible danger resulting from the perpetuity of treaty obligations. It also "minimizes the value of shrewd bargaining in conferences, inasmuch as any state which is discontented with the result may shortly free itself from its obligations." Tobin, *Termination of Multipartite Treaties* (1933), p. 203. Cf. also 2 Hoijer, *Les Traités Internationaux* (1928), p. 432.

The second part of Article 34 lays down the rule that "a denunciation to be effective must be in accordance with the conditions set by the provisions in the treaty or by the other parties." Treaties which contain provisions for their denunciation usually prescribe a certain procedure to be followed in the exercise of the right, and sometimes they specify the reasons for which or the conditions under which the treaty may be denounced. In the first place, it is often provided that the right of denunciation may not be exercised before a certain date or until the expiration of a certain period following the coming into force of the treaty, a period seldom less than three years, but sometimes as much as fifteen. (*E.g.*, the Latin Monetary Union Convention of December 23, 1865, 56 *British and Foreign State Papers*, p. 207.) The International Air Convention signed October 13, 1919 (Art. 43) provided that it could not be denounced before January 1, 1922. 1 Hudson, *International Legislation* (1931), p. 359. The agreement of January 27, 1922, regarding passports and visas allowed the right of denunciation after the expiration of one year from the date of the first minutes of the deposit of ratifications. 2 *Ibid.*, p. 787. The Convention on Freedom of Transit opened for signature at Barcelona on April 20, 1921, provided (Art. 8) that it might be denounced by any party thereto after the expiration of five years from the date when it came into force in respect of that party. 1 *Ibid.*, p. 625. The international labor conventions generally allow the right of denunciation after the expiration of ten years from the date of their coming into force. The additional protocol to the convention on the régime of navigable waterways of international concern, opened for signature at Barcelona April 20, 1921, provided that it might be denounced at any time after the expiration of two years dating from the time of the reception by the Secretary-General of the League of Nations of the ratification of the denouncing State. 1 *Ibid.*, p. 659.

Occasionally, however, there is no limitation as to the time when the right of denunciation may be exercised. Thus, the convention of July 27, 1929, relative to the treatment of prisoners of war (Art. 96), the convention of the same date for the amelioration of the condition of the wounded and the sick of armies in the field, and the nationality convention concluded at The Hague in 1930 (Art. 28), allow denunciation at any time. It may be remarked that there was considerable sentiment in the codification conference of 1930 against allowing the right of denunciation at all, since, it was said, the function of the conference was to codify international law, and it was felt

that conventions for this purpose should not be open to denunciation. This view did not prevail, and the conference went to the other extreme of allowing an unrestricted right of denunciation which might be exercised at any time.

Fauchille (1 *Traité de Droit International Public*, pt. 3, 1926, p. 381) raised the question as to whether the right of denunciation may be exercised in time of war as in time of peace. It might be argued, he said, that it would be an act of bad faith, although he did not himself hold that view. Apparently there is no treaty in existence allowing the right of denunciation which expressly restricts the exercise thereof to peace times, although there are a few, such as the conventions of 1929 relative to the treatment of prisoners and the sick and wounded in war which provide that denunciation shall not take effect during the war. On the contrary, there are a good many treaties which expressly allow denunciation at any time. The conclusion therefore would seem to be that in the absence of a restrictive clause in this sense, the right may be exercised in time of war as in time of peace.

Ordinarily where the right of denunciation is provided for in a treaty there are no restrictions as to the grounds upon or reasons for which it may be exercised. Subject to the limitations in respect to time and notice, a party is then entirely free to avail itself of the right in its own discretion. Occasionally, however, treaties specify certain grounds upon which the exercise of the right is conditioned. Thus, the convention of November 8, 1927, dealing with the abolition of import and export restrictions lays down a variety of circumstances (Art. 18) under which the convention is denounceable after five years. 3 Hudson, *International Legislation* (1931), p. 2172.

Treaties allowing denunciation uniformly require notice by the denouncing parties of their intention to withdraw. Manifestly, the notice of denunciation to be valid should be clearly expressed so that it will leave no doubt as to the denouncing party's intention to withdraw. It is not to be implied from an inquiry merely suggesting negotiations for a new treaty. 2 Hyde, *International Law* (1922), p. 79. The notice should likewise indicate precisely the particular articles to be denounced, when a part rather than the whole of a treaty is to be denounced. When it is intended to denounce complementary or supplementary treaties along with an original convention, the notice ought to so state. See the Japanese denunciation of the treaty of August 4, 1896, with France. 103 *British and Foreign State Papers*, p. 541.

In the case of bipartite treaties, the notice of denunciation must be addressed to the government of the other party. In the case of multipartite treaties it is usually required to be communicated to the government of one of the contracting States, with which the ratifications have been deposited, which in turn is charged with notifying the other parties. "Acts" of denunciation of international labor conventions adopted by the International Labor Conference are required to be communicated to the Secretary-General of the League of Nations. The exact form which the notice shall take is not

always specified, although the conventions of the Hague Peace Conferences of 1899 and 1907 required that it must be made "in writing." This requirement is now frequently found in treaties. The question as to what authority or organ of the government is legally competent to denounce, is a matter of national law. In the United States there has been some controversy on this point. See 5 Moore, *Digest of International Law* (1906), sec. 771; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), sec. 184; and Wright, *Control of American Foreign Relations* (1922), pp. 258-259. See also Reeves, "The Jones Act and the Denunciation of Treaties," 15 *American Journal of International Law* (1921), p. 33 ff, where the American practice is reviewed.

Usually it is provided that the notice of denunciation shall take effect only after the expiration of a certain period following the notice, or the receipt thereof by the government to which it must be addressed.

Considering that a party has no right to denounce a treaty unless such right is provided for by the terms of the treaty itself, or unless the other party or parties, in the absence of such a provision, subsequently give their consent to the denunciation, it seems reasonable to conclude that a denunciation is not effective except when the conditions laid down for the exercise of the right have been fully complied with by the denouncing party. Otherwise nothing would be gained by prescribing such conditions. A denunciation therefore without the notice required, or one made outside the time limit fixed, or one made for other reasons than those specified in the treaty, is not a valid denunciation and does not release the denouncing party from its obligations.

In 1911 the Government of Brazil, having decided to denounce its extradition treaties, requested the Government of the United States to waive the requirement of the extradition treaty of May 14, 1897, that denunciation should take effect six months after notice, in order that the treaty might be abrogated by Brazil upon receipt by the United States of the notice of denunciation. The Secretary of State replied that "this Government has no power to waive the treaty requirement that six months' notice of an intention to terminate its extradition treaty with Brazil be given." *U. S. Foreign Relations*, 1913, pp. 25-37.

During the period intervening between the date of notice and the taking effect of denunciation, the treaty continues, of course, to bind the parties as if no notice of denunciation had been given. The Belgian Court of Appeal has held (December 13, 1920) that an action brought under the Hague Convention of 1902 relative to conflicts of law concerning divorce, between the date of notice of denunciation and the taking effect thereof, can be maintained. *Pasicrisie Belge*, 1921, II, p. 21; and 6 *Bulletin de l'Institut Inter-médiaire International* (1922), p. 101.

In the United States the period of time specified in the treaty which is to elapse between the date the notice is given and the final termination of the treaty, has, as regards the various notices given by the United States, been

reckoned from the date on which the notice was presented at the foreign office of the other contracting party. Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 462, citing *U. S. Foreign Relations*, 1865, I, p. 259; 1874, p. 65; 1899, p. 757; and 1883, p. 435.

A minor controversy arose between China and Spain in 1926 when China notified Spain (November 10) of her intention to denounce the treaty of October 10, 1864, in accordance with Article 23 providing that six months' notice should be given before the end of the decennial period when revision of the treaty might be considered. It was the view of the Chinese Government that the treaty would expire on May 10, 1927; the Spanish Government, on the other hand, took the position that the treaty did not expire until November 10, 1927. The Chinese Government, however, finally agreed to accept the interpretation of the Spanish Government. *Chinese Year Book*, 1928, p. 1402.

Serbia's denunciation in April, 1909, of four conventions concluded with Austria-Hungary in April, 1881, was criticized at the time by M. Peritch ("*Traité conclus entre la Serbie et l'Autriche-Hongrie au Cours de l'Année 1911*," 1 *Jahrbuch des Völkerrechts*, 1913, p. 1174) as not being in harmony with the provisions of those conventions relative to denunciation. The conventions were all concluded for a period of ten years, and each provided that in case neither of the parties notified the other within twelve months of the expiration of this period, of its intention to denounce the convention, it would remain in force for a year from the date when one or the other party should have denounced it. The Serbian denunciation referred to contained a reservation to the effect that the treaties would nevertheless continue in force until the conclusion of new treaties replacing those denounced, a reserve which was not provided for in the convention.

In 1888 a controversy arose between the United States and Guatemala concerning the meaning of Article 33 of the treaty of March 3, 1849, which provided that all the parts of the treaty "relative to commerce and navigation" should be terminable upon a year's notice, but that "all those parts which relate to peace and friendship", should be "perpetually binding on both Powers", it being difficult to determine which articles belonged to each of the two groups. 5 Moore, *Digest of International Law* (1906), p. 326. Mention may also be made of the controversy between the United States and Great Britain which arose in 1883 as to the termination of certain articles of the treaty of Washington of May 8, 1871, the principal question being whether the notice of the United States was intended to include Article 29 (*ibid.*, p. 327 ff).

As to the effect of denunciation, it may be observed that the denunciation of a treaty includes all annexes in the form of protocols or other instruments which are declared to be an integral part of the treaty or which are in fact dependent upon it, unless they or the treaty otherwise expressly provide. It does not include those which constitute separate and independent engage-

ments. A controversy involving this question was raised by the action of the Rumanian Government in 1905 in notifying the Government of Greece of its intention to denounce the commercial convention of December 19, 1900, between the two countries, including the protocol annexed to the convention. The protocol stipulated that "the Greek churches listed in the annex—shall be definitively considered as moral (juridical) persons and shall continue to function, as well as the schools which depend upon them." The Greek Government denied the right of the Rumanian Government to denounce the protocol, on the ground that it was a separate international engagement of a unilateral character independent of the convention; and that denunciation of the convention, which was allowable by its own terms, did not carry *ipso facto* denunciation of the protocol, which itself was silent as to its own denunciation. The issues raised are discussed in detail, by Streit in "*La Question des Communautés Helléniques en Roumanie*," 2 *Revue de Droit International Privé et de Droit Pénal International* (1906), p. 253 ff, who defends the interpretation adopted by the Greek Government. The question was also discussed by Kohler in "*Ein Griechisch-Rumänischer Konflikt*," 1 *Zeitschrift für Völkerrecht und Bundesstaatsrecht* (1907), p. 264 ff, who concluded that the matter was one of treaty interpretation. If, he concluded, the denunciatory clause of the convention extended to the protocol, the latter could of course be denounced equally with the former, which would seem to be a sound conclusion. In view of the fact, however, that the protocol recognized and confirmed a legal status as belonging to the churches—a stipulation which was independent of the convention—it would seem reasonable to hold that it constituted a separate engagement, and since the protocol itself contained no provision for its own denunciation and the denunciation clause of the convention did not expressly apply to the protocol, the latter was not subject to denunciation.

If the treaty denounced is a bipartite one, obviously the effective withdrawal of one party necessarily terminates the treaty also for the other party. The treaty therefore ceases absolutely to have any existence. If, on the other hand, it is a multipartite treaty the effect of denunciation by one party is to terminate the treaty only so far as such party is concerned, unless of course the treaty provides otherwise. Henceforth, the relation of the denouncing party to the treaty is that of a third State. As among the non-denouncing parties the treaty remains in force and is binding upon them as before the withdrawal of the denouncing party, unless the treaty provides that denunciation by one party terminates the treaty for all parties or releases the other parties therefrom. See the examples mentioned by Tobin, *Termination of Multipartite Treaties* (1933), p. 195.

Some treaties provide that when the denunciations reduce the parties remaining to a certain number the treaty shall be considered as terminated for all parties. Thus, when the denunciations of the convention of July 13, 1931, concerning narcotic drugs reduce the number of parties remaining to

twenty-four, the convention is terminated (Article 23). Similarly, when the denunciations of the convention of December 14, 1928, concerning economic statistics (Article 16) reduce the number of parties to ten, the convention shall be terminated. But both conventions provide that a relatively small number of the parties may demand the call of a conference for the revision of the conventions—provisions which it was hoped might forestall denunciations.

ARTICLE 35. EFFECT OF WAR

(a) A treaty which expressly provides that the obligations stipulated are to be performed in time of war between two or more of the parties, or which by reason of its nature and purpose was manifestly intended by the parties to be operative in time of war between two or more of them, is not terminated or suspended by the beginning of a war between two or more of the parties.

(b) Unless otherwise provided in the treaty itself, a treaty which does not expressly provide that the obligations stipulated are to be performed in time of war between two or more of the parties, and which by reason of its nature and purpose was not manifestly intended by the parties to be operative in time of war between two or more of them, is suspended as between the hostile belligerents during the continuance of a war between two or more of the parties, and unless contrary provision is made at the conclusion of the war, it will again come into operation when the state of war is ended.

COMMENT

It may be observed by way of introduction that, as to the effect of war on treaties to which some or all of the belligerents are parties, there is much diversity of opinion among jurists and text writers. There is an almost equal want of uniformity in the jurisprudence of the courts of different countries. The jurisprudence of international tribunals is scant and not very helpful. Practice, so far as it is found in the decisions of peace conferences, has so often been determined by political considerations that it is impossible to deduce from the decisions any juridical rules based on reason and convenience, or the general interests of the society of States.

Concerning the present somewhat chaotic state of the law, the United States Supreme Court in the case of *Karnuth v. United States* (1929), 279 U. S. 231, observed that:

The effect of war upon treaties is a subject in respect of which there are widely divergent opinions. . . . The authorities, as well as the practice of nations, present a great contrariety of views. The law of the subject is still in the making, and, in attempting to formulate principles at all approaching generality, courts must proceed with a good deal of caution.

See also the remarks of Mr. Justice Cardozo in the case of *Techt v. Hughes* (1920), 229 N. Y. 222:

The effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law. . . . International law today does not preserve treaties or annul them, regardless of the effects produced. It deals with such problems pragmatically, preserving or annulling as the necessities of war exact. It establishes standards, but it does not fetter itself with rules. When it attempts to do more, it finds that there is neither unanimity of opinion nor uniformity of practice.

And he added:

No one can study the vague and wavering statements of treatise and decision in this field of international law with any feeling of assurance at the end that he has chosen the right path. One looks in vain either for uniformity of doctrine or for scientific accuracy of exposition. There are wise cautions for the statesman. There are few precepts for the judge. All the more, in this uncertainty, I am impelled to the belief that until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion; that they are not bound by any rigid formula to nullify the whole or nothing; and that in determining whether this treaty survived the coming of war, they are free to make choice of the conclusion which shall seem the most in keeping with the traditions of the law, the policy of the statutes, the dictates of fair dealing, and the honor of the nation.

The views which text-writers have adopted may be grouped under three heads: (1) that the outbreak of war between the parties *ipso facto* abrogates or puts an end to all treaties between them, (2) that war in itself does not have the effect of terminating any treaties, although it may cause the suspension of certain of them, and (3) that it has the effect of terminating or suspending some treaties but leaves others unaffected. The three theories are analyzed and discussed at length by Rühlmann in an article entitled "*Zur Theorie und Praxis des Einflusses des Kriegsbeginns auf Staatsverträge*," 32 *Niemeyer's Zeitschrift für internationales Recht* (1924), p. 74 ff. See also an article by Kleinfeller entitled "*Der Einfluss des Krieges auf völkerrechtliche Verträge*," 25 *ibid.* (1915), p. 383 ff.

The first of these theories, that, generally speaking, the outbreak of war between the parties to a treaty automatically terminates it, was supported by the older writers on international law. At the time this theory was adopted multipartite treaties were few and they played a far less important rôle in the international life of the world than they do today. Consequently the application of the principle of general automatic termination did not have the same upsetting effect upon the stability of international relations that it would have today. In 1863, during the diplomatic discussions between Great Britain and Prussia preceding the outbreak of the Austro-Prussian war against Denmark, Bismarck maintained that in case the two countries declared war against Denmark, the effect would be to terminate *all* treaties between Denmark and those countries. Counts Bernstorff and Rechberg took the same view, the latter declaring that "the doctrine that war annuls

all preëxisting engagements between the adverse parties is a principle of international law so universally proclaimed that we are surprised that it should suddenly be denied with such vehemence." Lord Palmerston appears not to have contested this rule. Earl Russell, in a dispatch to Lord Bloomfield, British Minister to Vienna, February 24, 1864, said:

Count Rechberg has supposed that Lord Palmerston contests the principle that war annuls anterior engagements. But he has misapprehended Lord Palmerston's meaning. It is because war annuls anterior engagements that Lord Palmerston says that to make aggressive war for the very purpose of annulling anterior engagements, to make war for the sake of war and for the sake of putting an end to Treaties, would be a great and evident abuse of an admitted principle. . . .

See the correspondence in Bruns, *Fontes Juris Gentium, Digest of the Diplomatic Correspondence of the European States, 1856-1871*, Series B, sec. I, tomus I, p. 795 ff.

It is doubtful if any statesman today would claim that it is "a rule of international law universally accepted" that war terminates all treaties between opposing belligerents. If so, the proposition could not be successfully defended. Nearly all writers on international law today hold that *ipso facto* termination is the exception rather than the rule. See Tobin, *The Termination of Multipartite Treaties* (1933), p. 22; Hurst, "The Effect of War on Treaties," 2 *British Year Book of International Law* (1921-22), p. 38; Politis, "*Effets de la Guerre sur les Obligations Internationales*," 24 *Annuaire de l'Institut de Droit International* (1911), p. 208; 5 Moore, *Digest of International Law* (1906), p. 381 ff; Pillet, *Les Lois Actuelles de la Guerre* (1901), p. 77; and Beer, "*Krieg und völkerrecht vor dem deutschen Reichsgericht*," in 25 *Niemeyer's Zeitschrift für internationales Recht* (1915), p. 321, 326 ff.

The abandonment of the old theory and the recognition of the principle that at most it can only be said that certain kinds of treaties are *ipso facto* annulled by the outbreak of war between the parties, that certain others are merely suspended, while others still are not affected, was a necessary corollary of the increasing interdependence of States, the establishment of a vast net work of treaty-relationships and a clearer appreciation of the general inconvenience of a practice which would result in the complete upsetting, under modern conditions, of these relationships. It has come more and more to be realized that there is no necessary incompatibility between the existence of a state of war between two or more States and the maintenance in force of their treaties, even though it may be necessary to suspend their execution during the period of hostilities. There is no reason of public policy or national defense why any treaties should be regarded as *ipso facto* annulled or terminated by the outbreak of war between the parties. Likewise it is more and more realized that there may be treaties or particular stipulations of treaties of which no consideration of public policy or belligerent

interest requires that they should even be suspended. In this class are such treaties as those which do not require for their execution direct relations between the enemy parties such as would be incompatible with the carrying on of hostilities.

The correct principle, it is believed, was thus laid down by Bluntschli in his draft code (*Droit International Cidifié*, Lardy trans., 1881), Article 461: "The validity of treaties does not depend necessarily upon the maintenance of peace; it does not cease *de plein droit* when war breaks out between the contracting States." Article 538 of his code adds: "Treaties concluded between belligerent states are not necessarily suspended or terminated by a declaration of war; they lose their efficacy in time of war only when their execution is incompatible with the war itself." See in the same sense Fiore (*International Law Codified*, Borchard trans., 1917, Art. 1438). Anzilotti (1 *Droit International*, Gidel trans., 1929, p. 451) remarks that one cannot say that war is itself incompatible with the existence of treaty relations between the belligerents, otherwise treaties which deal with war would not be entered into. The idea, he adds, that war and the maintenance of treaty relations are incompatible is in contradiction with the facts of history, with the realities of international life and with the practice of States. It is not war, he says, which extinguishes them, but, as a rule, it is the decision of the parties not to regard them as binding except during peace.

Courts of justice in their decisions dealing with the effect of war on treaties have uniformly held that there are exceptions to the old theory that the outbreak of war generally puts an end to all treaties between the parties. See the early American case of the *Society for the Propagation of the Gospel v. New Haven* (1823), 8 Wheaton, 464, where the Supreme Court of the United States declared that "treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace," are "at most, only suspended while it lasts." See also the English case of *Sutton v. Sutton* (1830), 1 Russell & Mylne, 665, where the Court of Chancery held that Article 9 of the Jay Treaty of 1794 relating to titles to real property was not affected by the War of 1812 between Great Britain and the United States. See also *State v. Reardon* (1926), 120 Kansas, 614, holding that a similar provision in the treaty of 1828 between Prussia and the United States survived the war of 1917-1918 between the two countries; and *Hempel v. Weedin* 23 F. (2d), 949, holding likewise in regard to the status of the same treaty. Only once has the Supreme Court of the United States ever held a stipulation of a treaty to have been abrogated by the outbreak of war between the parties. See *Karnuth v. United States* (1929), 279 U. S. 231, holding that Article 3 of the Jay Treaty of November 19, 1794, between Great Britain and the United States allowing the right of passage across the United States-Canadian boundary line to the nationals of each State, including Indians residing on either side, was abrogated by the War of 1812. In this case the court was confronted by the fact

that abrogation was strongly supported by an executive opinion, and by the fact that if this particular stipulation had been held to be still in force it would have conflicted with the immigration policy of the United States. Borchard, 26 *American Journal of International Law* (1932), p. 585. This decision is to be regretted; it cannot be defended in the light of practice and jurisprudence.

The French courts throughout the 19th century, while uniformly supporting the general abrogation theory, made exceptions in the case of treaties or particular treaty stipulations dealing with private rights. Thus the Hague Convention of 1905 on civil procedure was held to have been only suspended during the World War. *Etablissement Coullerez c. Maison Stein*, 53 *Journal du Droit International* (1926), p. 604. See the summary of French jurisprudence in an article entitled "*Annulation des Traités Bilatéraux ou Collectifs par la Guerre*", 11-12 *Revue de Droit International* (1915-1916), p. 5. See also Tobin, *The Termination of Multipartite Treaties* (1933), p. 116.

Likewise the German courts recognized exceptions to the old rule that war *ipso facto* terminates all treaties. The *Reichsgericht* in a decision of October 26, 1914 (H. H. v. L. Ch. in Paris, 85 *Entscheidungen des Reichsgerichts in Zivilsachen*, 357), being called upon to decide the question whether the Paris Convention of March 20, 1883 for the protection of industrial property had been terminated by the War of 1914-1918, held that, even if it were admitted that the treaty had been terminated as an international contract by reason of the existence of war, nevertheless, since its content had been incorporated in an imperial law and published in the *Reichsgesetzblatt*, it remained in force as a municipal law in consequence of the *transformations theorie*. Although the court did not express itself clearly on this point, apparently it did not regard the treaty as having been terminated by the war. Masters, *International Law in National Courts* (1932), pp. 37-39. Cf. also Beer, in 25 *Niemeyer's Zeitschrift* (1915), p. 321 ff.

Various German courts held that the Hague Convention of 1905 concerning civil procedure was suspended during the World War, but apparently not terminated. The texts of some of the decisions are reproduced in German and in French in Kusters and Bellemans, *Les Conventions de la Haye de 1902 et 1905 sur le Droit International Privé* (1921), p. 1156 ff.

The decisions of the Italian courts represent what is believed to be the modern tendency in jurisprudence when they held that the Hague Conventions of 1902 and 1905 were neither annulled nor suspended by the outbreak of war. Thus the Court of Appeal of Venice, in a decision of October 9, 1917 (*Domini v. Kenk*, Kusters and Bellemans, *op. cit.*, p. 493), held that the convention of 1902 relative to divorce was not abrogated nor (apparently) suspended by the outbreak of war between Germany and Italy. In its opinion the court observed that the feeling that the effects of war should be limited to the relations of States as such "responds more nearly to the sound conceptions of modern law than those which extend them without any necessity to

private relations; and it is one of the noblest traditions of the Italian school to safeguard so far as possible the law in times of moral perturbation resulting from armed conflicts, so that violence will not cause belligerent nations to misunderstand the authority of international law and the binding force of conventions." (Trans.) The wise equilibrium of the Italian doctrine, it was added, may be summarized in these terms:

non potersi reputare come effetto immediato della guerra l'annientamento di tutti i trattati, di tutte le convenzioni stipulati fra gli Stati belligeranti, ma di quelli soltanto, che, avuto riguardo alla loro natura ed alla loro materia, devono reputarsi incompatibili con lo stato di guerra. . . .

La convenzione dell'Aja, avente per oggetto la esecuzione delle sentenze dichiarative di divorzio o di separazione, nessun ostacolo trova nello stato di guerra per essere osservata e applicata. . . . La materia regolata evidentemente è tale, da non avere con la guerra alcuna attinenza, non soltanto diretta in rapporto alla sorte delle armi, ma neppure indiretta quale potrebbe derivare da una pressione economica. Soltanto per rappresaglia politica taluno degli Stati belligeranti potrebbe determinarsi a troncare o sospendere l'esecuzione del fatto; ma ciò dovrebbe risultare da un'espressa volontà, o mediante la denuncia della stessa convenzione che avesse ad impedire la tacita rinnovazione quinquennale come prevede l'Art. 12, o mediante un atto d'imperio che interdicesse il riconoscimento delle sentenze pronunciate dai tribunali dello Stato nemico. E poichè lo Stato Italiano a nessuna di tali determinazioni è addivenuto, la convenzione dell'Aja ha serbata nel regno la sua prima forza giuridica, nonostante la guerra. (pp. 498-499.)

Mr. Justice Sutherland, in the case of *Karnuth v. the United States* (1929), 279 U. S. 231, said that

The doctrine sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, is repudiated by the great weight of modern authority; and the view now commonly accepted is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character." . . . there seems to be fairly common agreement that, at least, the following treaty obligations remain in force: stipulations in respect of what shall be done in a state of war; treaties of cession, boundary, and the like; provisions giving the right to citizens or subjects of one of the high contracting powers to continue to hold and transmit land in the territory of the other; and, generally, provisions which represent completed acts.

Referring to the older view that war generally and *ipso facto* annuls treaties between the belligerent parties, Mr. Justice Cardozo said in *Techt v. Hughes* (1920), 229 N. Y. 222, that "the writers of our own time reject these sweeping statements." The condemnation of the old view was pronounced by the Tribunal of Arbitration in the *North Atlantic Fisheries Case* in its award of September 7, 1910, where it was said: "International law in its modern development recognizes that a great number of treaty obligations are not

annulled by war, but [are] at most suspended by it." Scott, *Hague Court Reports* (1916), p. 159. The unqualified^a assertion of Arbitrator Borel in the *Ottoman Debt Case* in 1925 that war terminates all treaties between the opposing belligerents, was in the nature of a dictum, since it was not necessary to the decision of the question at issue. *Repartition des annuités de la dette publique Ottomane, Sentence Arbitrale* (Geneva, 1925), p. 62.

Article 35 of this Convention is based on what is believed to be the more recent trend of opinion, practice and jurisprudence as summarized above, as well as upon considerations of reason and expediency. It does not recognize that the outbreak of war between the parties or some of them *ipso facto* terminates *any* treaties whatever. It does, however, recognize that the operation of some treaties is suspended during war between two or more of the parties, in which case the parties may at the close of the war treat them as terminated, if they wish to do so, by expressly providing for their termination in the treaty of peace. In other words, it is not the outbreak of war itself which terminates treaties, but the parties themselves by their agreement. It is believed that this is a sounder and more reasonable rule than that of general automatic termination.

Considering the unsettled state of the law and the practice regarding the effect of war on treaties, it may seem to some a futile task to attempt to formulate a series of rules which reflect in any degree what may be regarded as the established practice or law on the subject; in short, it might be contended that since "the law is still in the making" it is not yet ripe for codification. It may be remarked in this connection that the subject was altogether ignored in the Havana Convention on Treaties. It is believed however, that there is sufficient agreement on certain fundamental principles to justify the laying down of a few general rules which seem to be in harmony with the better practice, the more enlightened jurisprudence, and the doctrine of the most authoritative recent writers on international law. This is all Article 35 seeks to do. It does not attempt to lay down a series of detailed rules enumerating the particular kinds of treaties which are terminated by war or which are suspended, as does the draft of the Institute of International Law (25 *Annuaire de l'Institut de Droit International*, 1912, pp. 648-650).

Without attempting to enumerate the particular kinds of treaties which are unaffected by the beginning of a state of war between the parties or some of them, or which are suspended during war, Article 35 merely lays down two tests or conditions by which treaties falling within each class may be determined. In short, it enumerates criteria for determining the effect of war on treaties, rather than attempting to enumerate the specific kinds of treaties which are affected in one way or another by the existence of war between the parties or some of them. Manifestly, it would be impossible to classify by the method of enumeration all treaties which are terminated, which are suspended or which are unaffected by war. A study of the classi-

fications for this purpose which have been proposed by writers will show the futility of the effort. See *e.g.*, the rules proposed by Lawrence, *Principles of International Law* (7th ed. 1923), p. 341 ff. This Convention does not, for example, lay down the rule that a treaty which forbids the use in war of certain instruments or methods is unaffected by the existence of a state of war between the parties or some of them, nor does it lay down the rule that treaties of commerce, for example, are suspended upon the beginning of war. Instead, it provides (paragraph a) that a treaty which declares by its own terms that its obligations shall be performed in time of war, or which by reason of its nature and purpose was manifestly intended by the parties to be executed in time of war, is not affected by the existence of war between the parties or some of them. A treaty forbidding the use in time of war of certain instruments or methods would clearly fall within this category.

Turning now to a more detailed consideration of the provisions of Article 35, it will be seen that paragraph (a) deals with treaties that are unaffected by the existence of a state of war between two or more of the parties; that is, treaties which are neither terminated nor suspended as a result of war. Two kinds of treaties are recognized as falling within this class: (1) those which contain an express provision that the obligations stipulated therein are to be performed in time of war; and (2) those which by reason of their nature and purpose were manifestly intended by the parties to operate in time of war between two or more of them. There obviously remains one other possible group of treaties, namely, those which neither contain an express provision that the obligations stipulated in them are to be performed in time of war nor evidence that it was the manifest intention of the parties that they should operate in time of war between two or more of them. Paragraph (b) envisages and deals with the effect of war on treaties which fall within this latter group. In short, it envisages all treaties not falling within one or the other categories defined in paragraph (a).

The rule laid down in paragraph (a) needs no defence and little explanation. It aims simply to give effect to the intention of the parties as they have formally expressed that intention in the treaty itself. As to the principle that the intention of the parties should be the primary test in determining whether a treaty is terminated, suspended or unaffected by the existence of war between the parties, see Hurst, "The Effect of War on Treaties," 2 *British Year Book of International Law* (1921-1922), p. 40; and McNair, "The Functions and Differing Legal Character of Treaties," 11 *ibid.* (1930), p. 103, also his *La Terminaison et Dissolution des Traités*, 22 *Recueil des Cours* (1928), p. 511. A rule which should provide that a treaty containing a stipulation that its obligations are to be performed in time of war is terminated by the outbreak of war or is suspended during war between two or more of the parties, would have the effect of overriding the will of the parties as expressed in the treaty. Manifestly, such a rule could not be defended.

Treaties which expressly provide that they shall neither be terminated nor

suspended on account of the existence of war between the parties or some of them, have been rare, but they are not totally lacking. An example was the treaty of May 19, 1815, between Great Britain and Russia regarding the payment of interest on the Russo-Dutch Loan, which expressly declared that the operation of the treaty was not to be affected by the existence of war between the parties. 2 Martens, *Nouveau Recueil de Traités*, p. 275. Another example was the multipartite convention as to the Cape Spartel Light House of May 31, 1865, Article 3 of which provided that "the contracting Powers bind themselves, each so far as concerned, to respect the neutrality of the light-house, and to continue the payment of the contribution intended to uphold it, even in case (which God forbid) hostilities should break out either between them or between one of them and the Empire of Morocco." 20 Martens *Nouveau Recueil Général de Traités*, p. 350; 1 Malloy, *Treaties, etc.*, p. 1219. The General Act of February 26, 1885 relative to the Navigation of the Congo and Niger rivers for the purposes of trade, contained a somewhat similar provision (Art. 33): "Les dispositions du présent Acte de Navigation demeurent en vigueur en temps de guerre." 10 Martens, *ibid.* (2d ser.), p. 426.

The second kind of treaty which under paragraph (a) is neither terminated nor suspended during a war between two or more of the parties, are those which "by reason of their nature and purpose were manifestly intended by the parties to be operative in time of war between two or more of them." The rule here laid down, like the preceding rule just discussed, likewise makes the intention of the parties the test as to whether a treaty is or is not terminated or suspended during a war between them, but in this case the intention is not formally expressed in the treaty itself but is to be deduced from the nature and purpose of the treaty. Obviously, however, in many cases it may not be easy to discover from the nature of a treaty whether the parties intended it to operate in time of war or not, or whether they had any intention at all regarding the matter. If it is one which deals only with conditions or problems which arise in time of war or which establishes obligations which from their very nature can only become performable when a state of war exists between the parties or some of them; in short, if it is a treaty which was made in contemplation of war and which therefore would never actually become operative until the outbreak of war, manifestly it could not be said that it was the intention of the parties that it should be terminated or suspended during the very period when its stipulations are applicable and performable. If it were otherwise, such treaties would have no utility and it would be useless for States to enter into them. Among specific examples of treaties of this kind are those which provide that the nationals of one party residing in the territory of the other at the outbreak of war shall not be expelled, or, if required to leave, they shall be allowed a certain time within which to dispose of their property and to depart; those which provide that property shall not be confiscated or sequestered or

ships shall not be embargoed or seized in time of war; those which lay down rules which the parties must observe in the conduct of hostilities, which forbid the employment of certain weapons or instrumentalities, which relate to the treatment of prisoners, the rights of persons engaged in administering to the sick and wounded, the status of ambulances, hospitals, and hospital ships, the rights and duties of belligerents *vis-à-vis* neutrals, etc. All such treaties, instead of being terminated or suspended, are obviously brought into operation by the outbreak of war. Bipartite treaties relating to the treatment of enemy nationals and their property at the outbreak of war were formerly very common, and they are not lacking today. Multipartite treaties dealing with the conduct of war have greatly multiplied in recent years. Among examples of the latter may be mentioned the Declaration of Paris of 1856; most of the Hague Conventions of 1899 and 1907; the various Geneva Red Cross Conventions; the convention of December 21, 1904, for the exemption of hospital ships from harbor dues and taxes in war time (2 Martens, *Nouveau Recueil Général de Traités*, 3d ser., p. 213); the Declaration of London of February 26, 1909, concerning maritime warfare (7 *ibid.*, p. 39); the Washington Treaty of February 6, 1922, relating to the use of submarines and noxious gases in warfare (2 Hudson, *International Legislation*, 1931, p. 794); the Geneva Protocol of June 17, 1925, prohibiting the use of asphyxiating, poisonous or other gases and bacteriological methods of warfare (3 *ibid.*, p. 1670); the Convention of July 27, 1929, relating to the treatment of prisoners of war; and the convention of the same date for the amelioration of the condition of the wounded and the sick of armies in the field (27 *American Journal of International Law*, 1933, Supp., pp. 59 and 43).

As to the effect of war on treaties made in contemplation of war, the commission appointed under the Act of Congress of March 3, 1849, said, relative to the binding force of Article 26 of the treaty of April 5, 1831, between the United States and Mexico, which provided for a certain period of time for the withdrawal of citizens in the event of war between the two countries (4 Moore, *History and Digest of International Arbitrations*, 1898, pp. 3334-3335): "And although, as a general principle, the breaking out of war puts an end to all treaties between the belligerents, yet it is not universally so." The commission then quoted with approval the following from Kent (1 *Commentaries on American Law*, pp. 175, 177):

As a general rule the obligations of treaties are dissipated by hostility, and they are extinguished and gone forever unless revived by a subsequent treaty. But if a treaty contains any stipulations which contemplate a state of future war, and make provision for such an exigency, they preserve their force and obligation when a rupture takes place. All those duties of which the exercise is not suspended necessarily by the war subsist in their full force. The obligation of keeping faith is so far from ceasing in time of war that its efficacy becomes increased from the increased necessity for it.

The commission added, also from Kent: "Where treaties contemplate a permanent arrangement of national rights, or which by their terms are meant to provide for an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war." In *Techt v. Hughes* the New York Court of Appeals said "treaties which regulate the conduct of hostilities of course survive war." See in the same sense the opinion of Wheaton (Lawrence ed.), p. 472, and the authorities there cited; Hall, *International Law* (6th ed. 1909), p. 381, and Oppenheim, 2 *International Law* (4th ed.), p. 203.

In practice, States which have been parties to such treaties have rarely denied that they were binding upon them during war because, as stated above, no object would be served by entering into them if it were otherwise. An exception was the action of the Government of Spain in issuing a decree on April 23, 1898, following the outbreak of war between that country and the United States, declaring that the war had terminated all treaties, conventions, compacts, or other agreements in force between the two countries at the time of the outbreak of the war. Among them was the treaty of October 27, 1795, Article 13 of which provided that in the event of war between the two countries, a year should be allowed the merchants of either country residing in the cities and towns of the other for collecting and removing their goods and merchandise. The view of the Spanish Government that this and all other treaties were *ipso facto* terminated by the outbreak of war was vigorously challenged by the Government of the United States, and the attention of the Spanish Government was called to the fact that if such stipulations as Article 13 of the treaty of 1795 were terminated, "they would be subject to the singular fate of ceasing to be in force whenever they should become applicable." 5 Moore, *Digest of International Law*, pp. 375-376.

As to the history during the World War of the Hague Conventions of 1899 and 1907 which dealt with the conduct of war and which undertook to define the rights and duties of belligerents and neutrals, see Tobin, *Termination of Multipartite Treaties* (1933), p. 31 ff; and 1 Garner, *International Law and the World War* (1920), p. 17 ff. With the exception of the Hague Convention of 1907 for the adaptation to naval warfare of the principles of the Geneva Convention, none of the Hague Conventions dealing with the conduct of war was named in the Treaty of Versailles as being among those which were to be applied as between Germany and the Allied and Associated Powers, apparently on the theory that they had not been suspended or terminated by the war and consequently did not need to be revived or reestablished.

While ordinarily little difficulty is experienced in determining the intention of the parties in regard to treaties which deal with matters appertaining to war, the problem is more difficult in the case of those which regulate their

relations in time of peace, such, for example, as treaties of commerce, navigation, communication, extradition etc. Such treaties seldom contain any express provisions which indicate the intention of the parties regarding their status during the existence of war. But it does not necessarily follow from the silence of the treaty that the parties had no intention. In such cases the intention may sometimes be discovered by an examination of the *travaux préparatoires* or deduced from the circumstances attending the conclusion of the treaty. Thus the discussion at the Barcelona Conference of 1921 on the communication and transit conventions showed that it was the intention of the parties that those conventions should not be terminated by war between any of the parties, but that their operation might be suspended so far as the rights and duties of belligerents and neutrals required. Barcelona Conference, *Verbatim Report* (Geneva, 1921), pp. 106-107.

Turning now to a consideration of paragraph (b), it will be seen that it deals with treaties which are suspended during the continuance of war between two or more of the parties, and it lays down the tests by which treaties falling within this class may be determined. Within this class would fall every treaty not envisaged by paragraph (a), unless the treaty expressly provides otherwise. If the treaty itself does not contain an express provision that it shall operate in time of war, and is one which by reason of its nature and purpose was not manifestly intended by the parties to be operative in time of war between two or more of them, it is suspended as between enemy belligerents during the continuance of a war between two or more of the parties—unless it contains a provision which otherwise provides.

The latter qualification results from the introductory phrase to paragraph (b): “unless otherwise provided in the treaty itself”. This phrase envisages such cases as where a treaty otherwise falling within the category of treaties defined by paragraph (b), expressly provides that it is terminated for all parties or is terminable upon the outbreak of war between two or more of the parties, or is terminated or is terminable as between any parties which find themselves in a state of war with one another (that is, as between enemy belligerents) or is suspendable (but not suspended) as between such parties. Such treaties are not automatically “suspended” as provided in paragraph (b); they are either automatically terminated or else remain in force until terminated or suspended, as the case may be. Treaties which provide by their own terms that they shall be suspended upon the beginning of war between the parties or some of them, are rare—if there are any at all—but those which provide that they *may* be suspended at the option of a belligerent party are rather common today. Thus the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, adopted by the International Labor Conference at Washington, November 28, 1919 (Art. 14) provided that “The operation of the provisions of this Convention may be suspended in any country by the Government in the event of war or other emergency endangering the na-

tional safety." (1 Hudson, *International Legislation*, 1931, p. 402.) A similar provision is found in the Convention concerning the Regulation of Hours of Labor in Commerce and in Offices, adopted by the International Labor Conference on June 28, 1930 (Art. 9). The draft Convention Concerning Hours of Work in Coal Mines, adopted on the same date, omitted the clause as to the effect of war on the convention, for the reason, it was felt, that the purpose would be accomplished by the phrase . . . "emergency endangering national safety", which was inserted in the convention. 1 International Labor Conference, 1930 (pt. 3), p. 842.

The Washington Treaty of February 6, 1922 (Art. 22), relative to naval disarmament, allows any party which becomes engaged in war, whenever in its judgment its naval defense so requires, to notify the other parties of its decision to suspend the performance of its obligations during the period of hostilities (except those under Arts. 13 and 17). It also allows a neutral party to suspend its obligations thereunder whenever a belligerent party does so. (2 Hudson, *op. cit.*, p. 821.)

The Convention of October 13, 1919, on the Regulation of Aërial Navigation (Art. 38), provides that "in case of war, the provisions of the present Convention shall not affect the freedom of action of the contracting States either as belligerents or as neutrals." (1 *ibid.*, p. 374.) This means that during war the parties, whether belligerents or neutrals, *may* suspend the performance of their obligations under the convention. The Statute on the Régime of Navigable Waterways of International Concern annexed to the convention opened for signature at Barcelona, April 20, 1921 (Art. 15), declares that "this statute does not prescribe the rights and duties of belligerents and neutrals in time of war." The Statute adds, however, that "it shall continue in force in time of war so far as such rights and duties permit." (*Ibid.*, p. 656.) The Convention of December 9, 1923, on the Transmission in Transit of Electric Power (Art. 9), contains identically the same provisions. (2 *ibid.*, p. 1176.)

It will be seen that most of the treaties mentioned above do not provide that they are or shall be suspended during war; they merely provide for the optional right of suspension by the parties of their obligations under them. The rule laid down by paragraph (b) as to the suspension of treaties does not apply to treaties containing such provisions because they are excepted from its application by the introductory phrase "unless otherwise provided in the treaty itself".

Considering now the treaties which are not excluded by the phrase "unless otherwise provided in the treaty itself" and to which the rule laid down by paragraph (b) is intended to apply, it is necessary to emphasize that not every treaty which fails to provide expressly for performance in time of war is suspended during war; it must at the same time be one which by reason of its nature and purpose was not manifestly intended by the parties to operate in time of war. This additional test results from the use of the word "and"

which separates the two clauses of paragraph (b). There are certain kinds of treaties which by reason of their nature and purpose can be reasonably assumed were not intended by the parties to operate in time of war between some or all of them. Examples are treaties which provide for political or economic unions or associations between States, and treaties of defensive alliance, mutual assistance, security and non-aggression.

The United States Supreme Court in the *Karnuth* case (*supra*) stated that "treaties of amity, of alliance, and the like, having a political character, the object of which 'is to promote relations of harmony between nation and nation' are generally regarded as belonging to the class of treaty stipulations that are absolutely annulled by war." The draft of the Institute of International Law (Art. 2) lays down the rule that war automatically terminates agreements of international associations, treaties of protection, control, alliance, and guaranty; treaties concerning subsidies; treaties establishing a right of security or a sphere of influence, generally treaties of a political nature and treaties the application or the interpretation of which shall have been the direct cause of the war. Other treaties which by reason of their nature and purpose are probably not manifestly intended to operate in time of war are those relative to arbitration and conciliation; certain treaties of guaranty; treaties for the payment of subsidies and, in general, all treaties the execution of which in time of war would involve direct relations between enemy parties or other conduct which might result in handicapping a belligerent and in aiding his enemy. The execution of such treaties is often said to be incompatible with the prosecution of war by one party against another. Included in this category would be all treaties of commerce which involved trade or communication between hostile parties, treaties providing for the delivery of commodities, treaties relative to navigation by land, air, or water, and treaties for the payment of annuities—the latter because performance during war would enrich the enemy. But the obligations of performance, including the payment of arrears, revives upon the termination of war. In the case of the Russo-Dutch Loan, the British Government continued to make payments to Russia during the Crimean War in pursuance of the treaty of May 19, 1815, with Holland and Russia (revived in 1831). The treaty, however, stipulated that the payments should not be interrupted by the outbreak of war between the parties. It was not therefore a case which illustrates the point here under discussion.* McNair (22 *Recueil des Cours*, 1928, p. 501), remarks that the British Government adopted this course because it considered that it was under a moral duty to execute a legal obligation. The case, he says, is an illustration of the principle that the correct test as to the effect of war upon treaties is the intention of the parties.

As to the effect of war on treaties of commerce, navigation, and those generally involving intercourse or communication between the parties, there is a difference of opinion among writers. Some hold that they are extinguished by the outbreak of war, while others maintain that they are only suspended. The latter view is more in accord with the better and more

recent juridical opinion, and also more in accord with reason and the necessities of modern international life. See in this sense Borchard, 38 *Yale Law Journal* (1928-29), p. 516; 5 Moore, *Digest of International Law* (1906), p. 385; and Hershey, *Essentials of International Public Law* (1927), p. 564.

Courts have generally held that bipartite treaties of commerce are either automatically terminated or suspended. There is no agreement among them as to whether they are terminated or suspended. See, among others, the decision of the German *Reichsgericht* of May 23, 1925, III *Entscheidungen des Reichsgericht in Zivilsachen*, p. 40, and 53 *Journal du Droit International* (1926), p. 465, holding that the treaties of commerce of 1894 and 1904 between Germany and Russia, "like all treaties of commerce lost their force" upon the outbreak of war between the two countries. It is difficult to see how the court could have held otherwise, since the German Government had publicly declared at the outbreak of the war that all such treaties had "lapsed". See also the decision of the *Oberlandesgericht* of Hamburg, December 16, 1916 (1 *Bulletin de l'Institut Intermédiaire International*, 1919, p. 119), holding that the war "ended the effectiveness" of the convention of 1891 relative to commerce between Germany and Italy as well as the bilateral convention with Italy relative to the protection of literary property. See also the decision of the *Cour de Paris* of January 7, 1921 (48 *Journal du Droit International*, 1921, p. 197, the case of *Kultze*), holding that the naturalization convention of February 22, 1868, between Germany and the United States was annulled, or "at least suspended", in consequence of the state of war between the two countries. The Greek Tribunal Civil of Larissa (5 *Revue de Droit International Privé*, 1909, 340), however, held in 1907 that the most-favored-nation clause in the treaty of commerce of 1855 between Greece and Turkey was not terminated by the war of 1897 between the two countries, but was merely suspended.

As stated above, Article 35 of this Convention does not recognize that any treaties, whatever their character, are terminated by the outbreak of war. It recognizes, however, that certain treaties, which would presumably include those mentioned above which were held to have been terminated by war, are suspended as between enemy belligerents during war and may be terminated at the end of the war by action of the parties.

It will be noted that the rules laid down in Article 35 apply equally to both bipartite and multipartite treaties. This results from the phrases "between two or more of the parties" and "war between two or more of them" found in both paragraphs (a) and (b). It may happen, as it did during the World War, that all the parties to certain multipartite treaties were belligerents. In that case there would seem to be no reason why such treaties should not stand on the same footing as bipartite treaties to which both belligerents are parties. Cf. Hurst, article cited, 2 *British Year Book of International Law*, 1921-22, p. 40. On the other hand, if some of the parties are neutral, the situation is different.

Writers on international law are in substantial agreement that, in the case

of multipartite treaties to which neutral States (or, as is sometimes said, "third" states) are parties, the outbreak of war between some of the parties does not *ipso facto* or otherwise terminate or even suspend the operation of such treaties as between the belligerent and neutral parties, nor, of course, as between the neutral parties themselves. At most, it terminates or suspends the operation of the treaty only as between the opposing belligerent parties. Cf. the report of M. Politis to the Institute of International Law in 1910 (23 *Annuaire*, p. 262), where the view was defended that war between certain parties to a multipartite treaty does not affect the status of the treaty as between co-belligerents or as between belligerent and neutral parties. The rule adopted by the Institute (Art. 9) was (in part) as follows: "Collective agreements shall remain in force in the relations of each of the belligerent States with the third contracting State." See in the same sense Rühländ, article cited, 32 *Niemeyer's Zeitschrift für Internationales Recht* (1924), p. 74 ff. Anzilotti, 1 *Cours de Droit International* (Gidel trans., 1929), p. 456, interprets the stipulations of the treaties of peace at the end of the World War as being based on the view that collective treaties are concluded on the assumption that they are not automatically extinguished by the fact of war, not even as between the belligerents themselves, although they may be suspended as between the opposing belligerent parties. Cf. also the opinion of McNair, "*Terminaison et Dissolution des Traités*," 22 *Recueil des Cours* (1928), p. 510, who asserts that the presence of neutrals among the parties to a multipartite treaty has the effect of maintaining the treaty in force among all the parties including the belligerent enemy parties. See also Tobin, *Termination of Multipartite Treaties* (1933), p. 122, who, on the basis of a detailed examination, concludes that "subject to numerous exceptions . . . , multipartite conventions may be said to be generally suspended so far as they concern direct relations between belligerents, but to remain unaffected where neutrals are involved." It happened that at the outbreak of the World War all the guaranteeing parties (Great Britain, France, Germany and Russia) to the treaty of November 2, 1907, for the guarantee of the integrity of Norway, were at war, but no claim was made by any belligerent party that the treaty was terminated as a result of the war or that it was terminable by the action of any belligerent party thereto. The Government of Norway maintained, very correctly, it would seem, that the treaty was unaffected by the outbreak of the war, although Norway subsequently denounced it on the ground of its incompatibility with her obligations under the Covenant of the League of Nations. 31 *Revue Général de Droit International Public* (1924), p. 299.

A class of multipartite treaties which has received special attention in all discussions of the affect of war on treaties are those for the creation of international unions, such as the postal, geodetic, telegraphic, metric, seismologic, railway, and sanitary unions, the unions for the protection of industrial, literary and artistic property, the union for the exploration of the sea, the

International Institute of Agriculture, and others, nearly all of which are silent as to their war-time status. There is a general agreement among writers on international law that the outbreak of war between some of the parties to such treaties does not *ipso facto* abrogate them, but that as between the belligerent parties their execution is or may be suspended in so far as it is incompatible with a state of war. The doctrine is reviewed by Rühlmann in his article cited above. His own conclusion is that such treaties remain in force as between belligerents and neutrals, but that their application may be suspended for a time by the necessities of war. Neumeyer, who has given special attention to the subject of international unions, expresses the opinion that "the union ceases to exist between the opposing belligerents, but until denounced it has a continuous existence between the allied belligerents on each side and in their relations with neutral States." "*Les Unions Internationales*," 2 *Revue de Droit International de Sciences Diplomatiques, Politiques et Sociales* (1924), p. 139.

An examination of the practice during the World War in regard to this class of treaties shows that the effect of the war varied somewhat, depending on the nature of the treaty and the purposes of the union created by it. In the case of the Universal Postal Union treaty, the mutual interdiction of communication between opposing belligerents and the establishment of the blockade prevented the full execution of the treaty, but the Central Bureau continued to function and received membership contributions from both belligerent and neutral states. Substantially the same may be said of the treaty relative to international railway goods traffic and of the telephone and radio conventions. The provisions of such conventions which involved intercourse between opposing belligerent parties were uniformly regarded as suspended as between such parties, whereas those which did not involve intercourse, communication or other action incompatible with a state of war, remained in force. In the case of the conventions for the establishment of the industrial, literary and artistic property unions, the central bureaus continued to perform their functions, and although certain provisions of these conventions were partially or totally suspended as between the opposing belligerents when their execution would have interfered with the prosecution of the war, they were not regarded as having been abrogated by the existence of war between some of the parties. The International Office of Public Health established at Paris in pursuance of the Sanitary Convention of 1903 continued to discharge most of its functions, although the convention was partially suspended during the war. As the execution of the treaty for the establishment of the International Institute of Agriculture did not involve any relations between the opposing belligerent parties it does not appear to have been regarded as suspended as between any parties. Hobson, *The International Institute of Agriculture* (1931), p. 73.

From an examination of the practice during the World War it may be concluded that such parts of treaties falling within the class here under discus-

sion as envisaged direct relations between opposing belligerent parties were generally treated as suspended as between such parties. On the other hand, such parts as dealt with individual personal or property rights received a limited application even between opposing belligerents. Those which dealt with the setting up of international bureaus or offices and their activities received practically full application, such application no doubt being facilitated by the fact that most of these bureaus and offices were located in neutral territory. Where, however, the execution of the treaty was regarded as incompatible with a state of war, that is, where execution would have compromised the national defence, it was usually treated as suspended. There was a manifest disposition to resume execution from the moment of the cessation of hostilities, regardless of the fact that in some cases several years elapsed before the conclusion of the treaty of peace. See the analysis of the practice and the conclusions of Tobin, *Termination of Multipartite Treaties* (1933), p. 81. Most of the administrative union treaties which were in force at the outbreak of the war were enumerated in the treaties of peace of 1919–1923, which were “to be applied as between Germany and her allies and those of the Allied and Associated Powers parties thereto.” (See, for example, Arts. 282, 283 and 286 of the Treaty of Versailles.) Among the parties to the treaties thus to be applied were both belligerents and neutrals during the war. This enumeration, however, is not to be interpreted as implying that the treaties had been abrogated by the war and, therefore, needed to be revived in order to be in force after the war. In all probability their survival would not have been contested. To remove any possible doubt as to their status, the peace conference took the precaution to declare expressly that they should be continued in force.

As to the multipartite private law conventions adopted at The Hague in 1902 and 1905 relative to marriage, divorce, civil procedure, guardianship of minors etc., the German courts took the position that such of their provisions which, if executed, would have interfered with the prosecution of the war, or where there was lack of reciprocity between the parties, were suspended during the war. The Convention of July 17, 1905, relative to civil procedure was held not to be in force as between the belligerents during the war. The jurisprudence is summarized by Tobin, *op cit.*, p. 112 ff, and in 32 *Niemeyer's Zeitschrift für internationales Recht* (1924), p. 134 ff. A good many of the decisions are reproduced in Kusters and Bellemans, *Les Conventions de la Haye de 1902 et 1905 sur le Droit International Privé* (1921), p. 1156 ff, and in 1 *Bulletin de l'Institut Intermédiaire International* (1919), p. 118 ff. The Belgian Court of Appeal (Brussels) treated the Convention concerning the conflict of laws relative to divorce and separation as remaining in force even as between the opposing belligerent parties until denounced in accordance with the terms of the convention. 2 *Pasicrisie Belge* (1921), p. 21. But the Court of Cassation expressed the contrary opinion by a decision of March 3, 1930. 1 *ibid.* (1930), p. 137, and 25 *Revue de Droit International Privé*

(1930), p. 306. It held, however, that as between co-belligerent parties (*e.g.*, between Belgium and Russia), and as between belligerent and neutral parties, such conventions remained in force and were applicable during the war. In short, they were abrogated only as between the belligerent enemy parties. The Italian Court of Venice, by a decision of October 9, 1917, held that the Hague Convention of 1902 relative to divorce was not abrogated between Italy and Germany as a result of the war. Kusters and Bellemans, *op. cit.*, p. 493.

The *Oberlandesgericht* of Hamburg rendered a decision on July 14, 1917 (*Deutsche Juristen Zeitung*, 1917, p. 907), to the effect that, while war *ipso facto* abrogates bipartite conventions between opposing belligerents, it has no such effect upon multipartite conventions such as the Berne Convention of September 9, 1886, for the Protection of Literary Property, when the parties include both belligerents and neutrals. In this case the plaintiff invoked the protection of the convention, while the defendant argued that it had been annulled by the outbreak of war. The court admitted that the bipartite convention on the same subject between Germany and Italy had been abrogated, but it denied that the international union created by the Berne Convention was dissolved by the war, since it included neutrals as well as belligerents among its parties. Cf. also the decision of the *Reichsgericht* of October 26, 1914 (85 *Entscheidungen des Reichsgerichts in Zivilsachen*, p. 375), referred to in the earlier part of this comment. The court did not in this case make a direct pronouncement on the question as to whether in the absence of legislation incorporating the Convention of March 20, 1883, for the Protection of Industrial Property into German municipal law, the convention would have remained in force as between France and Germany. In view of other decisions of the *Reichsgericht* regarding the effect of war on multipartite treaties, we are justified in concluding that it would not have so held.

The Japanese Supreme Court, by a decision of June 20, 1915, held that the Convention of Paris for the Protection of Industrial Property was not in force as between Germany and Japan from the outbreak of the war until the conclusion of peace. Tobin, *Termination of Multipartite Treaties* (1933), p. 102. The Supreme Court of Austria, by a decision of December 4, 1916, appears to have reached the same conclusion as to the status of the same convention, as between Austria and France during the World War. 13 *Revue de Droit International Privé* (1917), p. 594.

As regards the multipartite convention relative to the transportation of merchandise by rail, the *Reichsgericht*, by a decision of June 27, 1923 (29 *Deutschen Juristen Zeitung*, p. 143), held that it was put out of force as between Germany and France by the outbreak of war between the two countries in 1914. But the *Oberlandesgericht* of Karlsruhe rendered a decision on June 20, 1917, holding that so far as relations between Germany and The Netherlands (a neutral party) were concerned, the same convention remained

in force. 1 *Bulletin de l'Institut Intermédiaire International* (1919), p. 120. This decision was apparently in accord with that of the *Reichsgericht* referred to above, which evidently meant to limit the effect of war upon multipartite treaties to relations between opposing belligerent parties and not to extend it to relations between belligerent parties and neutral parties.

This review of the jurisprudence shows that the view of the courts generally was that multipartite conventions to which both belligerent and neutral States were parties were "suspended," "abrogated" or "put out of force" (the phraseology employed varied), as between opposing belligerent parties during the World War, especially when their application involved relations between the belligerent parties which were deemed incompatible with a state of war; but that as between co-belligerents on one side, and as between belligerent and neutral parties, and of course as between neutral parties, they remained in force during the war unless denounced in accordance with their own terms.

The rule laid down in Article 35 regarding the effect of war on multipartite treaties is in accord with the prevailing doctrine and jurisprudence as summarized above. Under paragraph (b), if war breaks out between two or more of the parties to a multipartite treaty, it is suspended, in the circumstances there mentioned, but only "as between the hostile belligerents," i.e., as between enemy parties. It is not suspended as between belligerent and neutral parties, nor as between co-belligerent parties on each side.

It remains now to consider the last clause in paragraph (b) where, after mentioning the circumstances under which a treaty is suspended during the continuance of war between two or more of the parties, it is added: "And unless contrary provision is made at the conclusion of the war, it will again come into operation when the state of war is ended." The effect of this rule is, that if the suspended treaty is not expressly terminated by the treaty of peace or other agreement at the close of the war, it is automatically revived as from the date when the state of war ends. This date is the date when the war as a legal state or condition terminates, which is usually the date of the coming into force of the treaty of peace—a date which may in fact be some months or even years after the date of the cessation of hostilities. This Convention does not undertake to define the term "war".

The rule laid down in paragraph (b) that, unless the parties otherwise provide, treaties which have been suspended during war automatically revive at the end of the war, seems to be a logical and reasonable one. This rule was approved by the United States Supreme Court in the case of the *Society for the Propagation of the Gospel v. New Haven* (1823), 8 Wheaton 464, where, after referring to treaties which are suspended during war, the court said: "and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace." It was also the rule laid down by Bluntschli in his code, Article 718 of which reads: "Conventions which have been suspended during war *rentrent en vigueur de plein droit* [upon the conclusion of peace], unless they are

modified by the treaty of peace or concern things which the war has destroyed or modified.”

In practice, treaties of peace usually contain a clause dealing with the status of treaties as they were affected by the war. Sometimes they provide that all or certain of the treaties between the belligerent parties were terminated upon the outbreak of the war, sometimes they declare certain of them to be “revived”, “renewed”, “re-established” or “confirmed”, but sometimes they are entirely silent regarding the matter. As to the practice see Jacomet, *La Guerre et les Traités* (1909), p. 74 ff; 2 Fauchille, *Traité de Droit International Public* (1921), p. 56 ff; 2 Hyde, *International Law* (1922), sec. 550; Crandall, *Treaties, Their Making and Enforcement* (2d ed., 1916), p. 451 ff; and Phillipson, *Termination of War and Treaties of Peace* (1916), p. 255. As to the provisions of the treaties of peace following the World War, see Tobin, *Termination of Multipartite Treaties* (1933), p. 140 ff. The Treaty of Versailles (Art. 282 ff) enumerated the multipartite treaties, conventions and agreements “which shall alone be applied as between Germany and those of the Allied and Associated Powers party thereto.” As to bipartite treaties, each Allied and Associated Power was authorized to notify Germany of the bipartite treaties or conventions which such Power wished to revive with Germany. Those which were not so notified were to be considered as terminated (Art. 289). Opinions differ as to whether as regards those which were declared terminated, the Peace Conference acted on the assumption that they were terminated *ipso facto* by the outbreak of the War and whether likewise the revival clauses were based on that assumption, or whether it was the decision of the Peace Conference which terminated them, rather than the war itself. The renewal clauses may have been inserted as a precaution and in order to remove doubt and possible controversy as to the status of the treaties, without any intention of asserting the principle of automatic termination. In any case, the dispositions of such clauses are usually dictated by the political interests of the victorious belligerent and may not therefore enunciate any juridical principle concerning the effect of war on treaties.

ARTICLE 36. SETTLEMENT OF DISPUTES

(a) If there should arise between two or more of the parties to this Convention a dispute of any kind relating to the interpretation or application of the provisions of the Convention, and if the dispute cannot be settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties providing for the settlement of international disputes.

(b) In case there is no such agreement in force between the parties, the dispute shall be referred to arbitration or judicial settlement. Failing agreement by the parties upon the choice of another tribunal, the dispute shall be referred to the Permanent Court of International Justice; the court may exercise jurisdiction over the dispute, either under a special agreement between the parties, or upon an application by any party to the dispute.

[See comment on identic article (28) of Convention on Extradition.]

APPENDIX 1

CONVENTION ON TREATIES

Adopted by the Sixth International Conference of American States at Havana, February 20, 1928.¹

Article 1

Treaties will be concluded by the competent authorities of the States or by their representatives, according to their respective internal law.

Article 2

The written form is an essential condition of treaties.

The confirmation, prorogation, renewal or continuance, shall also be made in writing unless other stipulations have been made.

Article 3

The authentic interpretation of treaties, when considered necessary by the contracting parties, shall likewise be in writing.

Article 4

Treaties shall be published immediately after exchange of ratifications. The failure to discharge this international duty shall affect neither the force of treaties nor the fulfilment of obligations stipulated therein.

Article 5

Treaties are obligatory only after ratification by the contracting States, even though this condition is not stipulated in the full powers of the negotiators or does not appear in the treaty itself.

Article 6

Ratification must be unconditional and must embrace the entire treaty. It must be made in writing pursuant to the legislation of the State.

In case the ratifying State makes reservations to the treaty it shall become effective when the other contracting party informed of the reservations expressly accepts them, or having failed to reject them formally, should perform action implying its acceptance.

In international treaties celebrated between different States, a reservation made by one of them in the act of ratification affects only the application of the clause in question in the relation of the other contracting States with the State making the reservation.

Article 7

Refusal to ratify or the formulation of a reservation are acts inherent in national sovereignty and as such constitute the exercise of a right which violates no international stipulation or good form. In case of refusal it shall be communicated to the other contracting parties.

¹ The French, Portuguese and Spanish versions of this convention are also authoritative. The English version reproduced here is from the English version of the Final Act of the Sixth International Conference of American States, p. 135. See, also, 22 *American Journal of International Law*, Supp. (1928), p. 138; 4 Hudson, *International Legislation* (1931), p. 2378.

On Nov. 1, 1934, the convention was in force for Brazil, Dominican Republic, Haiti, Nicaragua and Panama.

Article 8

Treaties shall become effective from the date of exchange or deposit of ratification, unless some other date has been agreed upon through an express provision.

Article 9

The acceptance or the non-acceptance of provisions in a treaty, for the benefit of a third State which was not a contracting party, depends exclusively upon the latter's decision.

Article 10

No state can relieve itself of the obligations of a treaty or modify its stipulations except by the agreement, secured through peaceful means, of the other contracting parties.

Article 11

Treaties shall continue in effect even though the internal constitution of the contracting States has been modified. If the organization of the State should be changed in such a manner as to render impossible the execution of treaties, because of division of territory or other like reasons, treaties shall be adapted to the new conditions.

Article 12

Whenever a treaty becomes impossible of execution through the fault of the party entering into the obligation, or through circumstances which at the moment of concluding it were under control of this party and unknown to the other party, the former shall be responsible for damages resulting from its non-execution.

Article 13

The execution of a treaty may, through express stipulation or by virtue of special agreement, be placed wholly or partly under the guaranty of one or more States.

The guarantor State can intervene in the execution of the treaty only by virtue of a request by one of the interested parties and then only under the conditions which were stipulated for intervention. When intervention takes place, only such measures may be employed by the guarantor State as are sanctioned by international law, and without requirements of greater scope than those of the State which has been guaranteed.

Article 14

Treaties cease to be effective;

- A) When the stipulated obligation has been fulfilled.
- B) When the length of time for which it was made has expired.
- C) When the resolutive condition has been fulfilled.
- D) By agreement between the parties.
- E) By renunciation of the party exclusively entitled to a benefit thereunder.
- F) By total or partial denunciation, if agreed upon.
- G) When it becomes incapable of execution.

Article 15

The caducity of a treaty may also be declared when it is permanent and of non-continuous application, on condition that the causes which originated it have disappeared and when it may logically be deduced that they will not reappear in the future.

The contracting party invoking this caducity may, upon not obtaining the consent of the other party or parties, appeal to arbitration, the contracted obligation to remain in force if a favorable award is not obtained and while the decision is being made.

Article 16

Obligations contracted in treaties shall be sanctioned in cases of non-compliance and when all diplomatic negotiations have been exhausted without success, by decision of a court of

justice or an arbitral tribunal, within the limits and according to the procedure in use at the time in which the infraction is alleged.

Article 17

Treaties whose denunciation may have been agreed upon and those establishing rules of international law, can be denounced only in the manner provided thereby.

In the absence of such a stipulation, a treaty may be denounced by any contracting State, which State shall notify the others of this decision, provided it has complied with all obligations covenanted therein.

In this event the treaty shall become ineffective, as far as the denouncing State is concerned, one year after the last notification, and will continue in force for any other signatory States, if any.

Article 18

Two or more States may agree that their relations are to be governed by rules other than those established in general conventions celebrated by them with other States.

This precept applies not only to future treaties but also to those in effect at the time of concluding this convention.

Article 19

A State not participating in the making of a treaty may adhere to the same if none other of the contracting parties be opposed, its adherence to be communicated to all. The adherence shall be deemed final unless made with express reservation of ratification.

Article 20

The present convention does not affect obligations previously undertaken by contracting parties through international agreements.

APPENDIX 2

DAVID DUDLEY FIELD'S DRAFT CODE

From Field's *Outlines of An International Code*¹

TREATIES

188. The term "treaty," as used in this Code, means a written agreement between two or more nations for the performance or omission of an act creating, terminating, or otherwise affecting an international right or relation.

189. Any two nations can make a treaty.

190. The consent of a nation to a treaty can be signified with effect only in the form, and through the executive or other department, authorized by its law, or through its public minister duly empowered.

191. The executive or other department of a nation which is in a state of revolution, if such department is not in the peaceable possession of its powers, can make temporary treaties only.

192. Ratification of a treaty by a nation is necessary to render it binding thereon in the following cases only:

1. Where such ratification is therein expressly made a condition;
2. Where the treaty is concluded by the executive or other department of the nation, and ratification thereof is, in such cases, required by its law; or,
3. Where the treaty is concluded through a public minister of the nation who is not authorized to dispense with such ratification, or who, being thus authorized, does not expressly dispense with the same.

193. A nation by whose public minister a treaty is concluded in conformity with his powers, is bound to ratify the same, if his powers contain an express agreement, authorized

¹ New York (1876), pp. 78-83. The author's notes are omitted.

by the law of the nation, that it shall be ratified when so concluded; unless by the terms of the treaty its ratification is optional with such nation; or unless, before the time agreed on for its ratification, an event has occurred or been discovered which if occurring or discovered after its ratification would authorize such nation to rescind or refuse to perform it.

194. Where ratification is refused pursuant to the provisions of the last article, notice of such refusal, stating the reasons thereof, must be forthwith given to the other parties to the treaty.

195. The negotiation of a treaty by a public minister not in accordance with his powers creates no obligation on the part of his nation to ratify it.

196. A treaty which is binding on a nation without ratification, is binding from the date of its signature, unless therein otherwise expressed.

197. A treaty which requires ratification binds the ratifying nation from the time of ratification, unless therein otherwise expressed.

198. If a treaty interferes with the rights, under a pre-existing treaty, of a nation other than a party to the new treaty, it is, to the extent of the interference, valid, as to such nation, only so far as it submits to the execution thereof.

199. Any two or more nations may, by special compact, modify the application of any of the provisions of this Code, in respect to themselves, and persons and things within their exclusive jurisdiction, but not in respect to the other parties to the Code, or their members.

200. Except in respect to an act therein stipulated to be performed at a certain time, the performance of a treaty must be demanded before any nation, party thereto, can be placed in default.

201. All communications, written or verbal, between the parties to a treaty, preceding its signature, and relating to the subject thereof, are merged in the treaty.

202. An obligation created by treaty is extinguished, either,

1. By its full performance; or,
2. By renunciation of the party entitled to performance; or,
3. By the subsequent permanent impossibility of performance, without the fault of the party bound; or,
4. By fulfillment of the conditions, or the expiration of the time, expressed in the treaty for its extinguishment; or,
5. By breach of its conditions by the nation entitled to performance; or,
6. By rescission of the treaty, through common consent.

INFORMAL COMPACTS

203. Compacts, other than treaties, may be made in writing between nations, without the formality of a treaty.

204. The consent of a nation to an agreement in writing, made on its behalf by a person not authorized, may be given expressly, or by acting under it as if duly concluded and ratified.

APPENDIX 3

BLUNTSCHLI'S DRAFT CODE

From Bluntschli's *Le Droit International Codifié*¹

DES TRAITÉS

1. CONDITIONS ESSENTIELLES ET EFFETS DES TRAITÉS

402

Les états, en tant que personnes indépendantes, peuvent régler par des traités les questions qui les concernent spécialement, et créer ainsi entre eux un droit conventionnel au sens restreint.

¹ Traduit de l'Allemand par M. C. Lardy (3d ed., Paris, 1881), p. 243 ff. Arts. 425-449, dealing with the means of insuring the execution of treaties, the different kinds of treaties, and alliances are omitted, as are also the author's notes.

403

Chaque puissance indépendante est présumée capable de conclure des traités internationaux. Cependant, lorsqu'il est apporté des restrictions au droit d'un état de s'engager par traité, il doit en être tenu compte dans les relations des états entre eux.

404

Pour que le traité oblige l'état, il faut que les personnes appelées à le conclure aient qualité pour représenter l'état.

404 bis.

Le chef de l'État, lorsqu'il est tenu par la constitution d'obtenir le concours et l'assentiment des corps représentatifs (Sénat, Parlement, Conseil fédéral, Chambre des députés), n'est pas considéré, en droit international, comme capable d'engager l'État par un traité conclu sans ce concours et sans cet assentiment.

405

Lorsqu'une personne qui n'avait pas reçu les pouvoirs nécessaires a préparé et signé un traité au nom de l'état, l'état n'est pas lié par le traité, tant qu'il ne l'a pas ratifié. L'autre partie peut se dégager jusqu'à ce moment, à moins qu'elle n'ait renoncé à cette faculté.

406

Lorsque l'état ne ratifie pas le traité conclu en son nom par une personne qui n'a pas reçu les pouvoirs nécessaires, ce traité doit être considéré comme n'ayant jamais existé.

407

L'état qui a retiré un avantage du traité conclu en son nom par une personne qui n'avait pas qualité pour le représenter, doit, en cas de non-ratification du traité, et autant que les choses le permettent, restituer ce qu'il a reçu sans cause.

408

On admet qu'un état conserve sa libre volonté, lors même qu'il est forcé, par sa faiblesse ou par la nécessité, de consentir au traité que lui dicte un autre état plus puissant.

409

Si cependant les personnes qui représentent l'état à la signature d'un traité ne jouissent pas de leur libre volonté, soit par suite d'aliénation mentale ou de l'impossibilité pour elles de se rendre compte de leurs actes, soit parce qu'il est fait usage envers elles de violence ou de menaces sérieuses et immédiates, ces personnes ne sont pas susceptibles de prendre au nom de leur gouvernement des engagements obligatoires.

410

L'obligation de respecter les traités repose sur la conscience et sur le sentiment de la justice. Le respect des traités est une des bases nécessaires de l'organisation politique et internationale du monde.

En conséquence, seront nuls les traités qui portent atteinte aux droits généraux de l'humanité ou aux principes nécessaires du droit international.

411

Sont contraires aux droits reconnus de l'humanité, et nuls par conséquent, les traités qui :

- a) Introduisent, étendent ou protègent l'esclavage (art. 360 et suivants);
- b) Refusent tous droits aux étrangers (art. 381 et suiv.);
- c) Sont contraires à la liberté des mers (art. 307 et suiv.);
- d) Prescrivent des poursuites pour opinions religieuses.

412

Sont contraires au droit international, et nuls par conséquent, les traités qui ont pour but:

- a) L'établissement de la domination d'une puissance sur le monde entier;
- b) La suppression violente d'un état viable, et qui ne menace pas le maintien de la paix.

413

Les traités qui tendent à abroger ou à modifier la constitution ou les lois d'un état ne constituent pas nécessairement une violation du droit international, lorsqu'ils ont été conclus par les représentants de l'état; mais ils seront dans certains cas inexécutables et resteront sans effet.

414

Les traités dont le contenu est en contradiction avec des traités conclus précédemment avec d'autres états, sont nuls dans la mesure en laquelle l'état dont les droits antérieurs sont menacés s'oppose à leur exécution.

415

Chaque état doit respecter même les conditions onéreuses et les engagements dont l'exécution serait blessante pour son amour-propre. Un état peut cependant considérer comme nuls les traités incompatibles avec son existence ou son développement.

416

La validité des traités est indépendante de la forme du gouvernement des états contractants, de leur religion ou de celle de leurs représentants.

2. FORME DES TRAITÉS

417

Les déclarations d'un état, même si elles sont faites à un autre état, ne prennent le caractère de traités que:

- a) S'il en résulte d'une manière évidente l'intention de s'obliger;
- b) Si l'autre état a accepté la promesse résultant de la déclaration.

418

Lorsque, dans le cours d'une négociation, les divers états sont tombés d'accord sur certains points, il n'y a encore qu'un projet de traité; aucune des parties n'est liée.

419

La signature du protocole définitif ou du document spécial contenant le traité, par les envoyés ou agents munis des pouvoirs des états contractants, oblige les états représentés, lorsqu'elle a été faite sans conditions ni réserves. Toutefois la ratification du traité peut être considérée comme ayant été réservée dans certaines circonstances, sans que cela doive être expressément mentionné.

420

Le refus non motivé de ratifier un traité peut, suivant les circonstances être considéré comme contraire aux convenances, porter profondément atteinte au crédit d'un état, et mettre en péril les rapports de bonne amitié qui existaient entre les contractants; mais ce refus ne doit jamais être considéré comme une violation du droit, même lorsque la personne chargée des négociations a agi dans les limites de ses pouvoirs et a signé le traité conformément aux instructions qu'elle avait reçues.

421

Lorsque le traité a été ratifié, les effets en sont reportés, à moins de conventions contraires, au moment de la signature du protocole final par les envoyés ou agents des états contractants.

422

Les traités peuvent être conclus sous toutes les formes qui peuvent servir à formuler les intentions des états contractants.

423

Lorsque le traité doit être rédigé par écrit, on peut ou bien signer en commun un protocole, ou bien rédiger un acte en plusieurs doubles revêtus chacun de la signature des fondés de pouvoirs ou des souverains des divers états contractants, ou bien remettre à l'état auquel le traité confère certains droits une déclaration signée par les représentants des états qui s'obligent envers lui à certaines prestations.

424

Il n'est point nécessaire de porter les traités à la connaissance du public pour les rendre valables et exécutoires, quoique la publicité d'un traité soit une garantie de son exécution.

6. QUAND LES TRAITÉS CESSENT-ILS D'ÊTRE OBLIGATOIRES?

450

Les traités cessent de plein droit d'être obligatoires:

- a) Lorsque la prestation stipulée par le traité a été exécutée;
- b) Lorsque le traité a été conclu pour une durée déterminée et que le temps fixé est écoulé;
- c) Lorsque le traité a été conclu sous une condition résolutoire et que celle-ci se réalise.

451

Lorsqu'un traité a été conclu pour une durée déterminée, le maintien du traité est présumé si, de fait, les parties l'exécutent encore après l'expiration du terme fixé.

452

Le traité n'est plus obligatoire dès que tous les contractants sont d'accord d'en faire cesser les effets.

453

L'état qui a obtenu des droits en vertu d'un traité, peut toujours y renoncer.

454

Le traité ne prend fin, par suite de la dénonciation d'une seule des parties contractantes, que si cela a été expressément réservé, ou si le droit de dénoncer le traité résulte des circonstances.

455

Lorsqu'une des parties contractantes n'exécute pas ses engagements ou viole le traité, la partie lésée a le droit de se considérer comme dégagée.

456

Lorsque l'ordre de faits qui avaient été la base expresse ou tacite du traité se modifie tellement avec le temps, que le sens du traité s'est perdu ou que son exécution est devenue contraire à la nature des choses, l'obligation de respecter le traité doit cesser.

457

Les traités cessent également d'être obligatoires, lorsqu'ils arrivent à être en contradiction avec le développement des droits généraux de l'humanité et avec le droit international reconnu.

458

Les traités dont les dispositions sont devenues incompatibles avec le développement nécessaire de la constitution ou du droit privé d'un état, peuvent être dénoncés par cet état.

459

Lorsque l'exécution d'un traité est devenue impossible, ce traité cesse d'être obligatoire.

460

On peut exiger d'un état qu'il exécute les engagements onéreux contractés par lui, mais on ne saurait lui demander de sacrifier à l'exécution du traité son développement et son existence.

461

La validité des traités ne dépend pas nécessairement du maintien de la paix; elle ne cesse pas de plein droit lorsque la guerre vient à éclater entre les états contractants.

LA GUERRE

3. DROITS CONTRE L'ÉTAT ENNEMI ET SUR TERRITOIRE ENNEMI

538

Les traités conclus entre les états belligérants ne sont pas nécessairement suspendus ou rompus par la déclaration de guerre.

Les traités ne perdent leur efficacité, en temps de guerre, que si leur exécution est incompatible avec la guerre elle-même.

Les traités conclus spécialement à l'occasion de la guerre n'acquièrent de valeur que par la guerre.

APPENDIX 4

FIGLIO'S DRAFT CODE

From Fiole's *International Law Codified*¹

CESSION OF TERRITORY AND RESULTING ANNEXATION

EFFECTS OF CESSION AND ANNEXATION

154. International treaties and every right of the state with regard to its territorial possessions must be considered as extending fully to the annexed territory.

On the other hand, international treaties concluded by the ceding state cease to be applicable to it. In like manner the exercise of every international right by the former sovereign ceases *ipso jure ipsoque facto* with regard to the ceded territories, unless the treaty of cession otherwise provides.

155. With regard to third powers, the foregoing rule, so far as the binding force of treaties is concerned, must be subject to their previous recognition of the cession.

Nevertheless, the respective rights belonging to the transferor and transferee states over their respective territorial possessions cannot be disputed, even as regards the consequences of these rights in the international relations of the states.

TITLE II

TREATIES AND THE CONDITIONS FOR THEIR VALIDITY

TREATIES IN GENERAL

744. Any convention between two or more states, drawn up in writing and concluded with a view thereby to create an obligation or to annul or modify one already subsisting, is called a *treaty*.

745. Treaties may be divided into *named* and *unnamed*.

The former are those which by international law are designated by a particular name,

¹ English translation from 5th Italian ed. by E. M. Borchard, New York, 1918. The author's notes are omitted.

derived from the subject-matter of the agreement. Such are treaties of commerce, territorial cession, extradition and the like.

Unnamed treaties are those concluded for different objects, not subsumed under a specific name, but which, nevertheless, affect certain political or social interests of states. They are more commonly called conventions.

746. Whatever the denomination of a written act concluded by the sovereignty of the state to declare its will to bind itself, the resulting international obligation with all its effects should be considered as subsisting whenever the act complies with the substantial conditions necessary to its validity.

REQUIREMENTS FOR THE VALIDITY OF A TREATY

747. The conditions necessary to the validity of a treaty are:

- a. The capacity of the parties;
- b. Reciprocal consent, legally expressed;
- c. A lawful and attainable object, according to the principles of international law.

CAPACITY TO CONCLUDE A TREATY

748. Any state which enjoys rights of sovereignty must be deemed capable, in principle, of concluding a treaty and thus contracting legal obligations and acquiring rights with respect to the other contracting party, subject, however, to the limitation set forth in rule 739. [Invalidity of obligations contrary to a rule of international "common" law].

This capacity, furthermore, may be possessed by associations to which international personality has been attributed (see rule 81) within the limits, nevertheless, of the purposes for which personality was recognized and is considered as subsisting.

749. The power to conclude treaties may be attributed to states not fully possessed of international personality, when, by the constitutional law governing their union, this power is reserved to them for certain specific objects.

750. In a state, constituted under the form of a federated state or of a confederation, the power of the individual states to conclude treaties must be determined by their international personality, as fixed in the constitutional compact.

PERSONS COMPETENT TO CONCLUDE TREATIES

751. Only persons having the power to negotiate and conclude a treaty under the constitutional law of the state should be deemed competent to negotiate a treaty in the name of the state.

752. When, by the constitutional law of a state, the Executive is given the power to negotiate treaties, reserving to another governmental body a final assent to their definitive conclusion, the rules of the constitution govern the competency of the various parties in the conclusion of treaties.

753. Plenipotentiaries may be considered as properly delegated to represent the state to negotiate and conclude a treaty, when they are provided with official full powers, conferred upon them for that purpose. They should be exhibited to the other party, who should take cognizance of them. Conventions concluded within the limits of the full powers officially exhibited should be regarded as legally concluded.

754. Secret instructions given to the plenipotentiary delegated to conclude a treaty cannot have any legal force to modify in its international effects the full powers officially communicated to the other contracting party.

In case the plenipotentiary has concluded a treaty within the limits of the full powers exhibited, but contrary to the secret instructions of his government, he would incur personal responsibility to his government, which might justifiably punish the delinquency in conformity with its municipal law, but could not affect, in any way, the legal value of the international obligation contracted by virtue of the instructions contained in the full powers of its agent.

RATIFICATION OF TREATIES

755. Ratification must be considered essential to making a treaty final and perfect:

- a. When required by the constitutional law of the state to make the treaty binding upon it;
- b. When the plenipotentiaries who negotiated and concluded the treaty have made its validity dependent upon its ratification by the sovereign they represent or by the proper authorities.

Outside of these cases a treaty concluded by a plenipotentiary and signed by him without reserving ratification, by virtue of the full powers conferred on him and duly exhibited to the other party, and within the strict limits of his powers, must be considered as final and perfect from the day of its signature.

CONSENT REQUIRED FOR THE VALIDITY OF A TREATY

756. Treaties concluded between states must be freely assented to. Assent is not valid if given by mistake, extorted by violence or obtained by fraud.

757. The consent cannot be considered as lacking freedom when the treaty is assented to under pressure of a hostile power which has occupied part of the state territory, threatening the invaded state with greater disaster if the proposed conditions should not be accepted.

758. Duress resorted to by one party to a treaty against another is a ground for nullity only when it constitutes true physical violence, or when the person who signed the treaty was compelled to do so through external constraint which deprived him of all deliberation and freedom of judgment.

759. Fraud may be deemed a ground for the nullity of treaties only when the fraudulent methods resorted to by one of the parties were such as to mislead the other party as to the object of the convention.

LAWFUL SUBJECT-MATTER OF TREATIES

760. No state may by a treaty engage to do anything contrary to positive international law or to the precepts of morals or universal justice. No state may by treaty absolutely renounce its fundamental rights, enumerated in rule 62.

761. A lawful subject-matter of contracts between states should be considered to be only such as concerns the public interests of the state and may be regarded as within the conventional power of the contracting parties, according to the principles of "common" law.

762. An engagement which violates, to the injury of another state, an obligation previously contracted by treaty with one of the parties, cannot constitute the object of a convention.

763. Anything implying a violation of the constitutional law of either contracting party cannot constitute a lawful subject-matter of a treaty. But a subject-matter not in harmony with the municipal law of one of the contracting parties may be covered by a treaty, provided the contracting party has not conditioned the legal force of the treaty upon a change in its municipal law.

EXTRINSIC REQUIREMENTS, INCLUDING FORM

764. International treaties should be drawn up in writing, and do not acquire perfect form until they have been subscribed by all the parties to them.

765. An agreement upon certain articles of a treaty, even when drawn up in writing and signed by the contracting parties, cannot be considered a perfect reciprocal obligation with respect to the clauses adopted, independently of the final conclusion and signature of the treaty.

When, however, the clauses agreed to and subscribed are considered as a preliminary convention, concluded in order to establish the reciprocal obligations of a *status quo*, they should be regarded as perfect and valid until the conclusion of the final treaty or of a formal declaration that the parties consider themselves freed from any previous engagement.

766. When, in the negotiation of a treaty, a reciprocal agreement is reached on various distinct points, principal or accessory but related, and this agreement has been drawn up in

writing and signed by the contracting parties, the engagements assumed do not acquire binding legal force until the treaty is finally concluded and agreement established on all the separate parts which constitute the treaty as a whole.

767. The form of the reciprocal agreement concluded between the contracting parties may vary according to the degree of importance of the object of the convention. We may, therefore, consider as sufficient a diplomatic exchange of two declarations written and subscribed by persons duly authorized, or of two cartels, notes, or manifestos, properly subscribed.

768. An agreement relating to particular matters concluded by persons competent to contract international obligations will be valid, even though not drawn up in writing, but concluded verbally, on condition, however, that the agreement may be proved without difficulty, and that evidence thereof may be readily adduced.

TITLE III

LEGAL FORCE AND EXECUTION OF TREATIES

INVIOABILITY OF TREATIES

769. International conventions duly concluded between the parties have the same authority as law and must be held inviolable.

They cannot be revoked except by mutual consent of the parties or for causes determined by international law, ascertained and recognized as having force to that end.

770. Every treaty binds the parties, not only with respect to matters formally promised by each, but also incidental matters which, according to equity, usage and the rules of international law, must be considered as virtually included in what was promised.

771. An impairment of or injury to moral and economic interests, which may result from the faithful execution of a treaty duly concluded, cannot be a sufficient reason for not observing it (compare rule 778).

772. Every valid treaty gives rise, not only to a perfect right on the part of either party of exacting the fulfillment of the assumed obligations, but also to a right to prevent third powers from meddling in the agreement or from placing any obstacle in the way of its faithful execution.

EFFECTS OF TREATIES

773. A treaty takes effect only from the time it can be considered legally perfect.

774. When ratification is necessary to the legal existence of a treaty, duly concluded and signed (see rule 755), it shall take effect only after ratification.

Nevertheless, the contracting parties may stipulate that when the treaty is ratified, its effects should relate back to the time of its signature. But this requires an express declaration.

775. International conventions must, in principle, be considered as having effect over all the territory of the state and be regarded as extending actively and passively to all its dependencies, unless a contrary conclusion may be drawn either from a special clause in the convention, from the nature of the treaty itself or from the general principles of "common" law.

776. Every treaty must have full effect, even when some change takes place in the form of the government or the internal constitution of the state, except as this may be modified by rule 836.

It must be regarded as valid with respect to the state in whose name it was concluded, so long as the international personality of that state subsists.

777. Treaties legally and validly concluded by the sovereign of the state transmit their obligations upon the state, actively and passively, to whomsoever succeeds by universal title to the rights of sovereignty, in conformity with the rules which govern cessions and annexations.

778. Treaties concluded to regulate matters of public or social interest to the contracting states extend their effects to legal relations which arose before their conclusion, save in the case of an express declaration to the contrary.

When, however, the application of a treaty to legal facts or relations prior to its conclusion would result in injury to or diminution of private rights already vested in individuals, the treaty cannot apply to these rights.

EFFECTS OF TREATIES WITH REGARD TO THIRD PARTIES

779. A treaty can establish, modify, extend or extinguish rights only between the states which concluded it as contracting parties; as to third states, not parties to the treaty, it must be considered as *res inter alios acta*.

780. When two or more parties to a treaty have inserted some clause impairing the interests of a third power, such clause must be considered inoperative as to a state that has not taken part in the treaty, even in the absence of protest.

781. When, in a treaty, an advantage to a third state has been provided for, such stipulation does not become perfect and operative unless the third state has declared its intention to take advantage of it, or has in fact profited thereby.

782. Non-acceptance on the part of the third state cannot affect the validity of the treaty unless its acceptance constitutes an integral and principal part of the agreement, by making the validity of the treaty conditional upon its acceptance by the third state.

783. No stipulation can be held valid and operative unless it has been agreed to by each of the contracting parties in its own name. When one of them, unknown to a third state, has promised something for the third state, undertaking to obtain its consent, that party is bound to use its good offices with the said power to obtain the approval of the clauses which concern it; but it would not be bound to do anything, if, confident of fulfilling its undertaking by the employment of its good offices, after having assumed an engagement in the name of a third power, it had subsequently been unsuccessful in obtaining the expected adhesion, notwithstanding the employment in good faith of all means to that end.

EXECUTION OF TREATIES

784. International treaties must be held to be contracted in good faith and executed accordingly. The contracting parties are always bound, not only to carry out what they have expressly stipulated, but also whatever may be presumed to have been within their common intention, considering the subject-matter and nature of the treaty.

785. Neither party should be allowed to vary or to add any condition in the execution of the treaty, even when it may seem that such condition is advantageous to the other party.

786. International custom cannot alter or modify an express stipulation; but as to anything not the object of express declaration and of a formal provision of the treaty, it is presumed that the parties intended to comply with custom in the matter of its execution.

787. It must be held a fundamental principle of the law relating to treaties that none of the signatory parties may at will be deemed excused from executing it in good faith, in all its parts, owing to changed circumstances or to a possible eventual prejudice to its interests arising from its execution.

788. Should one of the parties declare a suspension or actually suspend the execution of a treaty which it had subscribed, the other contracting parties would also be justified in suspending its execution. Such a state of facts could only temporarily suspend the execution of the treaty, but would not imply its annulment or abrogation until the advisability of annulling the treaty had been agreed upon by the contracting parties themselves as a result of amicable negotiations, or until the demand of the party requesting its abrogation had been recognized as well founded in law by a tribunal of arbitration or a conference, after duly hearing the other party which insists on its maintenance and execution.

LAWFUL MEANS OF ASSURING THE EXECUTION OF TREATIES

789. Parties may, by express undertakings, guarantee the execution of obligations contracted, assuring their execution through real guaranties or means lawful according to international law.

790. A right given to one of the contracting parties to occupy a portion of the territory until after fulfillment of the obligations contracted must be considered as one of the lawful forms of real guaranty to assure the execution of a treaty.

It is also permissible to furnish security to insure the payment of a certain sum undertaken to be paid, or to provide for the intervention of a third power as guarantor.

Other means of security may also be adopted, provided they are not contrary to the general principles of international law.

791. It may be considered lawful for the parties to provide for a penalty clause in case of non-fulfilment of the obligation. But matters which cannot constitute the object of a lawful international convention cannot be stipulated as a penal clause in case of non-execution.

GUARANTY OF A THIRD POWER

792. A third state cannot be held as guarantor of an assumed obligation, except by virtue of an explicit, certain stipulation accepted in the form established for the conclusion of treaties.

The obligation of guaranty cannot be inferred from the simple fact that the state acted as mediator in the negotiations.

793. If the guaranty has been explicitly assented to and has not been limited to certain specific obligations assumed in the treaty it should be regarded as given and accepted for the fulfillment of all obligations incurred in the treaty.

OBLIGATIONS ARISING OUT OF A GUARANTY

794. A state guaranteeing the obligations assumed by another state in a treaty is bound, when so required, to assist in compelling the other party to execute the treaty through means permitted by international law. It is not bound to repair any damage caused to the other state which relied upon its guaranty if, having done everything in its power, without prejudice to its own rights, it failed to secure the proper execution of the treaty.

795. The guaranteeing state is not bound to give what the original debtor state has promised but failed to give, except in the case of payment of a certain sum of money for which it has given security by express declaration, or for which it has made itself surety.

796. The guaranteeing state is not permitted to use the coercive measures allowed by international law, in order forcibly to compel both parties to execute the treaty, except where that state has an actual interest, based on the ground that non-execution will inflict a real and effective injury upon its own rights.

INTERPRETATION OF TREATIES

797. Interpretation of a treaty is necessary:

(a) When the words used in drafting the stipulations between the parties have not a clearly determined meaning, and do not, therefore, express a clear and exact concept.

(b) When the wording, while clear in itself, does not render precisely and exactly the idea of the parties.

(c) When the general provisions of the treaty are not definitely applicable to a particular case.

(d) When unexpected circumstances give rise to inconsistencies between the present state of affairs and the stipulations of the treaty, or between the provisions of two treaties concluded between the same parties.

798. Interpretation may be *grammatical* or *logical*. The former may be necessary to determine the sense of obscure or badly drafted expressions. The latter serves to fix pre-

cisely the concept and extent of the reciprocal obligations assumed by the high contracting parties.

RULES OF GRAMMATICAL INTERPRETATION

799. There is no need to interpret that which does not require interpretation.

800. The meaning of words used must be fixed and determined according to common usage, rather than according to elegant language with all literary niceties.

801. Every fault of construction or syntax must be eliminated, taking into account what precedes and what follows.

802. A word susceptible of different meanings may be considered as used sometimes with one meaning, sometimes with another, according to whether the meaning coincides with its use in a particular clause.

803. Technical expressions used in a treaty should be understood in their technical, rather than in their popular sense.

If, however, according to specialists, technical terms or words of art may have different meanings, one need not adhere strictly to general definitions, but the words used should be understood in the sense best adapted to the subject to which they refer.

804. There need be no subtle discussion on the true meaning of the words used to express an idea when, according to the intention of the parties, the meaning clearly appears. It should be considered captious cavil to adhere to the strict meaning of an expression in order to elude the true sense of the words, as deduced from the intention of the parties.

805. Words which have a different legal meaning in each of the contracting states must be considered as used in the sense ascribed to them in the state which, by the treaty, undertakes an obligation.

806. The meaning of obscure or equivocal expressions must be determined so as to make them agree with clear and unambiguous expressions used in the same act or in other acts concluded between the same parties.

RULES OF LOGICAL INTERPRETATION

807. When the stipulation does not present any ambiguity it may be interpreted so as to establish the intention of the parties and to fix precisely the extent of their respective obligations.

808. The substance of the obligation must be determined by recalling the thought and intention of the contracting parties, as appears from the context of the treaty, rather than by referring to the dead letter of the document (*in fide semper autem quid senseris, non quid dixeris cogitandum*).

809. Yet, the state which has clearly assumed an obligation cannot restrict its extent by invoking its unexpressed intention.

If it has not clearly expressed itself the clause under discussion should not be interpreted in its favor, but against it, for having failed clearly to express the obligation it intended to assume.

810. None of the contracting parties may so interpret a stipulation as to draw undue advantage from it. The substance and extent of the assumed obligation must be understood in the sense most equitable and liberal to the respective interests of the contracting parties.

811. Clauses which are not capable of execution because they imply either a violation of principles of "common" law or a violation of general interests or an impracticable result, must be regarded as non-existing.

Treaty stipulations must be understood in the most equitable sense, and always so as to produce some useful effect and to avoid any derogation from "common" international law or the public law of the contracting parties.

812. The intention of the parties, when it comes to determine the substance and extent of each provision, must be deduced from the treaty as a whole, considered as indivisible and homogeneous.

813. We should avoid an interpretation which leads to absurdity; or one which renders the

treaty null and void; or one which would lead to an invidious result, by making one of the contracting parties bear all of the burdens without any reciprocal obligations by the other.

814. The spirit of every provision must be sought in its moving reasons. Yet, the discussions relating to the stipulations of the treaty, as found in the proceedings and preparatory work leading to its conclusion, cannot serve to interpret the treaty so as to give it a meaning substantially different from its express stipulations, save when the negotiators themselves have drawn up and signed a protocol to determine the legal meaning and value of the agreement.

BROAD OR RESTRICTIVE INTERPRETATION

815. On principle, it is not proper to give to a treaty a broad interpretation by application of the rules relating to the interpretation of statutes; it is necessary to conform to the intention of the contracting parties and to consider every provision applicable to the case which constituted the object of the agreement, apart from unforeseen cases.

816. It is not proper to proceed by analogy to give a broad interpretation to a provision in itself clear and explicit; it should, in fact, be considered as applying only to that which constituted the subject-matter of the treaty.

Analogy may be invoked when the provision lacks clearness and precision, and is, therefore, ambiguous. Ambiguity may be eliminated by referring to the stipulations of another treaty relating to analogous matters between the same parties.

817. Any provision tending to limit the free exercise of the rights of either of the two contracting parties must be understood in the most restrictive sense, like any other impairment of the liberty of persons under "common" law. Provisions entailing a burden must likewise be understood in a restrictive sense, when the words used do not clearly express what the party has engaged to undertake or do.

LEGAL INTERPRETATION OF A TREATY

818. It is incumbent upon parties which have concluded a treaty to adjust differences and doubts which arise as to its import. To this end, they may subscribe a declaration or protocol, which is then regarded as an integral part of the treaty.

819. The interpretation of the doubtful clauses of a treaty, made by declaration or protocol, will be regarded as legal and authentic whenever they fulfill the requirements for the validity of a convention between two states.

820. Whenever the contracting parties are unable to agree as to the interpretation of a treaty, the difficulty should be adjusted like any dispute involving individual interests between two states, and its interpretation should be submitted to the decision of a tribunal of arbitration.

821. The treaty, considered as a statute, may be interpreted by the courts when it is necessary to apply it in the interest of private persons. This interpretation, however, has merely the same effect as the interpretation of any other legislative provision. Therefore, it is only of value in the state in which the court sits. It has no influence on the interpretation of the treaty as a political act, save where expressly or tacitly accepted by the contracting parties.

DISPUTES RELATING TO THE EXECUTION OF A TREATY

822. Every dispute relating to the execution of a treaty concerning special interests concluded between two or more states must be decided in accordance with the rules governing the solution of questions of a political nature, by reference to the applicable principles of international law.

823. It is incumbent on states concluding a treaty to make a stipulation of a reciprocal obligation to refer to a tribunal of arbitration any difficulties arising out of it, and to draw up, as the case may be, a *compromis* for the submission of a specific case to arbitrators.

824. The parties are bound to observe any rules laid down in the treaty concerning the constitution of the arbitral tribunal and the procedure to be followed. If no rules are pro-

vided, and yet the parties have agreed to submit differences to arbitral jurisdiction, they shall be considered as bound to observe the rules of "common law," both as regards the constitution of the tribunal and arbitral procedure.

825. The obligation to refer every difficulty relating to the execution of a treaty to arbitrators must be considered as based on the general principles of law, even when not expressly stipulated in the treaty. Consequently, in case of a controversy as to the execution of a treaty and of failure of diplomatic negotiations to adjust it, one of the parties always has the right to notify the other party of its intention to refer the question to the decision of a tribunal of arbitration, and if the latter declines to agree to the proposition, the notifying party may hold the other responsible for all the consequences which may result from the unavoidable severance of friendly relations between the two states.

826. Every difficulty relating to the execution of a treaty of general interest must be submitted to the decision of a Conference to be established and to operate in conformity with the rules laid down in the following book.

TITLE IV

ABROGATION AND ANNULMENT OF TREATIES

GENERAL PRINCIPLES

827. Every treaty may be abrogated, either in whole or in part, by agreement of the states concluding it, or by a renunciation of its benefits on the part of the state profiting by it.

828. None of the contracting parties may on its own authority consider the treaty as abrogated either as a whole or in part, or suspend its execution, but must deem itself bound to observe it in all its parts until abrogation has been legally pronounced by a competent tribunal. If, however, one of the parties should suspend the execution of the treaty without evoking any protest from interested states, from which acquiescence may be presumed, the treaty ought to be considered as annulled by reciprocal tacit consent.

829. A party which has sufficient grounds to consider the abrogation of a treaty as justified, may suspend its execution and denounce it, notifying the interested parties, through diplomatic channels, of its asserted right to terminate the treaty. The abrogation, however, shall not be considered as having legally taken place except through a formal agreement of the interested parties, or the decision of a competent court.

830. Unilateral denunciation may be effectual in annulling a treaty only when the right is recognized in the treaty and it is carried out in the terms and cases provided therein and in the forms established by "common" law.

JUDICIAL PROCEEDINGS FOR THE ABROGATION OF A TREATY

831. The abrogation of a treaty ought to be pronounced by a competent court, at the formal instance of a signatory party.

832. The right of a party to request the annulment of a treaty must be considered as well founded, when it is proved and recognized that the treaty lacks one of the essential conditions required by international law for its validity.

833. Prejudice to the interests of a signatory power arising out of the execution of a treaty cannot be deemed a sufficient ground to request its annulment.

834. No state may base its right to regard a treaty as annulled on the ground that circumstances have so changed that, had they existed at the time the treaty was concluded, they would have constituted a serious impediment to the giving of its consent, essential to the conclusion of the agreement.

835. When a treaty, however, has been concluded with a view to conditions which afterwards come to be materially changed, so that the object of the convention may be considered as having completely disappeared, the treaty ought to be annulled by a competent authority, after establishing the absence of any reason for the continuance of the obligation.

836. A change in the political constitution of either of the contracting states, cannot *ipso*

facto be deemed a sufficient ground for annulling a treaty, except when its execution may be considered incompatible with the new constitution of the state.

837. When, by reason of a change in the political constitution of a state, certain clauses of a treaty become impossible of fulfillment, their abrogation could be effected by agreement between the parties because of established impossibility of fulfillment, if it were desired to continue in force the remainder of the treaty.

In the absence of such an agreement, the interested party could suspend the execution of the treaty, which, since it must be regarded as an indivisible whole, could not be fully executed, and if the other contracting party does not consent, the dispute arising out of its suspension ought to be referred to a tribunal of arbitration, which should first of all decide whether in effect the fulfillment of all the obligations assumed under the treaty is incompatible with the new political constitution of the state, and then determine the effects of the inconsistency, that is, whether the partial annulment of the incompatible agreement should be decreed, while maintaining the rest of the treaty in force, or whether the entire treaty should be held to be terminated.

838. When, in order to carry a treaty into effect, one of the contracting parties is required to take certain legislative action and the government of the state so obligated has failed to provide or was unable to obtain from the legislature the necessary legislation to carry out its obligations under the treaty, the other contracting party has the right to suspend the execution of the treaty until the legislative measures have been enacted, and may move the annulment of the treaty for non-execution by the other state.

In such a case, the international responsibility of the state which has assumed obligations it could not meet, remains complete.

839. If a treaty concluded between two or more states should be incompatible with another treaty concluded by one of the contracting parties with a third power, the latter could demand of its co-contractor the abrogation of the later treaty, which would impair rights previously acquired.

When the parties are unable to agree, the difficulty ought to be submitted to the judgment of a tribunal of arbitration, and if that tribunal should recognize the complaint of the third power as well founded it should decree the later treaty to be inoperative, so far as that power is concerned. This would give rise to the responsibility of the state in its relations with the other contracting party for having undertaken an obligation that it certainly knew it could not assume. It would be necessary then to apply the rules relating to the international responsibility of the state, which by its own act has violated the rights of others.

TERMINATION AND RENEWAL OF TREATIES

840. When, in a treaty, it has been formally agreed that at the expiration of the stated term, the treaty will be deemed to continue from year to year, or for a longer period, if either of the parties should fail to declare its intention to terminate it, the treaty must be considered in force until officially denounced within the period and according to the forms stipulated.

841. The party desiring to exercise its right to denounce a treaty must do so through diplomatic channels within the period agreed upon. The other party may similarly denounce it. But even in the absence of such formality, the treaty would cease to be in force by reason of the act of denunciation legally notified.

842. If, in the treaty, an obligatory term has been stipulated, without a clause providing for tacit termination in default of denunciation, and should the parties, after the contractual period has expired, continue reciprocally to observe their obligations, the treaty should be considered as tacitly renewed, when the reciprocal observance of the treaty is proved in a formal, explicit and unequivocal manner, and is such as to establish clearly the reciprocal intention of maintaining the treaty in force after the expiration of the contractual period.

843. The intention of the contracting parties to maintain the treaty in force after the expiration of the contractual period cannot be considered to arise from the observance of certain rules of "common" law, which happened, however, to be recognized in the treaty.

EXPIRATION OF TREATIES

844. Treaties expire legally:

- (a) By reciprocal consent of the contracting parties;
- (b) By performance of the obligation contemplated;
- (c) By the expiration of the term fixed in the treaty, when not continued by the parties;
- (d) By the express renunciation of the state which is alone interested in maintaining the treaty in force;
- (e) By the fulfillment of a condition subsequent;
- (f) By the complete disappearance, fortuitous and nonculpable, of the circumstances which constituted the object of the convention.

845. All treaties do not expire *ipso jure ipsoque facto*, by reason of war between the contracting states, although they cease to be operative. All conventions between the two states, however incompatible with a state of war, must be deemed suspended *ipso jure ipsoque facto* when war breaks out.

EFFECT OF WAR ON TREATIES

1438. The extinction of all treaties and conventions concluded between the belligerent states cannot be deemed an immediate effect of war, but only the termination of those which, by their nature and object, are necessarily inconsistent with a state of war.

Even though the execution or performance of a treaty must be regarded as suspended during the state of war by reason of its incompatibility with that condition of affairs or because of the obstacles created by hostilities, that circumstance cannot annul the legal force of the conventional obligations assumed by the belligerent states. These obligations again become valid and operative at the end of the war, unless the terms of peace modify the conventional relations previously established.

1439. All treaties, either general or special, concluded by states with a view to conditions of war, become operative from the time war is declared.

APPENDIX 5

DRAFT OF THE

INTERNATIONAL COMMISSION OF AMERICAN JURISTS

Rio de Janeiro, 1927 ¹

TREATIES

ARTICLE 1

Treaties will be concluded by the competent authorities of the contracting States according to their internal law, or by their duly authorized representatives.

ARTICLE 2

Treaties must be in writing. The confirmation, prorogation, renewal, reestablishment, or continuance must observe the same form, unless other stipulations have been made.

ARTICLE 3

The interpretation of treaties, when the contracting parties consider it necessary, must likewise be in writing.

ARTICLE 4

Treaties shall be published immediately after the exchange of ratifications.

¹ From Projects submitted for the consideration of the Sixth International Conference of American States at Havana, Pan American Union, Washington, 1927.

ARTICLE 5

Treaties are obligatory and in force only after ratification by the contracting States, even though this condition be not stipulated in the full powers of the negotiators nor appear in the treaty itself.

ARTICLE 6

Ratification must be unconditional and must embrace the entire treaty. It must be dispatched in writing in conformity with the constitution of the State.

In case the ratifying State makes reservations in the treaty, it shall become effective when the other contracting party, informed of the reservations, expressly accepts them.

In international conventions celebrated between different States, a reservation made by one of them in the act of ratification affects only the clause in question and the State to which it refers.

ARTICLE 7

A refusal to ratify is a right of States and can not be considered an unfriendly act. The refusal shall be communicated to the other contracting parties.

ARTICLE 8

The terms of a treaty are in effect from the date of exchange of ratifications, unless some other date has been agreed upon. Even in the latter event private rights remain safeguarded.

ARTICLE 9

Terms stipulated in a treaty for the benefit of a third State depend for their effect upon the express acceptance by the third State.

ARTICLE 10

No State can relieve itself of the obligations of a treaty nor modify its stipulations except by the agreement, secured by peaceful means, of the other contracting parties.

ARTICLE 11

A treaty continues in effect even though the constitution of the contracting States has been modified, unless its terms are entirely incompatible with the new condition of affairs resulting from this change.

ARTICLE 12

Whenever a treaty becomes impossible of execution through the fault of the party entering into the obligation or through circumstances which at the time of celebration it knew or could have foreseen, which circumstances were unknown to the other party, the former shall be responsible for damages resulting from the nonexecution.

ARTICLE 13

The execution of a treaty may, by express stipulation or by virtue of a special treaty, be placed wholly or partly under the guaranty of one or more States.

The guaranteeing State can intervene in the execution of the treaty only by virtue of a request by one of the interested parties, and then only under conditions expressly stipulated for intervention. When intervention takes place only such measures may be employed as are sanctioned by international law, and no more comprehensive or different demands than those made can be exacted by the State which has been guaranteed.

ARTICLE 14

A treaty ceases to be effective:

(a) When the stipulated obligation has been fulfilled.

- (b) When the length of time for which it was made has expired.
- (c) When a condition rendering it void has happened.
- (d) By agreement between the parties.
- (e) By denunciation of the party entitled to a benefit thereunder.
- (f) By renunciation, if agreed upon.
- (g) When it becomes incapable of execution.

ARTICLE 15

Obligations contracted by treaty shall be sanctioned in cases of noncompliance as when diplomatic negotiations have failed, by decision of an international court of justice or by an arbitral tribunal.

ARTICLE 16

Treaties, especially those establishing principles of international law, can be denounced only in the same way in which they were established.

In default of any stipulation, a treaty may be denounced by any contracting State which will notify the others of this decision.

In this event the treaty will remain ineffective, as far as the denouncing State is concerned, for one year after the last notification, and will continue in effect for the other signatory States.

ARTICLE 17

Two or more States may agree that their relations are to be governed by rules other than those established in general conventions celebrated by them with other States.

APPENDIX 6

RÈGLEMENT CONCERNING EFFECT OF WAR ON TREATIES

Adopted by the Institute of International Law, 1912 ¹

CHAPITRE I^{er}

Des traités entre les Etats belligérants

Art. 1^{er}. L'ouverture et la poursuite des hostilités ne portent pas atteinte à l'existence des traités, conventions et accords, quels qu'en soient le titre et objet, conclus entre eux par les Etats belligérants. Il en est de même des obligations spéciales nées des dits traités, conventions et accords.

Art. 2. Toutefois la guerre met de plein droit fin:

1° aux pactes d'associations internationales, aux traités de protectorat, de contrôle, d'alliance, de garantie, de subsides, aux traités établissant un droit de gage ou une sphère d'influence, et, généralement, aux traités de nature politique;

2° à tout traité dont l'application ou l'interprétation aura été la cause directe de la guerre, suivant les actes officiels émanés de l'un des gouvernements avant l'ouverture des hostilités.

Art. 3. Pour l'application de la règle établie dans l'article 2, il doit être tenu compte du contenu du traité. Si, dans le même acte, il se rencontre des clauses de nature diverse, on ne considérera comme annulées que celles qui rentrent dans les catégories énumérées en l'art. 2. Toutefois le traité tombe pour le tout quand il présente le caractère d'un acte indivisible.

Art. 4. Les traités restés en vigueur et dont l'exécution demeure, malgré les hostilités, pratiquement possible, doivent être observés comme par le passé. Les Etats belligérants ne

¹ From 25 *Annuaire de l'Institut de Droit International* (1912), pp. 648-650.

peuvent s'en dispenser que dans la mesure et pour le temps commandés par les nécessités de la guerre.

Art. 5. Les traités qui ont été conclus en vue de la guerre ne sont pas visés par les articles 2, 3 et 4.

Art. 6. En dehors de la responsabilité qu'entraînerait la violation de ces règles, celles-ci doivent servir à interpréter le silence et à combler les lacunes du traité de paix. A défaut de clause formelle contraire dans le traité de paix, on devra décider:

1° Que les traités atteints par la guerre sont définitivement annulés;

2° Que les traités non atteints par la guerre, qu'ils aient été ou non suspendus pendant le cours des hostilités, sont tacitement confirmés;

3° Que néanmoins les traités dont les clauses se trouvent en contradiction avec le contenu du traité de paix sont implicitement abrogés;

4° Que l'abrogation expresse ou tacite d'un traité n'atteint pas rétroactivement les effets produits dans le passé par le traité abrogé.

CHAPITRE II

Des traités entre les Etats belligérants et des Etats tiers

Art. 7. Les dispositions des art. 1 à 6 s'appliquent, dans les rapports des Etats belligérants, aux traités conclus entre ceux-ci et des Etats tiers, sous les réserves suivantes.

Art. 8. Lorsque les obligations qui lient les Etats belligérants entre eux ont le même objet que leurs engagements envers les Etats tiers, elles doivent être exécutées dans l'intérêt de ces derniers. Ainsi les traités collectifs de garantie demeurent en vigueur malgré la guerre survenue entre deux des Etats contractants.

Art. 9. Les accords collectifs restent en vigueur dans les rapports de chacun des Etats belligérants avec les Etats tiers contractants.

Ils ne peuvent pas être altérés par le traité de paix au préjudice des Etats tiers contractants, sans la participation ou l'assentiment de ces derniers.

Art. 10. Les traités conclus entre un Etat belligérant et des Etats tiers ne sont pas atteints par la guerre.

Art. 11. A défaut de clause formelle contraire ou de disposition ne laissant aucun doute sur l'intention des parties, les traités collectifs relatifs au droit de la guerre ne s'appliquent que si les belligérants sont tous parties contractantes.

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